

# A farewell to open borders? The Danish Approach

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## Abstract

Migratory pressure from abroad and populist trends in Europe have already put considerable stress on borderless Europe, despite the open borders being one of its most precious achievements. But what in the past could be seen as annoying yet temporary disturbances attained an entirely different character under the Danish initiative launched in early May 2011. The move to install permanent controls, including customs houses and video surveillance, alarmed not just Brussels but also travelers and business associations EU-wide. Even though the new government has since banished the nightmare by repealing the border measures, one should still not sound the 'all clear' signal. With populist parties all over Europe, similar scenarios are likely to arise elsewhere. This paper therefore seeks to clarify a few basic elements to help counter future 'plots' against free movement more swiftly, namely that 1) the reintroduction of internal border controls violates EU treaty legislation, no matter whether the measures are based on Schengen or customs provisions; and 2) such border-based checks are highly inefficient compared with modern cross-border cooperation among law enforcement authorities.

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# A farewell to open borders?

## The Danish Approach

Peter Hobbing\*

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Although ‘plots’ against free movement within the EU have multiplied recently, the Danish case is certainly special.

One may remember the spectacular ‘Franco-Italian affair’<sup>1</sup> earlier this year, when France reacted to an alleged ‘mass influx’ of Tunisian refugees via Italian territory by temporarily closing its borders with that country. Although highly doubtful under various aspects of European legislation, the measure still respected one of its basic pillars: the reinstatement of controls was expressly defined as a temporary event. Not so the recent Danish move, which bid farewell to the interpretation of a ‘serious threat’ and other elements of the Schengen exemption clause. It simply and bluntly spoke of a permanent measure accompanied by the building of customs houses and other symbols of national autonomy and seclusion.

### Background

Just to recall the facts: in mid-May the move in Denmark came practically out of the blue, shocking its immediate neighbours Germany and Sweden as much as the Brussels institutions. Based on a sort of horse-trading to ensure the passing of the Danish pension reform, the centre-right government gained the support of populist People’s Party (DV) in exchange for reinstating the above controls. Although stemming from the DV’s ten-year-old party programme, there was no convincing clarity as to whether the ‘secure border’ should be achieved by means of persons- or goods-related measures, or whether it would have to be assessed against Schengen or customs rules. Only when initial reactions from Brussels and elsewhere seemed to suggest that infringing Schengen would be considered a higher degree of sacrilege, did the Danish government opt for the customs approach, specifying that the ‘permanent border checks’ would imply i) 50 additional customs staff to be deployed to the border immediately with ii) more staff and physical infrastructure (customs buildings, inspection lanes and comprehensive video surveillance) to follow in 2012. With phase 1 of the border plan having come into effect on 5 July,<sup>2</sup> Brussels immediately sent an expert team to perform on-the-spot inspections of the situation in mid-July,

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This article was originally intended for publication before the Danish parliamentary elections on 15 September 2011. Yet, with the foreseeable impact of the election outcome on border plans as well as the publication of the Commission’s ‘Europeanisation’ initiative equally linked to that event, it appeared advisable wait for the post-election period.

<sup>1</sup> For details, see S. Carrera, E. Guild, M. Merlino and J. Parkin, *A Race Against Solidarity: The Schengen Regime and the Franco-Italian Affair*, Working Paper, CEPS Liberty and Security in Europe, Centre for European Policy Studies, Brussels, April 2011.

<sup>2</sup> “Border patrols likely to pass EU muster”, *Copenhagen Post*, 15 July 2011 (<http://www.cphpost.dk/news/national/51911-border-patrols-likely-to-pass-eu-muster.html>).

which was not able, however, to find “sufficient justifications” for the measures taken.<sup>3</sup> And yet, the European Commission abstained from taking any definite action, although according to Home Affairs Commissioner Cecilia Malmström, there were “persistent concerns”<sup>4</sup> about the EU compatibility of the Danish move. What was behind this polite restraint? Was it the hope if not certainty that the issue would be resolved after the national elections on 15 September?<sup>5</sup>

The present paper starts from the assumption that relying on such solutions of the *deus ex machina* type would put us on the wrong track: political developments, namely the rise of right-wing parties with hostile attitudes towards immigration, foreigners and borders, will not disappear from one day to the next. It is even less likely when they are backed by well beyond 10% of the voters and do not remain confined to one country. The Danish move was expressly welcomed (‘admired’) by the French Le Pen movement, and others like the Italian Lega Nord and the Finnish True Finns can associate well with such claims. So there are sufficient sympathisers at hand in the EU to take over the spearhead position on border closures once a similar political opportunity should open up in their own country.

Thus, independent of the fact that the Danish project was abandoned in October 2011 owing to the election of new government and its pro-European stance, the focus of our considerations is on the degree to which open borders and free travel are firmly enshrined in the Treaties, and the common sense arguments to render voters (and politicians) more resistant against unrealistic expectations linked to ‘well-controlled’ borders. One should not forget that according to recent polls, free travel (together with the common currency) are still the most cherished accomplishments of European integration,<sup>6</sup> so despite the existing Eurosceptic tendencies, well-taken arguments should not fail to convince the majority of citizens.

### Free movement: Guarantee and limitations

EU Treaty language is clear and outspoken in this regard: the original Rome Treaty on the European Economic Community (1957) had already established the free movement of goods and persons as part of its guiding principles (Art. 3). Of course, these were just programmatic targets with concrete actions being confined to the creation of the common customs territory<sup>7</sup> – in full accordance with the economic priorities of the time. And yet, the customs union completed as such by 1968 did not lead to the expected opening of borders, not even for goods. What went wrong?

The founding fathers may have overlooked the point that obstacles to cross-border trade may arise from entirely different sources, such as national taxes (VAT), technical standards and health regulations. It thus took until the era of Commission President Jacques Delors and Tax Commissioner Lord Cockfield in the mid-1980s to cut the Gordian knot and definitively achieve the abolition of goods-related controls by 1 January 1993.<sup>8</sup>

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<sup>3</sup> “Commission says Danish border controls ‘unjustified’”, EurActiv, 19 July 2011 (<http://www.euractiv.com/justice/commission-danish-border-controls-unjustified-news-506636>).

<sup>4</sup> Ibid.

<sup>5</sup> According to election forecasts at the time, there would be a strong social-democratic majority definitely willing to revoke the above border decisions.

<sup>6</sup> Europa Press Release, *Special Eurobarometer: Right to move and reside freely in the EU and right to good administration are the most important citizens’ rights*, EO/11/14, 7 July 2011.

<sup>7</sup> See Arts. 12-37, Treaty on European Economic Community.

<sup>8</sup> In particular, the White Paper on the Internal Market of 1985 set the pace for the abolition of all obstacles under the impetus of President Delors.

It was in particular the Cecchini report and its 200 billion ECU argument of economic advantages being lost because of the subsisting barriers<sup>9</sup> – including reference to excessive waiting times for lorries and drivers at internal border crossings – that convinced member states to sign the Single European Act (SEA) in early 1986 and thus open the door to the borderless single market of 1993. Interestingly enough, the SEA was at the origin of not just economic integration but also the passport-free Schengen area accomplished in 1995. In keeping with the outstanding economic interests at stake, heads of state and governments left no doubt, even during the preparatory phase, that the open border movement would not spare the issue of passports and persons. More specifically, if lorries and their freight were henceforth to be exempted from checks, this benefit should not be compromised by the continued need for drivers to stop and show their passport for identification. The Schengen Agreement has therefore proven to be less of a self-standing measure than a last-minute emergency reaction to avoid the abrupt abolition of internal border controls without providing for sufficient compensatory mechanisms in terms of migration and crime control.

The SEA as well as the Schengen Agreement hence paved the way for a continual history of open borders, thoroughly underpinned by the respective treaties from Maastricht to Lisbon guaranteeing this freedom with the same identical formula, stating that “[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”.<sup>10</sup> In addition, “[i]nternal borders may be crossed at any point without any checks on persons being carried out”.<sup>11</sup>

Of course, there is no rule without exception, which is most obvious for the movement of persons. The original Schengen clause that under certain conditions “national border checks appropriate to the situation shall be carried out at internal borders”<sup>12</sup> has in principle been retained to the present day, with the current version of the Schengen Borders Code (SBC) defining the situation in much more detail (“serious threat to public policy or internal security”) as well as the measures to be taken (“exceptional”, “strictly necessary” and “proportional”).<sup>13</sup> And even if recent developments indicate that the Union intends to introduce additional scenarios justifying the reinstatement of controls, these options would remain conditional upon various elements quite evidently not complied with in the Danish case (“common EU assessment” of the situation and a “strictly limited scope and period” of the measures taken).

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<sup>9</sup> A group of economic experts, chaired by Paolo Cecchini, examined the benefits and costs of creating a single market in Europe, in accordance with provisions of the Treaty of Rome. The report, completed in 1988, was mandated by Commission Vice-President Lord Cockfield, see European Commission, *Europe 1992: The Overall Challenge* (Cecchini Report), SEC(88) 524 final, Brussels, 13 April 1988.

<sup>10</sup> See Arts. 26(2) of the Treaty on the Functioning of the European Union (TFEU) 2009 (Lisbon Treaty) and 14(2) of the Treaty establishing the European Communities (TEC) 1997/2001 (Amsterdam/Nice Treaty), whereas Art. 3 TEC 1992 (Maastricht Treaty) still used a more cautious formula, “the activities of the Community shall include, as provided in this Treaty and in accordance with the time-table set out therein:...(c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons”.

<sup>11</sup> Identical text quoted from both Art. 2(1) of the Schengen Convention 1990 and Art. 20 of the Schengen Borders Code 2006.

<sup>12</sup> Art. 2(2), Schengen Convention 1990.

<sup>13</sup> Arts. 23 ff, Schengen Borders Code.

In addition, there is the general “spot-check” option, formally recognised since the early Schengen days,<sup>14</sup> according to which police may stop and search persons/vehicles anywhere in the territory on the basis of general police powers.<sup>15</sup> This may also include checks within the border areas provided they “may not be considered equivalent to the exercise of border checks”, i.e. if they are “random”, “not systematic”, “do not have border controls as an objective” and “are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders”, etc.<sup>16</sup> This obviously excludes the sorts of controls the Danish authorities intended to establish along their border with Sweden and Germany. In view of this tight and unambiguous legal framework, it is no surprise that Denmark avoided a Schengen-based justification of the measures taken. But does the customs argument change anything for the better?

### **Less freedom under the customs regulation?**

The principles stipulated for goods and persons are absolutely identical. The Treaties (referring to “area without internal frontiers in which the free movement...is ensured in accordance with the provisions of the Treaties”)<sup>17</sup> use the same formula, determining that neither travel nor trade should be subject to internal border controls,<sup>18</sup> since in both cases such measures would be counterproductive to European integration.

The mere fact that customs legislation, different from Schengen, remains silent on exceptions in terms of spot checks would not change anything – at least not in the sense of there being less protection for the trade sector. On the contrary, customs experts stress that the absence of such provisions rather reinforce the validity of the principle: according to them, early versions of the secondary legislation on customs contained references to spot checks along the lines of Art. 22 SBC, but were abandoned by the 1992 Community Customs Code as a sign of the absolute priority that free movement enjoys. Spot checks have not been ‘100% excluded’ in areas not yet fully harmonised (drugs and cash control), but should be used to a minimum. Yet all such measures, if applied at all, would be subject to the principles of necessity and proportionality in the sense of Art. 36 TFEU.

### **Supremacy of the right to free movement within the customs union**

The customs union, being the first flagship achievement of the still young European integration movement of the 1960s, was probably even more dependent on the existence of a truly borderless area, as the multiple complaints by business and trade about the not-yet-achieved ‘common’ market of the 1970s/1980s proved. One can best visualise the urgency and rigorous accuracy with which the Commission pursued the elimination of remaining obstacles by looking at the multiplicity of elements listed in the Cecchini report of 1988, which still disturbed intra-Community trade and whose elimination would bring about billions of savings and other benefits. The extent to which the study considered even more remote disturbances, such as diverging technical standards and public procurement policies, leaves no doubt about the determination to

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<sup>14</sup> Art. 2(3), Schengen Convention 1990.

<sup>15</sup> Art. 21, Schengen Borders Code, to which President José Manuel Barroso alluded in his first reaction to the Danish plans in mid-May (see “Barroso to Copenhagen: border checks are illegal”, *EUobserver.com*, 13 May 2011 (<http://euobserver.com/22/32334>)).

<sup>16</sup> Art. 21(a) of the Schengen Borders Code.

<sup>17</sup> See the references in footnote 10 above.

<sup>18</sup> As confirmed inter alia by the Commission’s answer to Written Question 3459/96, OJ C 105, p. 78.

adopt legal provisions in the SEA and Maastricht Treaty – which by 1 January 1993 would do away with at least the directly border-related obstacles, i.e. in particular controls, checks and similar measures.

### Assessing the Danish case

The legal assessment appears simple: as regards the permanent border installations planned in phase 2 (customs houses, video systems, etc.), these were definitely illegal, no matter the framework under which they might have fallen. Not even the farthest-reaching measure in the Schengen context, i.e. the temporary introduction of controls (Art. 23ff SBC) would cover such a move, for the simple reason that it infringes the basic requirement of being “temporary”, i.e. limited in time.

The deployment of “*additional* customs staff to the border”<sup>19</sup> as well as the “reinforcement of controls”<sup>20</sup> as implemented under phase 1 in July requires a somewhat more profound analysis. What is striking at first sight is the term ‘additional’, as if Denmark had already been operating customs controls on the border beforehand; however, since there had been no complaints, we will assume that the earlier posting concerned staff within the Danish territory to operate random spot checks more or less away from the border in the ‘hinterland’. Such controls correspond to practices applied by other member states, e.g. France performs occasional checks at toll stations on the motorways, although even these off-the-border checks have come under close scrutiny under European jurisdiction (e.g. in the *Melki* case C-188/10).<sup>21</sup>

As shown above, the customs regulation foresees no formal exception to the open border rule; we can furthermore assume that possible compensatory powers in terms of spot checks are subject to the criteria of necessity/proportionality and are by no means to exceed the intervention possibilities existing under the Schengen framework. Analogous to the Schengen spot-check provision (Art. 22 SBC), this would exclude any systematic controls directly on the borderline (measures “equivalent to border checks”).<sup>22</sup> The Danish authorities were definitely mistaken if they believed they could avoid the pitfalls of “systematic” interventions by the mere fact that they did “not stop every car, every lorry to cause the least possible disturbance to traffic”.<sup>23</sup> Selective interventions and the effort not to disturb traffic are nowadays core features of any modern customs strategy, especially those applied in the framework of *systematic* border controls (and not a specifically generous form of random checks, as the Danish minister tried to make us believe!).<sup>24</sup>

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<sup>19</sup> Somewhat surprisingly, even the critical media (e.g. the *Copenhagen Post* of 18 July 2011, “Will border controls really keep away German tourists?”) accepted the terminology chosen by the Danish government (“additional staff”) as if the decisions taken just concerned an **intensification** of measures already existing beforehand, whereas – according to the law – there should have been no such thing as customs staff or controls at the internal borders.

<sup>20</sup> The “reinforcement of controls” terminology was employed e.g. by the EurActiv article “Denmark reinforces its borders” of 5 July 2011, whereby it referred to “50 additional customs agents”.

<sup>21</sup> The Court of Justice of the European Union stated in its decision of 22 June 2010 that national legislation on checks within the border region “must...guarantee that its practical exercise cannot in effect [be] equivalent to border checks” – a condition that was *not* complied with by the French legislation in question.

<sup>22</sup> See Art. 21(a), Schengen Borders Code.

<sup>23</sup> “Danish customs checks to cause ‘no delays’”, *EUobserver.com*, 4 July 2011 (<http://euobserver.com/22/32587>).

<sup>24</sup> Cf. Art. 13 Community Customs Code 1992. The current practice of marrying security with facilitation concerns by means of selective/risk-based controls is equally promoted by the World Customs Organisation

### **If not legal, at least efficient?**

That being stated, we can already draw the conclusion that the Danish controls were by no means covered by the EU Treaties or secondary legislation; however, to round off the picture, it would appear useful to look at some of the more practical aspects of the measure. Just under the hypothesis that the controls were compliant with the Schengen or customs rules (or both), would they have passed the efficiency test, i.e. be likely to achieve the targets for which they were designed?

What were the objectives of the Danish controls? Not even this question is easy to answer. There was just as little clarity regarding the nature of the intervention (police or customs) as there was visible strategy concerning the type of disturbance the controls were to address. Only two of the numerous government statements referred to customs-related risks (“smuggling of illegal merchandise”),<sup>25</sup> while all the remaining arguments fell under the headings of either immigration (“economic migrants”) or general crime control (“stop criminals”, “violence”, “break-ins” and “brutal criminality”).<sup>26</sup> The impression of a somewhat confused reasoning is furthermore backed by the lack of any statistical material to underpin the findings.

If the Danish administration had wished to comply with the requirements of necessity and proportionality, they would have i) clearly described and quantified the problem as an extraordinary event, ii) demonstrated that the border controls represented an efficient solution, and iii) shown that the purpose pursued may not have been attained by less stringent measures. None of this was done or even attempted.

Had such effort at least been undertaken together with the Brussels institutions and experts worldwide, it would have transpired that border controls, even when based on ample resources and the most refined technology, represent a rather blunt weapon in the fight against crime, whereas cross-border and EU-wide police cooperation promises much better results. Illicit traffic tends to follow the path of least resistance: if official border crossings are (more intensely) controlled, traffic routes switch to the open green and blue borders. If fences or other obstacles are erected, criminal organisations will find a way around or across them, with additional difficulties/obstacles failing to close the gap and just increasing the price of the crossing. The frustrating US experience at the Mexican border, with its fences and hi-tech detection devices, endless investment and yet futile outcomes, tells the entire story of such vain ventures.<sup>27</sup>

### **Bad image for “Openhagen”?**

Coming back to the Danish example, its incoherent management provoked scorn and derision in some of the critical media, such as the statement that the new entry controls might help to “check empty vans at their arrival from Romania but not when they leave Denmark crammed with stolen

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(WCO) and UN – see United Nations Conference on Trade Development (UNCTAD), “Risk Management in Customs Procedures”, UNCTAD Trust Fund on Trade Facilitation Negotiations, Technical Note No. 12, UNCTAD, Geneva, 2008 ([http://r0.unctad.org/ttl/technical-notes/TN12\\_RiskManagement.pdf](http://r0.unctad.org/ttl/technical-notes/TN12_RiskManagement.pdf)).

<sup>25</sup> See for example, the *EUobserver.com* article, “Danish Customs Checks to Cause no Delays” of 4 July 2011.

<sup>26</sup> See EurActiv, “Denmark ‘reinforces’ its borders”, 6 July 2011; see also the *Spiegel Online* article, “EU Slams Denmark over Plans to Reintroduce Border Checks”, 12 May 2011.

<sup>27</sup> For an explicit account of the US difficulties, see the *New York Times* article, “Homeland Security Cancels ‘Virtual Fence’ after \$1 Billion Is Spent”, 14 January 2011 ([http://www.nytimes.com/2011/01/15/us/politics/15fence.html?\\_r=1&ref=borderfenceusmexico](http://www.nytimes.com/2011/01/15/us/politics/15fence.html?_r=1&ref=borderfenceusmexico)).



goods”.<sup>28</sup> On the other side, one might wonder about the extent to which Pia Kjaersgaard and her Danish People’s Party really had border security in mind when initiating the measures in question. Or were they meant as a message to ‘foreigners in general’ as some observers suspect? Statements by Kjaersgaard and her allies back the latter assumption when they claimed, during the 2011 election campaign, to “protect our welfare state against people coming from outside and enjoying the benefits of our society”.<sup>29</sup> Danish tourism and trade organisations in any case feared that all efforts to promote Denmark and its capital abroad could be in vain if their slogan “Openhagen” were boldly countered by the new border measures.<sup>30</sup>

### **Alternative means to ensure the respect of security needs**

It is entirely understood that there must be means to protect member states and their citizens against any kind of security challenge from the outside. The abolition of internal border controls does not mean that such threats cannot be appropriately tackled; on the contrary, there is sufficient evidence that the Union with its sophisticated mechanisms of police and border cooperation is in a much better position to address such situations than individual member states.

One may remember the historical debate that took place in the late 1980s on the premises of Interpol between police and customs authorities, about whether it was really possible to abandon crime control at national borders in favour of a regional European control on the external border.<sup>31</sup> After initial hesitation, the conviction finally prevailed that with regard to drugs and other transnational crime in particular, it was far more effective to stop large illegal consignments as they entered EU territory than wait until they split up into small lots. Nothing has changed since then, except that external border structures as well as internal Schengen/EU police cooperation have become much stronger in the meantime. If for example Denmark suffers from cross-border theft and robbery, it may count on multiple means to follow the traces of perpetrators Europe-wide. There are first of all joint police/customs offices (PCCCs) operating with neighbouring Germany and situated in Padborg and Puttgarden, which help to prevent and investigate such cases on the basis of modern European legislation and bilateral agreements. Further Europe-wide police cooperation, such as cross-border hot pursuit and joint investigation teams, may be requested under the Schengen provisions, with Europol providing coordination and assistance.

### **‘Europeanisation’ of border controls: The most recent Commission proposal<sup>32</sup>**

In comparison with the early days, there is now much more efficient management of external borders, mainly owing to the increasing EU oversight of Schengen governance, notably in terms of common legislation and the coordinating role of FRONTEX. Yet it is no secret that things are still far from 100% perfect.

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<sup>28</sup> See *Badische Zeitung*, “Nichts da mit ‘Openhagen’” [No chance for ‘Openhagen’], 10 June 2011.

<sup>29</sup> See *Swedish Wire*, “Danish far-right calls for more border control”, 29 August 2011.

<sup>30</sup> See *Badische Zeitung*, “Nichts da mit ‘Openhagen’” [No chance for ‘Openhagen’], 10 June 2011

<sup>31</sup> See C.J.C.F. Fijnaut, “Policing Western Europe: Interpol, TREVI and Europol”, *Police Studies*, Vol. 15, No. 3, pp. 101-106 and 103, 1992.

<sup>32</sup> European Commission, Communication on Schengen governance – Strengthening the area without internal border control, COM(2011) 561 final, 16 September 2011(c).

As recent events show, there are challenges bearing heavily on the smooth operation of the border, caused partly by its own weakness and partly by external events. And additional challenges may lie ahead. The Schengen area clearly remains an ongoing construction site, whereby Brussels pursues a two-way strategy. One aspect of this strategy involves aligning member states on the eastern/south-eastern border in conducting its management in a still more coherent manner (“as would one single administration”).<sup>33</sup> At the same time, the strategy aims at preventing individual member states from taking premature action in exceptional situations (such as the sudden influx of migrants), because this might put at risk mutual trust and the right of citizens to free movement.

Current efforts are proceeding on various fronts: following the historic changes and continuing turmoil in northern Africa (the ‘Arab Spring’), the Union is promoting arrangements with the countries concerned to offer legal migration opportunities (‘circular migration’)<sup>34</sup> and thus ease the migratory pressure on European territory.<sup>35</sup> In a second move, the Commission is proposing the ‘Europeanisation’ of border management in the sense that European interests, especially the right of free movement, are respected to a greater extent whenever exceptional situations of the above-mentioned kind arise. This latest initiative was launched on 16 September, just after the Danish elections (to avoid any negative repercussions on their outcome) and targets two major weaknesses:

- 1) the patchwork character of the external border, whose management is handled by 25+ distinct states and a multitude of national services (as opposed to the formula of “one state, one border service” valid for example in the US);<sup>36</sup> and
- 2) one-sided solo runs in reinstating internal border controls, based on an incomplete vision of the overall European situation and possibly insufficient consideration of less stringent measures (border control as a ‘last resort’).

With this ‘de-nationalisation of the emergency-brake’ in favour of a European system, which confers the decision on internal border controls to the Commission, we are definitely entering new terrain. From an objective point of view, this offers many advantages in terms of a more balanced consideration of all the elements of risk at stake, and equally important, the elimination of one-sided political arguments from the national level. But it represents a radical change, a ‘big bang’ in border and security matters, which member states still conceive as their inherent domain.<sup>37</sup> If Brussels has the final say on this from now on, national capitals will mainly conceive

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<sup>33</sup> As most concisely formulated for the customs sector by recital 2 of Decision No. 624/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing an action programme for customs in the Community (Customs 2013) (OJ L 154/25, 14.6.2007).

<sup>34</sup> For further details on the circular migration schemes first tested on a smaller scale with Moldova, Cape Verde and Georgia, see S. Carrera and R. Hernandez i Sagrera, *The Externalisation of the EU’s Labour Immigration Policy: Towards mobility or insecurity partnerships?*, CEPS Working Document No. 321, Centre for European Policy Studies, Brussels, October 2009, pp. 11, 21.

<sup>35</sup> European Commission, Communication on a dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292 final, 24 May 2011(b).

<sup>36</sup> This has already been addressed by the European Commission’s *Proposal for a Regulation on the establishment of an evaluation mechanism to verify application of the Schengen acquis*, COM(2010) 624 final, 16 November 2010, and amended with still more stringent means of action by the European Commission’s *Amended proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis*, COM(2011) 559 final, 16 September 2011(a).

<sup>37</sup> In this regard, they may refer to some backing by EU legislation, notably Art. 1(1) of the FRONTEX Regulation (EC) No. 2007/2004 (“the responsibility for the control and surveillance of external borders lies with the Member States”) and Art. 72 TFEU (stipulating that Title V on the Area of Freedom, Security and

it as another evocative loss of national sovereignty, which will be a hard sell – especially to the populist electorate. The Commission, however, may refer to its privileged position allowing it to exercise pressure on both sides, including on those on the external borders responsible for possible loopholes. Greater transparency can be expected from the tool and scenario descriptions in Annexes I and II of the Communication of 16 September 2011(c).

While the prospect of Union-led control of national performance at the external borders (replacing the former “peer evaluation” by fellow member states)<sup>38</sup> seems to have already been digested, the Europeanisation of the internal emergency brake is not likely to be accepted that readily. Given that Germany, France and Spain immediately protested, stating that such temporary checks concern a “core area of national sovereignty” and could “only be carried out...on the basis of the expertise and resources of their security authorities”,<sup>39</sup> it looks like there is trouble ahead and there will be a long process of bargaining with a still uncertain outcome.

In a way, the situation resembles that on another prominent construction site at the European level: if the lack of mutual trust among member states is at the core of the current euro crisis, things are not much different here. It seems that there as here European solutions should be accepted as a matter of common sense, since no single state could, on its own, shoulder problems with such a regional if not global dimension. Still, national particularism tends to block reasonable solutions, especially when employing such emotive concepts as a ‘European Ministry of Finance’ or the ‘Europeanisation’ of border controls.

So one can hope that as a by-product of these deplorable crises, at least comprehension will grow that the only way to preserve two of our most cherished EU accomplishments, the freedom of travel and the common currency, is through a greater sense of community combined with the acceptance of possibly unpopular concepts.

## Outlook

Now after the Danish election day has gone by and the new centre-left government has lived up to its promises by rolling back the controversial measures on its very first day of work,<sup>40</sup> it still appears useful to sum up the lessons one should draw from this temporary but easily repeatable episode:

- 1) Politicians in Brussels as well as national capitals should keep the memory alive of what practical advantages free movement has brought to us during the past 20 years; right-wing parties tend to rely on the fading of public awareness as citizens seem to take such benefits for granted.
- 2) The EU institutions would do well to clearly denounce and widely publicise the illegitimacy of internal border controls irrespective of the legal basis referred to (Schengen, customs or other); remaining vagueness in the Commission’s reaction might otherwise be seen as an invitation to other governments to test approaches similar to that of the Danish.

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Justice “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

<sup>38</sup> See footnote 32 above.

<sup>39</sup> “EU countries say ‘No’ to commission powers on border control”, *EUobserver.com*, 13 September 2011 (<http://euobserver.com/22/113606>).

<sup>40</sup> “New Danish government rolls back border controls”, *EUobserver.com*, 4 October 2011 (<http://euobserver.com/22/113809>).

- 3) Based on the illegitimacy established above, the Commission should set up a system by which it could react more swiftly to any similar attempts to restrict free movement within borderless Europe (the Schengen area and internal market).
- 4) To prevent any unnecessary strain on intra-EU trust and solidarity, it is essential that the EU continues to improve the coherent and efficient management of its external border, notably by means of an enhanced Europeanisation of controls. Further support may come from the consistent pursuit of efforts to reduce migratory pressure on European borders, such as the development of circular migration schemes.

## References

- Carrera, S. and R. Hernandez i Sagrera (2009), *The Externalisation of the EU's Labour Immigration Policy: Towards mobility or insecurity partnerships?*, CEPS Working Document No. 321, Centre for European Policy Studies, Brussels, October.
- Carrera, S., E. Guild, M. Merlino and J. Parkin (2011), *A Race Against Solidarity: The Schengen Regime and the Franco-Italian Affair*, Working Paper, CEPS Liberty and Security in Europe, Centre for European Policy Studies, Brussels, April.
- European Commission (1988), *Europe 1992: The Overall Challenge* (Cecchini Report), SEC(88) 524 final, Brussels, 13 April.
- European Commission (2010), *Proposal for a Regulation on the establishment of an evaluation mechanism to verify application of the Schengen acquis*, COM(2010) 624 final, 16 November.
- European Commission (2011a), *Amended proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis*, COM(2011) 559 final, 16 September.
- European Commission (2011b), *Communication on a dialogue for migration, mobility and security with the southern Mediterranean countries*, COM(2011) 292 final, 24 May.
- European Commission (2011c), *Communication on Schengen governance – Strengthening the area without internal border control*, COM(2011) 561 final, 16 September.
- Fijnaut, C.J.C.F. (1992), “Policing Western Europe: Interpol, TREVI and Europol”, *Police Studies*, Vol. 15, No. 3, pp. 101-106.
- United Nations Conference on Trade Development (UNCTAD) (2008), “Risk Management in Customs Procedures”, UNCTAD Trust Fund on Trade Facilitation Negotiations, Technical Note No. 12, UNCTAD, Geneva ([http://r0.unctad.org/ttl/technical-notes/TN12\\_RiskManagement.pdf](http://r0.unctad.org/ttl/technical-notes/TN12_RiskManagement.pdf)).



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