



DISCUSSION PAPER



The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach

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After two years of negotiations, which were often tense and occasionally characterised by political theatrics, the Schengen governance legislative package has finally been adopted. Stemming from a context of political crisis and with the objective (for the French and Italians) of reinforcing Member States' control of the Schengen mechanism, the legislative package yields quite a different result. Firstly, it has paved the way for quicker adoption of a new evaluation mechanism verifying the application of Schengen rules by Member States and has reinforced their implementation and efficiency. Further, the amendments to the Schengen Borders Code give greater clarification to the conditions under which States can reintroduce control at internal borders. Finally, the amendments to the Schengen rules were concurrent with a strengthening of the roles played by the European Commission and European Parliament in Schengen governance. Ultimately, this episode illustrates a strong movement toward integration, where confrontations between the Community method and intergovernmental approach have given way to more subtle balance.

In April 2011, in the wake of the Arab Spring, several thousand Tunisian migrants arrived on the shores of the Italian island of Lampedusa. The Italian government, which deemed the situation difficult to manage, appealed for support from its European partners. However, they did not reach the same assessment of the situation and denied Italy's request for support.

Deeply offended and with a backdrop of dramatic rhetoric¹, the Italian government decided to grant the Tunisian nationals residence permits with authorisation to travel. These documents were intended to allow the Tunisian nationals to travel in the Schengen area and, more specifically, to enter France. However, these residence permits were granted in violation of the rules of free movement within the Schengen zone, as stipulated in the Schengen Borders Code.

Given this situation, France retaliated in two ways. Firstly, for public security reasons, several trains from Vintimille were blocked and police controls at the Franco-Italian border were ramped up. Secondly, France seized the opportunity to force Italy into the legally questionable act of jointly asking for a revision of the Schengen rules.

On 26 April 2011, Nicolas Sarkozy and Silvio Berlusconi announced during a press conference that they had sent a letter to the President of the European Commission, requesting a revision of Schengen governance. The revision was to include a modification of the evaluation mechanism and a modification of the conditions permitting the reintroduction of internal border control.

On 29 April 2011, with unusual speed, the President of the European Commission agreed to the Franco-Italian request. In a letter to the French and Italian presidents, José Manuel Barroso highlighted that 'the temporary restoration of borders is one of the possibilities, provided this is subject to specific and clearly defined criteria, that could be an element to strengthen the governance of the Schengen agreement'.

In June 2011, in a strained political climate, with different national and European actors in opposition over the modification of Schengen governance, the European Council defined the framework of action to be taken. It highlighted the need to strengthen the system of Schengen evaluation and agreed to the proposal to create a new procedure for reinstating internal border control. Although the European Council accepts the principle of such a procedure, its implementation is strictly structured since it must only be applied as a 'last resort' and 'in exceptional circumstances'.² With the framework presented, the Heads of state and government invited the Commission to present a legislative proposal in September 2011.

On 16 September, the Commission presented a communication entitled 'Schengen Governance – strengthening the area without internal border control'³ and two legislative proposals, one related to strengthening the Schengen evaluation mechanism⁴ and the other related to the reintroduction of internal border control.⁵

Even as outlined by the European Council, the proposals presented by the Commission revealed a complicated context in which contradictory issues are pitched against one another. Firstly, on a logical level, the Commission remains responsible for ensuring the free movement of people whilst introducing legal amendments for a new procedure allowing for the reinstatement of internal border control. The paradoxical and delicate nature of the task is clear.

Subsequently, on a functional level, the Commission went on to take the opportunity, using the legislative proposals, to significantly augment its powers. In an area in which intergovernmental tendencies remain strong, the Commission's proposals were received by the Member States as a provocation. This was evidenced by the high number of subsidiarity warnings⁶ issued by several national parliaments in response to the Commission's proposals. The Commission's ambitious proposals were thereby counterbalanced by the Member States.

After two years of negotiations, fraught with tensions between the different actors – between the Council and the European Parliament⁷ in particular – Schengen governance underwent a transformation. Analysis of the two texts relative to the procedure by which internal border control⁸ is introduced (I) and the Schengen evaluation system⁹ (II) demonstrates that Schengen cooperation is still characterised by strong tensions between intergovernmental and Community methods. That said, the new measures define much more clearly the conditions under which internal and external border control can be implemented by Member States. Furthermore, the intergovernmental approach is weakened by European integration and gives way to the Community method.

I. Internal border control in the Schengen area

The amendments to the Schengen Borders Code¹⁰ affect two areas. Firstly, they touch on already existing regulations regarding the reintroduction of internal border control. The new draft of the Code brings in requirements which apply a stringent framework to Member States' realm of action (A). Secondly, the amendments confirm the creation of a new procedure for the reintroduction of border control. The application of this measure seems, however, illusive given the difficulty of fulfilling all the required conditions (B). In both areas, the new measures introduce greater control of the sovereignty clause within EU law and, in consequence, an advance of communitisation.

A. The demarcation of existing rules: subordination of the sovereignty clause

The option for Member States to reintroduce internal border control is a *sine qua non* for their participation in the Schengen agreement. Conceived as a veritable 'sovereignty clause', this option is described in a paragraph of the convention implementing the Schengen agreement adopted in 1990. The measures put forward the basic conditions under which border control may be reintroduced, namely: the need for the existence of a threat to public order or national security; the temporary nature of the reintroduction, be it premeditated or applied in an emergency; and the obligation to inform other parties in cooperation.

Following the integration of the Schengen *acquis* into the European Union through the Treaty of Amsterdam, the adoption of the Schengen Borders Code in 2006 provided the European Parliament and Council with the opportunity to bring the conditions governing the application of the 'sovereignty clause' under the framework of EU law. In four articles, the Schengen Borders Code defines and clarifies the conditions for the application of border control, the procedure to adhere to, especially in emergency situations and, finally, the conditions under which Member States may extend the duration of border control.

The new draft of the Schengen Borders Code¹¹, adopted under the Schengen governance package, brings in new elements relating to the conditions (1) and procedure (2) of reintroducing border control that limit the discretion of Member States in the implementation of the 'sovereignty clause'.

1. Conditions and criteria for the reintroduction of border control at internal borders

The new article 23 of the Schengen Borders Code reiterates the essential conditions for border control to be reintroduced, namely a threat to public policy and the exceptional nature of such a measure. It also introduces several clarifications.

The first clarification indicates that the reintroduction of border control may be applicable at 'all or specific parts' of internal borders. This addition simply reflects the reality of the situation inasmuch as the reintroduction of border control need not necessarily be applicable at all borders but only at certain sections.¹²

Secondly, the Schengen Borders Code clarifies the maximum duration for which border control may be reintroduced, whether it is planned or in an emergency. Planned reintroduction is still authorised for an initial 30-day period, and the new measure states that 30-day prolongation periods are possible, but with a maximum duration of 6 months. The new regulation thus introduces a new limit which did not exist before. With regard to emergency situations, it stipulates that control can be reintroduced for an initial 10-day period and extended for a maximum period of two-months. In reality, however, these limitations do not have a great impact, since until now Member States have not reintroduced control for periods exceeding this.

The third clarification is, however, more significant. The regulation highlights that such measures 'should only be adopted as a last resort'. Furthermore, this requirement should be read in combination with the new article defining the criteria which must be met for border control to be reintroduced. More precisely, in order to decide upon the reintroduction of border control as 'a last resort', the Member State must assess its necessity and proportionality. When a State decides to reintroduce border control it must evaluate whether it would firstly be 'likely to adequately remedy the threat to public policy', and secondly, assess the proportionality of the measure in relation to the threat. Over the course of the assessment, the Schengen Borders Code adds that the State should take two elements into consideration. Firstly, it should assess 'the likely impact of any threats to its public policy' including terrorist threats and threats posed by organised crime. Secondly, the assessment should take into account the likely impact of such a measure on the free movement of persons.

Concretely, these measures oblige Member States to weigh up the interests of free movement and security. Is the reintroduction of border control indispensable to counter a threat to public policy? Is the measure proportional? In other words, is there another measure which may counter the threat without

interfering with free movement? In this respect, the preamble to the regulation reiterates that 'in accordance with the case-law of the Court of Justice of the European Union, a derogation from the fundamental principle of free movement of persons must be interpreted strictly and the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.¹³

The amended measures in the Schengen Borders Code thus impose new requirements upon States which must be able to prove both the necessity and proportionality of border control reintroduction. The assessment and monitoring procedure of these new requirements also underwent some modifications.

2. The procedure for reintroducing border control at internal borders

From the beginning of the Schengen agreement, States that decided to reintroduce border control at internal borders, whether planned or in an emergency, have had to inform their partners. This requirement, formed in rather general terms in 1990, was given greater precision in the adoption of the Schengen Borders Code. It provides a list of information to be presented and details the conditions under which consultations would take place in order to organise cooperation and assess the proportionality of the intended measures. The new amendments maintain this structure and comprise some specific points.

In the 2006 version, the Schengen Borders Code states that the Member State planning to reintroduce border control or doing so in an emergency must inform its partners of the reasons for the intended reintroduction and provide details of 'the events that constitute a serious threat to public policy'. The new text goes further. States must now provide 'all relevant data detailing the events that constitute a serious threat to its public policy'.

Henceforth, simply referring to an event will not be sufficient to reintroduce border control at internal borders. It will fall upon the State in question to present all relevant information concerning the event and to justify the decision to reintroduce border control on the basis of an evaluation of attending interests. The amendment also states that the Commission may, if necessary, 'request additional information from the Member State concerned.'

The obligation to supply more information is accompanied by the organisation of an extended consultation process. Firstly, information provided by the concerned Member State, including classified information, is presented to the European Parliament and Council. This demonstrates a certain 'communitisation' of procedure as well as allowing for political supervision, notably by the European Parliament.

Furthermore, the Commission, and now the Member States too, can issue an opinion on the submitted information. The Commission is also required to issue an opinion if it deems that the intended reintroduction does not meet the criteria of necessity and proportionality.

Finally, the consultation phase following the issuing of opinions can now be completed through 'joint meetings' between the Member State intending to reintroduce border control and the other States, especially those directly affected by such measures. Thus, intervention by concerned parties will no longer only be carried out through informal consultations but will, in certain circumstances, take place in meetings which will allow each party to examine the necessity and proportionality of the intended measures.

In short, States which want to reinstate border control must provide details of the situation to the Commission and its partners and, if required, convince them of the necessity of such measures through joint meetings. This 'explanation process' carries three major consequences. Firstly, the new measures strongly restrict Member States' discretionary powers. Or, from a different angle, the Member States' 'safeguard clause' is subject to a powerful instance of 'communitisation'. Further, the amendment gives the Commission and the Member States the opportunity to appeal to the Court of Justice when, for instance, a state reintroduces border control without having convinced its partners of the necessity and proportionality.

Finally, in a strained political context in which the free movement of persons is exploited, especially for electoral ends, the adoption of a constraining legal framework safeguards the area of free movement.

Certainly, the amendments to existing Schengen Borders Code measures, by subordinating the sovereignty clause, constitute a major step in the Schengen integration process. The limitation of Member States' sovereignty has been eclipsed, however, by the debate over the creation of a new procedure for the reintroduction of border control at internal borders.

B. The new procedure of reintroduction of border control

This point has certainly attracted the most attention. A product of the 'political posturing' by Sarkozy and Berlusconi who turned the reintroduction of border control into a symbol of State authority within the Schengen zone, the outcome is far from what they were hoping for. Indeed, the new procedure is deeply European in its internal approach (1) and may never be implemented (2).

1. A national decision taken 'under a specific Union-level procedure'¹⁴

The new article 26 of the Schengen Borders Code provides for the possibility of temporary reintroduction of control at internal borders 'in exceptional circumstances where the overall functioning of the area without internal border control is put at risk'. This is a complex procedure and raises numerous legal issues.

It is worth reiterating that this measure preserves the Schengen cooperation approach. On the one hand, the new procedure does not detract from the possibility for a State to reintroduce border control on the original basis of a serious threat to that State's public policy.¹⁵ On the other hand, the new procedure does not amend the principle by which the decision to reintroduce border control belongs to the Member States.

In its legislative proposal, the Commission had actually proposed to amend this measure by giving itself the power to decide to reintroduce border control. The proposal was both politically unacceptable for the Member States and difficult to uphold on a legal level. Indeed, article 72 TFEU (Treaty on the Functioning of the European Union) states that the responsibility for the maintenance of law and order and the safeguarding of internal security is incumbent upon Member States. If the reintroduction of border control is based on a threat to public policy, as proposed by the Commission, the decision to reintroduce control at internal borders falls upon the Member States.¹⁶

That said, the new regulations place this national prerogative within a 'specific Union-level procedure' which warrants clarification and discussion. Certainly, what is new here lies in the fact that the national decision to reinstate border control is adopted on the Council's recommendations, itself adopted on proposal from the European Commission.

It is therefore two EU institutions – the Council and the Commission (following the established procedure or requested by Member States) – that initiate the procedure. Although the recommendation does not constitute a legal obligation, it does assume a real political dimension. To begin with, the recommendation is adopted by the Council, which is to say, by peer review, and on proposal by the Commission. The effect of this organised procedure is to politically instruct the State in question to reintroduce border control. Furthermore, paragraph 3 of article 26 states that a Member State which does not implement the recommendation 'shall without delay inform the Commission in writing of its reasons'. The article adds that the Commission will then present a report to the European Parliament and Council assessing the reasons presented by the recalcitrant State and the consequences of the inaction on the common interests in the area without internal border control. Ultimately, the process is politically persuasive and fits entirely within a European institutional dimension.

The European dimension is strengthened yet again when one examines the conditions which may lead the Council to recommend the reintroduction of border control. Among the numerous conditions which can

form the basis of a recommendation, which we will come back to later in more detail, is the condition that the exceptional circumstances 'constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof'. It is therefore no longer the threat to national public policy that triggers the procedure, but the threat to public policy in the common area of free movement of persons.

Given this formulation, an observer could draw two radically opposed interpretations. The first leads one to consider that this condition forming the basis for the reintroduction of border control has no legal basis in the Treaty. Indeed, in application of article 72 TFEU¹⁷, dispensation from the principle of free movement of persons can only be based on a threat to the public policy of a Member State.

The alternative interpretation is more progressive and rests upon the dynamic of European integration. It would be to consider that the European Union and the Member States have reached a new stage in the formation of a common area and have taken a step towards the creation of a 'European public policy'. We have already highlighted that 'national public policy', which forms the basis for the reintroduction of control at internal borders, and in consequence breaks up the European area of free movement, brings into question the definition of 'European public policy'.¹⁸ The formulation given in article 26 of the Schengen Borders Code could be seen as the manifestation of this new approach. Thus, the reinstatement of border controls would be based, in exceptional circumstances, on this concept of public policy raised to Union level. Following this approach, much in the manner of European citizenship, 'European public policy' would not replace but be in addition to national public policy.

It is difficult to establish which of the two interpretations is the correct one. Natural optimism would lead us to lean toward the second. The Court of Justice alone can solve it, if ever it comes to that.

Whatever the case may be, and to return to the measures of the Schengen Borders Code, the national decision comes under a 'specific Union-level procedure'. This measure is certainly rather removed from the concerns that stirred Mr. Sarkozy and Mr. Berlusconi during the first stages of the Arab Spring, who saw in Schengen governance the opportunity to regain national power.

2. Conditions so strict as to render the application of the procedure illusive?

Any obscurity surrounding the criteria for implementing the new procedure was quickly dispersed by the European Council in June 2011. The Council clearly defined the framework which the new regulations must adhere to. The legislature did not deviate from directives from the European Council.

Article 26 of the Schengen Borders Code defines the conditions in which the Council can recommend the reintroduction of internal border controls to one or several Member States. Thus 'in exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control ... and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced ... for a period of up to six months'. It adds that the Council's recommendation comes 'as a last resort and as a measure to protect the common interests'.

Put more simply, the Council cannot act unless several elements are in play, notably: the exceptional circumstances putting the common area under threat; the serious and persistent deficiencies of a Member State's ability to control its borders; a serious threat to public policy in the common area; and finally, if no support measure recommended by the Commission during its evaluation of serious deficiencies, such as the deployment of European border guard teams or the proposal of a strategic plan has adequately remedied the identified serious threat. Furthermore, the new regulations oblige the Council to evaluate the necessity and proportionality of such 'recommended' measures on the basis of 'detailed information' provided by the various concerned parties. Finally, it should be highlighted that the Council recommendation can only be

taken on proposal from the Commission. In other words, the Commission has to be convinced that the conditions are met in order to present a proposal to the Council.

It is therefore rather difficult to imagine the context in which the Council would adopt a recommendation to reintroduce internal border control for one or more Member States. Indeed, only under exceptional circumstances could all the required conditions be combined.

Greece, which has shown some serious difficulty in managing its external border, could, for some, represent a situation in which all the exceptional circumstances are combined. It is, of course, impossible to prove such a claim. The assistance Greece receives is greatly improving its capacity to manage its external border. And more to the point, no procedure relative to a serious threat to public policy – national or European – was initiated. And finally, the lack of territorial continuity between Greece and other countries in the Schengen area¹⁹ tempers any suggestion of a serious threat to public policy and internal security in the area without border control.

Ultimately, it is possible to conclude that the specific procedure defined in article 26 of the Schengen Borders Code may never be implemented. This is supported by the idea that, even before this procedure can begin, Member States would have had to instigate the original procedural process of reintroduction of border control based on a threat to national public policy.

The new procedure is similar to a nuclear weapon; the important thing is not to use it, but rather to possess it. The usefulness of such a 'weapon' can be called into question, however, in an area where free movement of persons is the principle. Unless the procedure is intended to 'sanction' Member States who do not fulfill their responsibility to manage external borders. But here, too, it is disproportionate in as much as EU law possesses strong corrective mechanisms such as financial and operational support, and where appropriate, procedures for failure to meet obligations.

The amendments to the Schengen Borders Code enforce the communitisation of the original procedure of reintroduction of internal border control, especially through the addition of criteria that increase Member States' responsibilities. Similarly, the new procedure of reintroduction of border control follows the same approach, but in a slightly less pronounced way. Although it is subject to a procedure that requires the intervention of both the Commission and Council, the decision to reintroduce border control remains national. Also, in the Commission's assessment of the serious deficiencies in external border control management, it can recommend that the concerned Member takes specific action, but it cannot recommend the closure of a border crossing point. Although this possibility is noted in point 8 of the preamble, it is not mentioned again in article 19a, which hints at Member States' reticence to recognise the Commission's authority in this respect.

Despite a few points of resistance related to the sovereign nature of the issue, the revision of the Schengen Borders Code has resulted in an important instance of communitisation. A similar quality also marked the second part of the Schengen governance package relating to the Schengen evaluation mechanism.

II. The Schengen evaluation mechanism

The evaluation mechanism is of crucial importance to Schengen functioning and has, for a long time, been an area reserved for a select insider group. This process emerged from the shadows during negotiations as a result of disagreements between the Council and the European Parliament about the legal basis for the proposed amendment. Sidelined by the Council²⁰ from the legal procedure following amendments to the legal basis, the European Parliament reacted strongly. It threatened to bring annulment proceedings against the future regulation amending the evaluation mechanism and, in violation of the principle of mutual sincere cooperation²¹, to put a year-long freeze on discussions with the Council about five proposals relating to justice and internal affairs. Once the theatrics and gesticulations were behind them, the Council, in close collaboration with the European Parliament, adopted the amendment for the creation of a new Schengen

evaluation mechanism.²² This defines the new means to evaluate and verify the application of the Schengen *acquis* (B) and in doing so, defines the roles of the Commission and Council (A).

A. A new division of powers

The evaluation mechanism of the Schengen *acquis* was created in 1998 within the framework of Schengen intergovernmental cooperation. As it gave pride of place to national authority, the measure had to be amended in order to increase its effectiveness and to secure it within the new legal and institutional framework brought about by the communitisation of 1999 and the entry into force of the Treaty of Lisbon. Aside from the improvements to assessment, to which we will return later, is the central question of the division of authority. In other words, which powers would be attributed to the European Commission?

Unsurprisingly, and in a way that has become habitual in the European legislative process, the Commission presented an ambitious proposal in which it also generously defined its role. The Commission considered that, as of 2010²³, it should be 'responsible for the application' of the evaluation mechanism, and have the power to make recommendations with regard to evaluated Member States.²⁴ This organisation of powers reflects the Commission's desire to re-establish its role and area of responsibility in the new institutional framework and within its role as guardian of the treaties.

Although the Schengen *acquis* has been well integrated into the European Union, the approach that prevails in terms of EU cooperation reflects intergovernmental tendencies even more greatly. Therefore, to take away the monitoring and control of the evaluation process from the Member States was not acceptable. The final text therefore re-establishes Schengen cooperation in a more 'balanced' way.

Firstly, it is both the Commission and the Member States that are jointly 'responsible for the implementation of the evaluation and monitoring mechanism'.²⁵ Therefore, the Commission is included in the new measure, but in a more progressive way. It is responsible for the planning and preparation of the evaluations, in the evaluation process itself and for the adoption of evaluation reports.

Following this, the power to recommend corrective measures addressing any deficiencies of evaluated Member States comes under the Council's jurisdiction. The justification of the preservation of power gave rise to the composition of one of, if not the, longest preamble points in the history of legislation.²⁶ The Council's maintenance of power is justified in three points. Firstly, through the specific reasoning of article 70 of the Treaty which allows for the establishment of exceptional peer review in place of assessment usually carried out by the Commission. Secondly, this specific procedure guarantees that the political process is upheld since any shortcomings must first be peer reviewed, which is to say, discussed at ministerial level. Finally, conferring the power to the Council also deals with the sensitive nature of the issue since the recommendations are 'often touching on national executive and enforcement powers'.

Essentially, evaluating the application of the Schengen *acquis* is a sensitive area for Member States which fully intend to keep control of a process which could implicate one or more of them with regard to their border activity. Whichever way one looks at it, the new procedure constitutes a step in the direction of 'communitisation' of the Schengen evaluation system compared with what was in place previously. The permanent Schengen evaluation commission, founded in 1998 and composed of Member State representatives, has been replaced by the Commission and the Council. What was an intergovernmental structure is now managed by EU institutions. Furthermore, the Commission's presence at every stage of the evaluation process, especially in the planning and preparation stages, will, in practice, reduce the role of the Member States in the process. Also, each stage of the evaluation process is subject to legal review by the Court of Justice and political review by the European Parliament and national parliaments. The mechanisms for cooperation that were developed outside the legal framework of the EU, effectively to sideline the Commission, Court and Parliament, have been brought around to the Community approach.

With the sensitive question of power distribution settled, next comes the simpler question of the definition of the new evaluation process and its governance.

B. The organisation of the evaluations

The amendment details the scope of the evaluations (1), the kind of evaluations that can be used (2) and the consequences of these evaluations (3).

1. The scope of the evaluations

In compliance with the amendment, an evaluation verifies the 'application' of the Schengen *acquis* and verifies that the 'necessary conditions of application' of Schengen regulations are met. This distinction relates, firstly, to the application of the rules by States that are members of the Schengen area and, secondly, to the evaluation of the conditions of application for candidate states. The text does state, however, that the evaluation for entry into the Schengen area is not applicable to Member States whose 'evaluation will already have been completed at the time of entry into force of this Regulation.' In other words, the evaluations already completed concerning Romania and Bulgaria are not affected.²⁷ Since the evaluation concerning Cyprus has already commenced based on the old procedure, the new one will not apply until January 2016.²⁸

As stated in the regulation's preamble, the evaluation mechanism and monitoring 'should' cover all aspects of the Schengen *acquis*.²⁹ Although this concerns, first and foremost, the evaluation of external border control and the absence of internal border control, article 4 of the amendment makes it clear that the scope of evaluation is much broader. Evaluations may cover the effective and efficient application of accompanying measures in the areas of visa policy, the Schengen Information System, data protection, police cooperation and judicial cooperation in criminal matters. It is not only aspects related to border control *sensu stricto* that constitute the main focus of evaluations, but the combination of measures which allow and maintain the area of free movement of persons without internal border control. The breadth of scope justifies the use of article 70 of the Treaty as a legal basis.

The preamble then goes on to make a few important reminders. It emphasises first that the evaluation of the application of Schengen rules should encompass all relevant legislation and operational activities.³⁰ That is, the evaluation covers normative action relating to implementation as well as its operational counterpart. It then states that the evaluation should ensure that the application of the Schengen *acquis* is carried out with respect for fundamental principles and norms, which is to say, with respect for human rights. The preamble adds that, during the evaluation and monitoring process, 'particular attention to respect for fundamental rights in the application of the Schengen *acquis* should be paid'.³¹

The emphasis put on respect for human rights gives rise to a certain number of consequences. First and foremost it is the Commission's responsibility to guarantee that the framework of the evaluation, whether it takes the form of questionnaires or detailed inspection programmes, is committed to respect for fundamental rights. If this requirement is not satisfactorily fulfilled, it could constitute powerful means of leverage and pressure from the European Parliament. It is easy to imagine legal proceedings at the Court of Justice to annul an evaluation's questionnaire for failing to properly address fundamental rights.

2. Types of evaluation

Article 4 states that evaluations can be carried out through questionnaires or on-site visits which can be planned or – and this is what constitutes real progress in the area – unannounced.

Inspections are organised on a multiannual basis covering a five-year period as established by the Commission. The programme states the order in which Member States are to be evaluated each year and that each Member State must be evaluated once in the five-year period. The Commission also establishes annual evaluation programmes on the basis of risk analyses provided by Frontex.³² These programmes include a provisional time-schedule for on-site visits, list the Member States to be evaluated and include proposals for the areas of evaluation with regard to the application of the Schengen *acquis* by a given Member State or group of states when an evaluation targets a specific area of the Schengen *acquis*. The annual evaluation programme also includes an un-communicated section which lists the unannounced on-site visits.

Although sending out questionnaires and organised on-site visits were already part of the framework of the old procedure, the possibility of sending out unannounced on-site visits surely must significantly reinforce the evaluation mechanism and, therefore, mutual trust between Member States. However, this can only be possible if the visit is, in fact, unannounced and its secrecy upheld. This condition must be met for all visits to internal borders which are not subject to any prior announcement. However, this supposition is not guaranteed for external border visits. The regulation states that the detailed programme of visits, as established by the Commission, is to be communicated to the State in question 'at least twenty four hours before'. This means that the intention to carry out a visit could be communicated several days before, thereby reducing the unannounced nature of the visit. Another measure in the regulation presents a possibility for leaks; national experts participating in unannounced visits are appointed at least 11 days before they begin.³³

Aside from the risk of information leaks, unannounced on-site visits are clearly an important element of improving the evaluation mechanism. Indeed, this type of inspection replaces peer review, which was particularly ineffective because it was planned. Also, the role conferred to the Commission in creating the questionnaires, the management of visits and establishment of detailed programmes for on-site visits, guarantees the 'objectivity' of the evaluation.

Ultimately, the new measures guarantee a good balance between the different actors invited to participate in the whole evaluation process. The measure should also assure a 'high level of mutual trust' is maintained, without which Schengen cooperation cannot properly function.

3. The outcomes of evaluation

The evaluations, questionnaires or on-site visits conclude in evaluation reports drawn up by experts from the Member States and representatives of the Commission. These reports collate lists of deficiencies identified during the evaluation which are classed as 'compliant', 'compliant but improvement necessary' and 'non-compliant'.

The draft evaluation report is sent to the evaluated Member State which can provide comments which may be included and reflected in the draft evaluation report. These documents are then sent to Member States who can also submit comments. Following these exchanges, the Commission then adopts the evaluation report. The report may be accompanied by recommendations for remedial measures to address identified deficiencies, such as engaging Frontex assistance. Based on this, the Commission can then present a proposal to the Council for adoption, by qualified majority, of the recommendations.

The recommendations require the state in question to present, in variable timescales according to the seriousness of the situation, an action plan to address the identified deficiency or deficiencies. The Member State is also invited to report on the implementation of the action plan at regular intervals. In the case of persistent deficiencies, the Commission may organise further on-site visits. If the deficiencies continue and are deemed to constitute a threat to the overall functioning of the area without internal border control, the procedure to reintroduce border controls at internal borders can be instigated.

The new measures aim to provide the evaluation with tools that will adequately address the identified deficiencies and that can lead to – if necessary and as 'a last resort' – the initiation of the procedure to reintroduce control at internal borders. Although it has been mentioned that the likelihood of internal border control actually being reintroduced seems rather slim, the procedure is not lacking in measures to exert political pressure. Indeed, the Commission is required to keep the European Parliament and national parliaments informed at all stages and of evaluation results. Such institutions could well play an important political role in addressing the deficiencies.

The Schengen evaluation mechanism has been anticipated for several years now, and it is finally in position. It distributes the powers and responsibilities between the different European institutions in an area in which they were previously absent. It provides mechanisms to respond – one hopes in an efficient manner – to identified deficiencies in the application of the Schengen *acquis* at internal and external borders. The amendments are

crucial to assure a high level of mutual trust between Member States and therefore, for the continuation of free movement of persons in the Schengen area.

Conclusion

It took two years for the Schengen governance package to be adopted. The highly politicised negotiations were certainly no easy process. From the very beginning, the European Commission presented legislative proposals which, since they conferred greater power to the Community executive, antagonised Member States. Then, the Council's decision to amend the legal basis and exclude the European Parliament from the adoption procedure of the Schengen evaluation mechanism caused further political tension. Upon learning of the amendment, the Parliament reacted fiercely and tried, for several weeks, to re-establish its role at whatever cost. It attempted to link the text relating to the evaluation mechanism with the Schengen Borders Code using a 'bridging clause'. This would have enabled a linking-up of the two texts and meant that any amendment in one would bring about the same change in the other and, in doing so, would have enabled the European Parliament to play a part in decisions relating to the two texts. Despite repeated effort, Parliament managed only to assure itself the right to be informed.³⁴ Member States, for their part, were highly vigilant in order to protect their rights as far as possible.

Despite a particularly heated political climate in which institutions were obliged to concede, if not surrender, certain powers, negotiations came to a rather balanced result. Member States made sure their rights were respected in the areas of public policy, the Commission gained a greater role in all areas, including the evaluation process, a role that is very likely to increase in practice, and the European Parliament became an actor in its own right in Schengen governance. Ultimately, the outcome of the Schengen governance package is a far cry from the political histrionics that characterised its beginnings in April 2011. It reflects an instance of European integration in which the confrontations between the Community method and intergovernmental tendencies have given way to a more subtle balance.

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Endnotes

- 1 The Italian President, Silvio Berlusconi, referred to the situation as a 'human tsunami'.
- 2 The European Council mentions specifically that “a mechanism should be introduced in order to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons. It should comprise a series of measures to be applied in a gradual, differentiated and coordinated manner in order to assist a Member State facing heavy pressure at the external borders. These could include inspection visits and technical and financial support, as well as assistance, coordination and intervention from Frontex. As a very last resort, in the framework of this mechanism, a safeguard clause could be introduced to allow the exceptional reintroduction of internal border controls in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules. Such a measure would be taken on the basis of specified objective criteria and a common assessment, for a strictly limited scope and period of time, taking into account the need to be able to react in urgent cases. This will not affect the rights of persons entitled to freedom of movement under the Treaties.” European Council 23 & 24 June 2011, doc. EUCO 23/1/11.
- 3 Communication from the Commission to the European Parliament, Council, the European Economic and Social Committee and the Committee of the Regions 'Schengen Governance - strengthening the area without internal border controls', COM(2011) 561 final, 16 September 2011.
- 4 Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011) 559 final, 16 September 2011.
- 5 Proposal of regulation from the European Parliament and Council to amend the regulation (EC) n° 562/2006 in order to establish the common criteria relative to the temporary reintroduction of internal border controls under exceptional circumstances, COM(2011) 560 final, 16 September 2011.
- 6 According to the protocol relating to national parliaments within the European Union, annexed to the Treaty of Lisbon, national parliaments may issue reasoned opinions, also called warning mechanisms, if they believe the principle of subsidiarity has not been observed in a proposed legislative act.
- 7 The European Parliament indeed reacted fiercely against the Justice and Home Affairs Council's decision in June 2012, to amend, by unanimous action, the legal basis of the Schengen evaluation mechanism. This amendment effectively excluded the European Parliament from the legislative procedure. In a strongly worded communication to Council, the European Parliament even threatened to submit an appeal before the Court of Justice.
- 8 Regulation (EU) N° 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) N° 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295, 6.11.2013.
- 9 Council Regulation (EU) N° 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013
- 10 Regulation (EC) n° 562/2006 of the European Council and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ, L 105/1, 13 April 2006.
- 11 Regulation (EU) n° 1051/2013 of the European Parliament and the Council of 22nd October 2013 amending the regulation (EC) n° 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295/1 6 November 2013.
- 12 Regarding this point see the Commission's biannual reports on the functioning of the Schengen area.
- 13 Point 6 of the preamble of regulation (EU) n° 1051/2013.
- 14 See point 9 of preamble.
- 15 As indicated in article 26, paragraph 5, “This Article shall be without prejudice to measures that may be adopted by the Member States in the event of a serious threat to public policy or internal security under Articles 23, 24 and 25.”
- 16 Without going into the hypothetical decision that would implicate States associated with the Schengen area which have not taken part in the vote.
- 17 “This Title 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.”
- 18 Y. Pascouau, (2012) Schengen and solidarity: the fragile balance between mutual trust and mistrust, Policy Paper 55, *Notre Europe/European Policy Centre*, p. 19.
- 19 Until the inclusion of Romania and Bulgaria in the Schengen area.
- 20 The proposal to amend the Schengen evaluation was initially based on a legal foundation involving a 'co-decision' procedure (art. 77 TFEU). In June 2012, under advice from its legal services, the Council unanimously decided to amend the legal basis of the text (art. 70 TFEU) reducing the European Parliament's role to that of simple observer.
- 21 Article 13, paragraph 2 of the TEU states that, 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'
- 22 Council Regulation (EU) n° 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 06 November 2013.
- 23 Proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2010) 624 final, 16 November 2010.
- 24 Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2011) 559 final, 16 November 2010.

- 25 Article 23 of regulation n° 1053/2013.
- 26 Point 11 of the preamble of regulation n° 1053/2013.
- 27 Point 28 of the preamble of regulation n° 1053/2013.
- 28 Point 27 of the preamble of regulation n° 1053/2013.
- 29 Point 13 of the preamble of regulation n° 1053/2013.
- 30 Point 15 of the preamble of regulation n° 1053/2013.
- 31 Point 14 of the preamble of regulation n° 1053/2013.
- 32 Within the framework of its responsibilities, Frontex publishes an annual report on migration flow over the external borders of the European Union.
- 33 Article 10, paragraph 2, 'In the case of unannounced on-site visits, the Commission shall, no later than two weeks before the on-site visit is scheduled to commence, invite Member States to designate experts. Member States shall designate experts within 72 hours of receiving that invitation.'
- 34 The new article 37a of the Schengen Borders Code states only that, "the European Parliament shall be immediately and fully informed of any proposal to amend or to replace the rules laid down in Council Regulation (EU) n° 1053/2013."

NOTES

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