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Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package

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1. Introduction

Ever since the inception of the Schengen zone, the abolition of internal border controls was meant simultaneously to enable movement without physical barriers or border guards and to enhance European economic integration and interdependence. Indeed, the creation of a cosmopolitan European Union of transnational citizens was envisaged.¹ Today, free movement within the Schengen Area is a reality for most EU citizens in most instances, although border controls may be temporarily reintroduced in *exceptional* cases as stated in the Schengen Convention (1990) and the Schengen Borders Code (2006).²

The question when internal border controls may be temporarily reintroduced became a pivotal topic of European political debate in early April 2011. At the time, a growing number of asylum seekers escaped political and social unrest in North Africa due to what has come to be known as the Arab Spring, in search of safety and stability on the European continent. Faced with hundreds of refugees arriving on its shores, as well as with subsequent capacity problems, the Italian Government chose to issue residence permits to facilitate the movement of these refugees within the rest of Europe. Concerns about immigration within the Schengen zone grew as a result of these facilitated residence permits, compelling the European Commission to provide a response. This response followed in September 2013

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1 S. Sassen, *Guests and Aliens*, 2000.

2 After several enlargements, the Schengen Agreement has now been adopted by 26 European countries. In addition to 22 EU Member States, a further four countries – Iceland, Liechtenstein, Norway and Switzerland – have also fully ratified the agreement. Special rules apply for Ireland and the United Kingdom. Bulgaria, Croatia and Romania, although being EU Member States, are not yet part of the Schengen area. Consequently, the Schengen countries are: Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

by means of the Schengen Governance Package, the legislative package relating to border controls in the Schengen Area.

The Schengen Governance Package entails a regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* (10597/13) and an amendment to the Schengen Borders Code as regards the rules for the temporary reintroduction of border controls at internal borders in exceptional circumstances. Whereas the European Commission does not specifically frame it as such, one of the underlying rationales of implementing the Schengen Governance Package seems to be the wish to prevent future abuse of internal border checks driven by growing concerns on immigration or even xenophobia. By drawing on the fairly recent scholarly literature on crimmigration – i.e. the process whereby crime control and immigration control become interlinked – we will evaluate the merit of the Schengen Governance Package.³ In doing so, we aim to specifically answer the following research question: to what extent are the amendments in the Schengen Governance Package useful in the context of tackling the emergence of ‘crimmigration’ in the national policies and practices of the Member States?

In order to formulate an answer, we will first further outline the concept of crimmigration in relation to the European context. Subsequently, we will elaborate upon recent incidents that underline the criminalization of migration in the Schengen Member States. Next, we will analyse the development of how often, and on which grounds, Member States temporarily closed their internal borders in the period of January 2000–March 2014, so under the old legal framework. In doing so, we will not only pay attention to the question whether Member States have been using (the fear of) immigration as a reason to invoke the exception clause, but also to the transparency of the procedures that were followed. After an assessment of the Schengen Governance Package – the new legal framework – in light of this analysis, we will also address certain other forms of border control being developed within the Schengen zone. In the concluding part, the implications of the examined Schengen border practices for the crimmigration debate will be outlined and discussed.

We will argue that although the Schengen Governance Package might be useful in order to prevent future abuse of internal border checks – which might be used for ‘crimmigration’ purposes – the framework does not capture the possibility for Member States to circumvent the new and stricter rules on closing the internal borders by introducing ‘Schengen-proof’ police checks that can be carried out in the internal border areas. As we will further elaborate upon, seen from a crimmigration perspective, the latter checks seem to give more reason for concern than the former ones, questioning the necessity and effectiveness of the novel regulations as stipulated in the Schengen Governance Package.

2. Crimmigration and the criminalization of migration in Europe

In 2006, in a ground-breaking article, Juliet Stumpf introduced the term crimmigration to denote the merger of immigration law and criminal law in both substance and procedure.⁴ So far, a small, but growing body of commentary has examined this blurred boundary between immigration enforcement and criminal justice.⁵ Although scholars provide different explanations for the crimmigration trend, they are unanimous in concluding that it creates an ever-expanding population of outsiders, making criminals into aliens and aliens into criminals without the protections that citizens enjoy. Thus, as aptly captured by Stumpf, ‘[a]s criminal sanctions for immigration-related conduct (...) continue to expand, aliens become synonymous with criminals. As collateral sanctions for criminal violations continue to

3 J.P. Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’, 2006 *American University Law Review* 56, pp. 367-419; K.F. Aas, ‘Crimmigrant Bodies and Bona Fide Travelers: Surveillance, Citizenship and Governance’, 2011 *Theoretical Criminology* 15, no. 3, pp. 331-346. M.A.H. Van der Woude, et al., ‘Crimmigration in the Netherlands’, 2014 *Law and Social Inquiry* 39, no. 3, pp. 560-579.

4 Stumpf, *supra* note 3.

5 I.V. Eagly, ‘Prosecuting Immigration’, 2010 *Northwestern University Law Review* 104, pp. 1281-1292; J.M. Chacón, ‘Overcriminalizing Immigration’, 2012 *The Journal of Criminal Law & Criminology* 102, no. 3, pp. 613-652; A.S. Hartry, ‘Commentary Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System’, 2012 *Berkeley Journal of Gender, Law & Justice* 27, no. 1, pp. 1-27.; T.A. Miller, ‘Blurring the Boundaries Between Immigration and Crime Control After September 11th’, 2011 *Boston College Third World Law Journal* 25, no. 1, pp. 81-123; D.A. Sklansky, ‘Crime, Immigration and Ad Hoc Instrumentalism’, 2012 *New Criminal Law Review* 15, pp. 157-223; M. Bosworth & M. Guild, ‘Governing through migration control: Security and Citizenship in Britain’, 2008 *The British Journal of Criminology* 48, pp. 703-719.

target the hallmarks of citizenship and community membership, ex-offenders become synonymous with aliens.⁶ This process of crimmigration manifests itself on different levels: the level of political and public discourse, where crime and immigration are increasingly lumped together in debates and political decision-making, the legislative level, where substantive criminal *law* and immigration *law* are increasingly merged – and the level of procedure and enforcement.⁷

To a large extent, the latter manifests itself through the actions and strategies of immigration officers at the sovereign borders: who do they select and stop for an ID check or a preventive search and on what grounds? Motomura states that the discretion to stop persons is the strongest driver behind the process of crimmigration, since it enables racial profiling and makes street-level officers responsible for funnelling immigrants into systems dealing with immigration crime or criminal violations.⁸

As such, immigration officers operating at the border are of vital importance in the decision-making process of who belongs, and subsequently can cross the border, and who does not, thereby continuously differentiating ‘insiders’ from ‘outsiders.’⁹ Thus, at the border, ‘bona fide’ global citizens are distinguished from ‘crimmigrant others’, resulting in different levels of border permeability.¹⁰ As Bosworth & Guild outline, ‘[i]t is a defining aspect of modernity that as borders have become increasingly permeable due to global capitalism, mass tourism, the communications evolution and evolving forms of regional governance such as the European Union, most industrial, democratized nations have, like the United Kingdom, sought to restrict access to non-citizens. (...) [P]olicies continue to emphasize border control as though the primary risks emanate from elsewhere.’¹¹ Borders and border control practices, then, become *bordering tools*, or *mechanisms*, not only in the physical sense of the term, but also – more broadly – in terms of crimmigration enforcement. In the context of crimmigration, the notion of a border consequently fulfils a double function: borders simultaneously *create* and *differentiate* political territories, thereby converting ‘spaces’ into ‘places’ and distinguishing between what is ‘ours’ and what is ‘theirs’, whilst acknowledging several shades of grey *vis-à-vis* ‘alienness.’¹² Thus, as Van Berlo states, ‘[i]t indeed becomes apparent that the idea of citizenship is being remade in the process of fluctuating borders with constantly changing levels of permeability, with immigrants and refugees being excluded whilst jetsetters, global citizens and cosmopolitans are included in contemporary democratic statehood (...)’¹³

Despite the fact that the Schengen zone is – or ought to be – an area without borders, it is precisely at the border – both the internal borders and the external borders – where the danger of crimmigration appears to be most pressing. Focussing on the internal border zones, we will argue that the ‘old’ Schengen rules indeed provided Member States with the opportunity to use crimmigration-based motives to temporarily close internal borders, thereby reinforcing its function as a crimmigration bordering mechanism, but that this opportunity was hardly ever used for these reasons. Due to crimmigration-inspired fears and anxieties about open internal borders, however, a dialogue has been initiated between various Member States and the European Commission, resulting in a new set of Schengen rules as laid

6 Stumpf, *supra* note 3, pp. 418-419.

7 The overlap in substance operates both ways: Some authors point at the criminalization of migration, whereas others focus on the immigrationization of criminal law. The most far-reaching example of the former outing of crimmigration on the legislative level is the criminalization of illegal stay. Examples of the latter are not only the expanding grounds for administrative detention and deportation on the basis of an immigrant’s criminal background, but also the increasing importation – more generally – of immigration law rationales such as long-term exclusion into criminal and penal law systems. For a further elaboration on the various forms of crimmigration on the legislative level see Van der Woude et al., *supra* note 3.

8 H. Motomura, ‘The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line’, 2011 *UCLA Law Review* 58, p. 1819.

9 Aas 2011, *supra* note 3; K.F. Aas, ‘The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State’, in K.F. Aas & M. Bosworth (eds.), *The Borders of Punishment: Migration, Citizenship and Social Exclusion*, 2013; V. Barker, ‘Democracy and Deportation: Why Membership Matters Most’, in K.F. Aas & M. Bosworth (eds.), *The Borders of Punishment: Migration, Citizenship and Social Exclusion*, 2013; L. Zedner, ‘Is the Criminal law Only for Citizens? A Problem at the Borders of Punishment’, in K.F. Aas & M. Bosworth (eds.), *The Borders of Punishment: Migration, Citizenship and Social Exclusion*, 2013.

10 Aas 2011, *supra* note 3.

11 Bosworth & Guild, *supra* note 5.

12 Aas 2013, *supra* note 9; A.C. Diener & J. Hagen, *Borders: a Very Short Introduction*, 2012; D.E. Spiro, *Criminalizing Immigration: The Social Construction of Borders and National Security*, Paper presented at the annual conference of the International Studies Association, New Orleans (20 February 2010). Retrieved from <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515466> (last visited 19 January 2015); P. Van Berlo, *The Borderscapes of Australia’s Offshore Immigration Detention Policy*, Master Thesis Leiden Law School (July 2014); Zedner, *supra* note 9.

13 Van Berlo, *supra* note 12.

down in the Schengen Governance Package. These new rules, we will argue, are the wrong antidote for the rightly identified problem that crimmigration rationales may leap into policy decisions on bordering practices: indeed, the newly introduced Schengen Governance Package has well identified the risk of crimmigration, but the way in which it has been designed might actually stimulate rather than counter crimmigration on the level of law enforcement by imposing stricter compliance rules in the wrong enforcement area.

2.1. Anxiety about open borders

There is a wide consensus amongst scholars that the ‘criminalization of migration’ in (Western) Europe has intensified during the past three decades, therewith echoing the situation in the United States.¹⁴ Interestingly – or rather, paradoxically – the emergence of a complex system of migration control in Western Europe, functioning, on the one hand, as a regulatory tool for legal entry and residence and, on the other, as a repressive tool against illegal entry and residence, can be traced back to the establishment of the Schengen Agreement in 1985. Indeed, ironically, the establishment of an area with no borders has effectively stimulated border control, since the notion that European integration *via* the opening of internal borders would lead to an increase in crime and more mobile criminal organised groups became the shared belief underpinning Schengen.¹⁵ In particular, third country nationals and irregular migrants are increasingly seen as potential safety risks.¹⁶ Thus, according to the Schengen process, the abolition of controls at the internal frontiers must be matched by a standardised strengthening of controls at the external frontiers of ‘Schengenland’.¹⁷ As Mitsilegas rightfully observes, two factors in particular seem to have contributed to this development towards strengthened external border control.¹⁸

The first factor is the enlargements of the EU in 2004 and 2007, leading to the movement of the EU external border to the East of Europe.¹⁹ Indeed, in the late 1990s, the EU membership of the eight then candidate countries from Central and Eastern Europe caused a number of concerns centred in particular on the perceived difficulties that these countries would face in guarding the EU external border. The second factor has been the ‘war on terror’ that immediately rocketed to the top of the political agenda in both the US and the EU after the terrorist events of 9/11.²⁰ A major characteristic of the resulting counterterrorist strategies has been the focus on maximum surveillance, especially in relation to immigration and the movement of people. As a result, immigration and crime – and especially serious crimes such as terrorism – are turned into a single problematic issue.

Although most of the concerns seem to be focused around third country nationals and irregular migrants, the securitization of migration also seems to affect certain EU citizens themselves. Thus, for example, in December 2013, the German delegation at the EU interior ministers’ meeting in Brussels outlined that it continues to oppose any inclusion of Romania and Bulgaria in the passport-free Schengen Area. In a similar vein, at the same meeting, the delegation of the United Kingdom – which is notably not a signatory to the Schengen *acquis* – proposed the imposition of limits on free movement for migrants

14 B.A. Vollmer, ‘Policy Discourses on Irregular Migration in the EU – Number Games and Political Games’, 2011 *European Journal of Migration and Law* 13, pp. 317-339; A. De Giorgi, ‘Immigration Control, post-Fordism and less eligibility’, 2010 *Punishment and Society* 12, no. 2, pp. 147-167; J. Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, 2006; D. Bigo, ‘Criminalisation of Migrants: The Side Effects of the Will to Control the Frontiers and the Sovereign Illusion’, in B. Bogusz et al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, 2004; D. Melossi, *The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU*, CHALLENGE Research Paper No. 14, Centre for European Policy Studies, Brussels, 2003.

15 A.A. Faure, *The Abolition of Internal Border Checks in an Enlarged Schengen Area: Freedom of movement or a web of scattered security checks?*, CHALLENGE Research Paper No. 8, Centre for European Policy Studies, Brussels, 2008; D. Bigo, *Police en réseaux, l’expérience européenne*, 1999.

16 Irregular migrants constitute the prime target of the broader punitive turn in the regulation of migration that has emerged in the European context since the mid-1970s. R. Cholewinski, ‘Criminalisation of Migration in EU Law and Policy’, in A. Baldaccini et al. (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law & Policy*, 2007, pp. 301-336; De Giorgi, *supra* note 14.

17 M. Anderson et al., ‘Frontiers, Identity and Security in Europe: An Agenda for Research’, in M. Pratt & J.A. Brown (eds.), *Borderlands Under Stress*, 2000, pp. 251-274.

18 V. Mitsilegas, ‘Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance’, in A. Baldaccini et al. (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law & Policy*, 2007, pp. 361-362.

19 *Ibid.*

20 *Ibid.*

within the EU. This call echoed an appeal made in April 2013 by the United Kingdom, Germany, Austria and the Netherlands that tighter controls should be imposed on migrants' access to welfare benefits.²¹

Against the background of a Europe in which crime and immigration are increasingly being seen as coherent in the social and political discourse and in which there are growing concerns about the alleged lack of sufficient protection of the EU's external borders, it seems understandable that the Arab Spring and the resulting influx of third country nationals has caused Member States a significant amount of anxiety. Particularly, but not exclusively, those states at the southern external border of the Schengen zone have witnessed a steep incline in their levels of concern.

2.2. *The Franco-Italian dispute*

During the first months of 2011, revolutions in various North-African countries have not only greatly affected the domestic political foundations of the respective local regimes but have also, as Zaiotti states, 'sent shockwaves across the Mediterranean Sea.'²² As a result of the revolutions and the violent political uproar that came with them, thousands of North Africans chose to flee their homelands in search of a better and more secure future across the Mediterranean Sea on the European continent. Large numbers of immigrants were able to surpass the external border controls and indeed landed in Southern Europe to scatter around the continent from there. A great number – around 30,000 – of mostly Tunisian and Libyan immigrants entered the EU at the small Italian island of Lampedusa.²³

In order to 'manage' the large influx of immigrants, the Italian Government decided to grant all Tunisian nationals temporary residence permits for humanitarian reasons under Article 20 of Italy's Consolidated Immigration Law allowing them to travel – and therewith further spread – throughout Europe, specifically to France.²⁴ Since Tunisia was under French colonial rule and uses the same language, many of the Tunisian immigrants were said to have family ties or friends in France. Therefore, the Italian Government was of the opinion that the permits should allow Tunisians to go to France under the Schengen Agreements.²⁵ Consequently, many Tunisians travelled to the Italian-French border town of Ventimiglia awaiting their opportunity to cross the border into France by train. In response, France challenged the lawfulness of the issued temporary residence permits by claiming that this practice was not in keeping with the Schengen *aquis*. Furthermore, the French Government outlined that it would tighten its border security.²⁶ In doing so, the French announced an increase of *non-systematic* internal border checks, which allegedly would not violate the Schengen Borders Code. In effect, the reinstated internal border checks resulted in pushing back hundreds of immigrants and the blocking of trains from Ventimiglia, carrying some 300 migrants and NGO representatives on 17 April 2011.²⁷

During a summit in Rome, in order to ease (international) political tensions, the French President and the Italian Prime Minister decided to join forces in calling for an upgrade of the Schengen pact. Sarkozy and Berlusconi insisted that the rules should 'indispensably' be changed to allow more restrictions on the freedom of travel within the Schengen zone.²⁸ In a joint letter to the Heads of the European Commission and the European Council, José Manuel Barroso and Herman Van Rompuy respectively, they expressed the necessity to 'examine the possibility of temporarily re-establishing internal frontier controls in case of

21 <<http://www.dw.de/germany-britain-press-for-inner-eu-migratory-curbs/a-17274220>> (last visited 17 December 2014).

22 R. Zaiotti, *The Beginning of the End? The Italo-French Row over Schengen and the Lessons of Past 'Crisis' for the Future of Border Free Europe*, Occasional Paper No. 12, European Union Centre of Excellence, 2011.

23 <<http://www.telegraph.co.uk/news/worldnews/europe/italy/8416659/Refugees-head-for-Europe-from-Tunisia-and-Libya.html>> (last visited 17 December 2014).

24 Y. Pascouau, *The Schengen Governance Package: The Subtle Balance between Community Method and Intergovernmental Approach*, European Policy Centre Discussion Paper (12 December 2013).

25 <<http://www.france24.com/en/20110417-italy-france-train-illegal-tunisia-migrants-lampedusa-eu-north-africa-diplomacy/>> (last visited 17 December 2014).

26 G. Campesi, *The Arab Spring and the Crisis of the European Border Regime: Manufacturing Emergency in the Lampedusa Crisis*, Robert Schuman Centre for Advanced Studies No. 59, European University Institute, 2011, p. 15.

27 See 'France angers Italy after blocking migrants at border', <<http://www.euronews.net/2011/04/17/france-angers-italy-after-blocking-migrants-at-border/>> (last visited 17 December 2014); see also 'France blocks pro-migrant protest', <<http://www.euronews.net/2011/04/17/france-blocks-pro-migrant-protest/>> (last visited 17 December 2014); see also 'France blocks Italian trains carrying migrants', <<http://www.bbc.co.uk/news/world-europe-13109631>> (last visited 17 December 2014).

28 <<http://www.theguardian.com/world/2011/apr/26/eu-borders-arab-protests>> (last visited 17 December 2014).

exceptional difficulty in the management of the [Schengen zone's] common external frontiers.²⁹ Hence, basically, the requested upgrade should include new – more lenient – rules on allowing border controls to be reinstated temporarily under circumstances related to external border pressures.³⁰ As a result of the Franco-Italian dispute and the concerns and reactions it caused in the greater Schengen Area, the European Commission decided that it was indeed necessary to revise parts of the legal framework of Schengen, including rules on temporarily reinstating internal border control. As will be further elaborated upon in Section 5, the European Commission's plans materialized into the Schengen Governance Package, which was adopted by the European Council on 7 October 2013.³¹

2.3. Not just a Southern European debate

Although the debate on internal border control was sparked by the Italian-French divide on how to deal with North-African asylum seekers, it did not take long before other Member States also responded to the situation. As such, Germany, Austria, the Netherlands and Belgium also expressed concerns about the Italian measures and announced similar measures as France on land and air borders. For example, in the Netherlands, Prime Minister Mark Rutte declared that '[a]ny Tunisian who got in through the Berlusconi arrangement, must leave the Netherlands'.³²

In May 2011, an agreement was concluded in Denmark's national political realm to strengthen controls at Danish borders.³³ According to the agreement, extra resources were to be allocated at the internal borders between Denmark and Germany/Sweden. These extra resources were to be used for rebuilding border stations, employing more customs officials, beginning extensive video surveillance of vehicles crossing Danish borders and making rapid police assistance available in case customs officers need them.³⁴ The aims of the controls were to combat cross-border crime (particularly economic crime), to prevent the smuggling of drugs, weapons, persons and large amounts of cash and to prevent the avoidance of Danish tax by the use of foreign workers.³⁵ In this context, Søren Pind, Denmark's Integration Minister at the time, stated that the EU needed a frank discussion about the 'dark side' of open frontiers.³⁶ The Danish plan to strengthen its internal borders was met by a concerned statement from the European Commissioner for Home Affairs, Cecilia Malmström, who warned that the measures may be against Denmark's European and international obligations.³⁷ As Munkøe outlines, however, '[i]n the end, the debacle came to a definite end as the centre-right government was ousted in the September 2011 general election. The new government immediately reassured its European partners of its intent to abide by the Schengen Agreement and that the establishment of 'permanent' facilities at the border would be cancelled.³⁸ Notwithstanding the fact that the Danish plan was watered down by the new Government, the interaction and discussion between the Danish authorities and the European Commission pre-eminently shows that the debate on internal border controls is not confined to the southern region of Europe. Indeed, across Europe, law and policy makers are actively involved in a dialogue about the existing Schengen regime on internal border controls and the potential need to apply changes.

29 Ibid.

30 <<http://www.euractiv.com/future-eu/sarkozy-berlusconi-propose-schen-news-504292>> (last visited 17 December 2014).

31 Council of the European Union, 7 October 2013, 14441/13 (OR. en) PRESSE 400.

32 See 'Tunesiërs uit Italië niet welkom in Nederland', <<http://www.nrc.nl/nieuws/2011/04/08/tunesiers-met-italiaanse-verblijfsvergunning-niet-welkom-innederland/>> (last visited 17 December 2014).

33 <<http://www.telegraph.co.uk/news/worldnews/europe/denmark/8514180/Denmarks-defiance-over-frontier-controls-has-left-European-Union-bordering-on-crisis.html>> (last visited 17 December 2014).

34 Ibid.

35 Ibid.

36 <<http://www.eubusiness.com/news-eu/immigration-travel.9wx>> (last visited 16 December 2014).

37 <http://europa.eu/rapid/press-release_MEMO-11-296_en.htm?locale=fr> (last visited 16 December 2014).

38 For a detailed overview of the national and international dynamics and debate *vis-à-vis* the Danish plan to reinstate permanent internal border controls, see M. Munkøe, *The 2011 Debacle over Danish Border Control: A Mismatch of Domestic and European Games*, College of Europe EU Diplomacy Paper 01/2012. Retrieved from <<http://aei.pitt.edu/33456/>> (last visited 19 January 2015).

3. Schengen and the ‘old’ rules governing internal border control³⁹

The 1985 Schengen Agreement on passport-free travel constitutes one of the core legal frameworks of the European Union, although it must be borne in mind that not all EU Member States are party to it whilst some non-EU states are legally bound by it, as outlined below. It entered into force in 1995 and has expanded considerably ever since.⁴⁰

Indeed, on March 26, 1995, Belgium, Germany, France, Luxembourg, the Netherlands, Spain and Portugal eliminated their internal border controls. The Treaty of Amsterdam, which came into force in 1999, subsequently incorporated the Schengen Agreement in EU law and effectively realised the fundamental EU principle of freedom of movement, one of the most important precepts of the internal market. In addition to the abolition of border controls, the agreement included sections dealing with the harmonization of visa and asylum policies, the common fight against drug-related crime and increased controls at the EU’s external borders. The agreement also led to the creation of the Schengen Information System (SIS), a governmental database that allows police authorities in Schengen Member States to exchange information without delay.

The Schengen Borders Code (SBC)⁴¹ sets out the standards and procedures to be followed in controlling the movement of persons across internal and external Schengen borders. According to Article 20 SBC, ‘[i]nternal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out’. According to the *travaux préparatoires*, this provision means that any control, whether systematic or by spot-checks, carried out solely for the reason of crossing an internal border, is incompatible with the idea of a single area without borders, and is therefore prohibited. According to the European Commission, this also means that border surveillance must be abolished.⁴² Crossing an internal border between two Member States to which the Schengen rules apply must thus not be treated any differently than a journey between regions, provinces, counties or other administrative areas within a Member State.⁴³ In order to ensure this, the physical dismantling of existing border check infrastructures is expressly called for (Article 2 SBC).

Nevertheless, Article 21 SBC makes clear that lifting border controls does not mean giving up *all* forms of control. Indeed, national police forces still have the possibility of carrying out controls in border areas, subject to the conditions as described in the SBC and as long as these controls do not have an effect equivalent to border checks. As such, border controls cannot be conducted in a systematic way and must not be the objective of such practices. As can be derived from Article 21(a) SBC, a main aim of the exercise of such police powers ought to be to combat cross-border crime on the basis of general police information and experiences regarding possible threats to public security.

3.1. The exception to open internal borders

Article 2(2) of the Schengen Convention in conjunction with Articles 23-31 of the SBC provides for the exceptional possibility for Member States to reinstate border controls in case of a serious threat to public policy or internal security. Such interim border checks may be reintroduced for up to 30 days, but – in the case of serious threats – can be extended. At all times the principle of proportionality should be taken into consideration, meaning that the controls must not be reintroduced for longer than necessary nor must they be more intrusive than required by the threat.

Furthermore, the SBC clearly outlines that, when introduced, the measures and grounds for border control must be disclosed in an open and transparent way. Therefore, other than in cases requiring urgent action, the other Member States and the European Commission must be given prior notice

39 For a complete overview and legal analysis of the rules governing internal border control, not only in relation to the free movement of persons, but also the free movement of goods and services, see C.W. Jorgensen & K.E. Sorensen, ‘Border Controls in the European Union: Recent Challenges and Reforms’, 2012 *European Law Review* 37, pp. 249-268.

40 F. Breuss, *An Evaluation of the EU’s Fifth Enlargement. With special focus on Bulgaria and Romania*, Economic Papers 361, March 2009. Retrieved from <http://ec.europa.eu/economy_finance/publications/publication14283_en.pdf> (last visited 19 January 2015).

41 Regulation (EC) No 562/2006 of the European Parliament 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, 13.04.2006, pp. 1-32.

42 Report of the Commission on the application of Title III of Regulation 562/2006 (Schengen Borders Code), COM(2010) 554 final, p. 3.

43 COM(2004) 391 final p. 31.

(Article 24 SBC). As such, Member States can and should be consulted. In case the urgency of the security threat prevents such a prior notification and consultation, the Convention requires that notification is given at the earliest opportunity. Upon lifting the measures, a report demonstrating the success of the operations in view of the aim pursued should be prepared and sent to the other Member States and the European Commission (Article 26 SBC). Both the Schengen Convention and the SBC are, however, unclear on the consequences if a Member State fails to comply with any of these conditions.

4. Closing the internal borders before the Schengen Governance Package

As outlined in the previous section, in Article 2(2) Schengen Convention and Articles 23-31 SBC, the Schengen *acquis* includes a procedure for the temporary reinstatement of internal border controls in case of a serious threat to public policy or internal security, subject to the principle of proportionality. Indeed, these provisions provide the Member States with the opportunity to temporarily regain full control over their internal Schengen borders, as long as the right procedures are followed and the reasons for temporary border controls are justified.

In light of the ongoing and intensifying criminalization of migration, the Franco-Italian call for more lenient rules on temporary border control, and the newly devised Schengen Governance Package that alters these rules, the question arises to what extent the existing legal framework on temporary border reinstatements has been used – or perhaps misused – by Member States to preclude migrants from crossing into their territories. In particular, it becomes of importance to analyse whether the current system has indeed been (mis)applied to such an extent, or bears the risk of future misapplication, that it effectively serves as a tool for Member States to regulate, monitor and repel migrants. Hence, in what follows, it will be analysed whether the existing legal possibility to temporarily reinstate border controls has been used by Member States to extend their control over migration flows within the Schengen zone. This analysis will subsequently be utilized to draw implications *vis-à-vis* the necessity and potential impact of the Schengen Governance Package.

The analysis will comprise the period of January 2000- March 2014. This time frame has been chosen for both a conceptual and a practical reason. In relation to the former, as noted above, fears and concerns *vis-à-vis* migration have driven renewed efforts to strengthen internal border controls in the Schengen zone in particular during the past decade.⁴⁴ It is thus safe to say that the post-Millennium time frame is the most interesting period to look at for the purpose of examining the use of possible crimmigration rationales in cases of temporary border reinstatements. In relation to the latter, the incorporation of the Schengen *acquis* in the EU's legal system in 1999 entailed *inter alia* that from that moment onwards, under Article 2(2) Schengen Convention, Member States had to notify the Council and the European Commission of their intention to reinstate internal border controls and of the underlying reasons.⁴⁵ Hence, the post-incorporation period provides for a practical timeframe given the fact that all temporary border control reinstatements ought to be consistently outlined and justified in notification letters, which not only reduces the likelihood that instances of temporary border reinstatements are overlooked in the present analysis, but which also avoids that the (official) reasons for the temporary border reinstatement have to be second-guessed for analytical purposes.

4.1. Research methods

The data gathered were retrieved from the public register of the Council, as well as through direct contact with the Transparency Service of the General Secretariat of the Council. In response to a request for access, the Transparency Service provided an exhaustive list of letters of notification concerning the temporary reinstatement of border controls, received between January 2000 and March 2014.⁴⁶ In total, 89 letters of notification, as outlined in Table 1, were examined.

⁴⁴ Mitsilegas, *supra* note 18.

⁴⁵ K. Groenendijk, 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?', 2004 *European Law Journal* 10, no. 2, pp. 150-170.

⁴⁶ Two response letters from the Transparency Service of the General Secretariat of the Council to a request for access to letters of notification sent by Member States in relation to the invocation of Art. 2(2) SIA were received on 22 January 2014 and 21 March 2014.

Usually, the letters are addressed to the Secretary-General of the Council or the High Representative of the Council, as well as to the other EU Member States and Iceland, Liechtenstein, Norway and Switzerland. Furthermore, the originating Member State often directly informs the involved neighbouring Member States of its intention to temporarily reinstate border controls, either by formal or informal means.⁴⁷

In total, the 89 letters of notification cover 82 unique cases of temporary reinstatements of border controls. For the purposes of the present article, a unique case is defined as an individual Member State's decision to temporarily reinstate controls at its internal Schengen borders for a delineated reason and for a specific period of time. Indeed, various notification letters concern the same temporary reinstatement issue and are meant as follow-up messages on the basis of an evolving availability of relevant information,⁴⁸ and thus concern one unique case. Simultaneously, one joint letter on a particular instance of border reinstatement was sent by two Member States and has thus been counted as involving – *de facto* – two separate unique cases of temporary internal border reinstatement, since both involved Member States decided to close their respective internal borders other than their shared internal border.⁴⁹ Moreover, if Member States decided to prolong border control at the internal borders under Article 26 SBC, each prolonging was, in the framework of the present article, treated as a separate unique case as it concerns a different delineated period of time and possibly also a different (additional) underlying reason, in line with Article 26(2) SBC.⁵⁰

Of each of the 82 identified unique cases, information in relation to the following features was systematically gathered: (i) the issuing country, (ii) the reason for the temporary reinstatement of internal border control, (iii) the duration of the temporary reinstatement, (iv) the geographical delineation of the intended border control(s) and (v) the type of border control, i.e. involving land, sea and/or air borders. This information was deduced from the 89 identified notification letters and not from other sources such as media reports or European Commission publications, for example the bi-annual reports on the functioning of the Schengen Area that also provide information on border reinstatements.⁵¹ This approach is warranted, given the fact that under Article 24(1) SBC, there is an obligation for Member States to include the aforementioned information in their letters of notification 'as soon as available'. Subsequently, under Article 24(3) SBC, the provided information serves as a basis for consultations between the Member States and the European Commission. Hence, each letter of notification should – in principle – disclose all relevant information, and by merely relying on these official letters for the necessary information, the present article consequently maintains a high level of consistency and validity as it does not have to rely on second-guessing or unofficial interpretations of temporary border reinstatement instances. Nevertheless, it ought to be noted that – as will be further outlined below – officially stated reasons should be considered with caution as they may not disclose all underlying rationales for temporary border reinstatements.

One exception to this rule has, however, been allowed in relation to a temporary border reinstatement by the German authorities. Remarkably, whilst Germany has sent 3 letters of notification within the researched period, it has 4 unique cases of temporary border reinstatements as outlined in Table 1. This is due to the fact that one instance of temporary border reinstatement involving Germany was mentioned in a European Commission report to the European Parliament and the Council on the application of Title III of the Schengen Borders Code,⁵² whilst no respective letter of notification can be traced in the Council's public register. Indeed, as the Transparency Service of the General Secretariat of the Council outlines in its response letter to a request for access to documents of 21 March 2014, '[t]he Commission

47 Groenendijk, *supra* note 45.

48 Council Document 5816/00 (Follow-up of Council Document 5380/00); Council Document 6185/1/05/REV1 (Follow-up of Council Document 6185/05); Council Document 9119/06 (Follow-up of Council Document 8839/06); Council Document 6084/07 (Follow-up of Council Document 5925/07); Council Documents 5370/1/09/REV1 and 7501/09 (Follow-up of Council Document 5370/09); Council Document 11380/09 (Follow-up of Council Document 10653/09); Council document 8584/10/ADD1 (Follow-up of Council Document 8584/10).

49 Council Document 6829/00 (Joint letter of notification by the relevant authorities of Belgium and the Netherlands).

50 The French authorities have used the possibility to prolong the temporary reinstatement of internal border controls on seven consecutive occasions as a result of 'serious risks of a terrorist attack' due to the terrorist attacks that happened in London on 7 July 2005. See Council Documents 11098/05; 11909/05; 12052/05; 13124/05; 14139/05; 15239/05; 5148/06; 6055/06.

51 COM(2012) 230 final; COM(2012) 686 final; COM(2013) 326 final; COM(2013) 832 final.

52 COM(2010) 554 final.

document COM(2010) 554 final (...) also mentions in the list in its Annex I a temporary reintroduction of internal border checks by Germany from 25 May until 9 June 2007. However, the General Secretariat has never received a letter concerning this action.⁷ While this particular instance of temporary border reinstatement has been officially identified and outlined in the concerned European Commission document and since no letter of notification has been registered by the Council *vis-à-vis* this particular case, the information as listed in the European Commission report has been included in the present study for practical reasons. Indeed, the exclusion of this documented and identified instance of temporary border reinstatement merely on the basis that no official notification letter can be traced in the Council's register was deemed disproportionate as it would evidently amount to an incomplete analysis of all temporary border reinstatements under the Schengen *acquis* for the purposes of the present article. Having said that, at the same time, there is no mechanism to check whether there are other non-notified instances of temporary border reinstatements similar to the aforementioned German case. Indeed, as the present analysis is primarily based on letters of notification registered by the General Secretariat and listed by the Transparency Service, it cannot be ruled out that other such cases exist. This limitation should therefore be taken into account in interpreting the analysis, since the possibility exists that further instances of temporary border reinstatements exist outside the scope of the documented and notified cases.

Table 1 Number of notifications and unique cases per Schengen Member State

Country	Number of notifications	Number of unique cases
FR	28	22
ES	17	17
AT	5	5
FI	5	5
IT	4	3
LU	4	3
NO	4	4
BE	3	3
SE	3	3
DE	3	4
DK	2	2
NL	2	2
IS	2	2
PL	2	2
PT	2	2
EE	1	1
LV	1	1
MT	1	1
CZ	0	0
EL	0	0
HU	0	0
LIE	0	0
LT	0	0
SK	0	0
SI	0	0
CH	0	0
TOTAL	89	82

4.2. Results

To outline the actual use of the Schengen provisions related to the temporary reinstatement of internal border controls in the period of research, the following tendencies have been analysed below: (i) the number of cases per country, (ii) the number of cases per year and (iii) the events triggering the temporary reinstatements of internal border controls.

4.2.1. Number of cases per country

Between January 2000 and March 2014, 89 letters of notification were sent involving 82 unique cases, as envisaged above. Table 1 outlines the number of notifications and the number of unique cases per Schengen Member State in the period under study. These figures explain the discrepancy between the number of notifications and the number of unique cases: indeed, whilst most unique cases were accompanied by a single letter of notification, for some cases, multiple follow-up letters were sent (i.e. by France, Italy and Luxembourg), whilst for one examined case, no letter could be retrieved (i.e. the aforementioned German case). The vast majority of cases were initiated by France and Spain, with respectively 22 and 17 unique instances of temporary border reinstatements. By contrast, as can be noted from Table 1, Austria and Finland, which are in a shared third position when it comes to the number of temporary border reinstatements, only did so in 5 cases between January 2000 and March 2014. Hence, effectively, there is a significant gap between France and Spain as the top 2 countries, on the one hand, and the remaining countries, on the other. This goes to show the extent to which France and Spain dominate the process of the temporary reinstatement of internal border controls under the relevant Schengen provisions.

Table 2 Number of cases per year

Year of border controls (Start date is decisive)	Number of cases
2000	10
2001	6
2002	12
2003	3
2004	4
2005	9
2006	9
2007	3
2008	3
2009	9
2010	5
2011	4
2012	3
2013	1
2014 (Jan-March)	1
TOTAL	82

4.2.2. Number of cases per year

As shown in Table 2, ever since 2000 the number of cases per year has differed considerably. Notably, with the exception of 2003-2004, the most intense years in terms of the number of cases are situated in the first half of the period under study, i.e. from 2000 up until and including 2006. Indeed, in the post-2006 period, no single year witnessed more than 5 unique cases, with the exception of 2009. Moreover,

in 2012, there were only 3 unique cases, whilst from January until March 2014, there was only one notification of a border control reinstatement. Whether this denotes a declining trend cannot be derived nor concluded from the overview provided in Table 2, but the analysis at least shows that the powers as provided under the Schengen *acquis* in relation to temporary border controls have been invoked less and less, and that they arguably do not constitute tools that Member States regularly rely on.

4.2.3. Events triggering the temporary reinstatements of internal border controls

Various reasons have been invoked to justify the temporary reinstatement of internal border controls under the Schengen framework. As outlined in Table 3, from an analysis of all notification letters, it can be concluded that temporary border controls were mostly reinstated because of significant political meetings and events being hosted by a Member State. Thus, whilst 10 border control reinstatements were due to meetings of the European Council and related activities scheduled by the EU Presidency, 28 cases of border control reinstatements were justified with reference to other large political events, such as meetings of the G8, the G20, the European Economic Forum, the European Social Forum, the UN, the NATO and the World Bank. Interestingly, as Groenendijk notes, in relation to European Council-related events, certain Member States have refrained from using the instrument of temporary border control reinstatement when hosting such events.⁵³ Thus, for example, Belgium and Greece did not reintroduce border controls during the respective Summits in Laeken (2001) and Thessaloniki (2003).⁵⁴ As such, it is not a given fact that borders *have* to be closed when major events are hosted on the territory of a Member State.

The only country that has invoked terrorism threats as a ground of justification for temporary border control reinstatements is France,⁵⁵ which used the relevant Schengen provisions to reinstate border controls and to subsequently prolong these controls for 7 consecutive periods of time as a result of '[t]he events which occurred in London on 7 July 2005 and the serious risks of a terrorist attack on French territory'.⁵⁶ Thus, although the risk of terrorism has been used to justify border reinstatements in 8 of the 82 cases and thus constitutes a justification ground in almost 10% of all cases, it should be borne in mind that the threat of terrorism was only invoked by one Member State in relation to one ongoing issue – comprising multiple unique cases.

As shown in Table 3, various other grounds have been invoked to justify the reinstatement of internal border controls in the Schengen Area. Interestingly, in 3 cases, the grounds for reinstatement are not apparent from the respective notification letters, contrary to the requirements as listed in Article 24(1) SBC.

When examining the provided justification grounds substantively, there is a significant grey area that merits further discussion and reflection. Indeed, some justification grounds seem to warrant the temporary reintroduction of border controls more than other justification grounds. For example, one could debate whether state visits by foreign officials or vacations taken by 'high-ranking persons' in border areas constitute a 'serious threat to public policy or internal security' which warrants the exceptional reintroduction of border controls under Article 2(2) Schengen Convention in conjunction with Article 23 SBC. As aptly argued by Apap & Carrera, border controls have been temporarily reinstated 'also in situations when the grounds for emergency were not clear in order to apply the "exceptional" article. This was also the case in the movement of eminent persons to the Arán Valley during the Christmas holidays'.⁵⁷

From a crimmigration perspective, what is of particular interest is that immigration-related issues are not often used as *official* grounds of justification for temporary border reinstatements. Indeed, it was only relied upon in three instances in 2000. All of these cases were related to a regularization operation set up by the Belgian Government, which entailed that undocumented residents could apply

53 Groenendijk, *supra* note 45.

54 *Ibid.*

55 It should be noted that internal border controls have also been reinstated by Norway and Sweden as a result of terrorism attacks in Norway in 2011. However, these reinstatements appear to be primarily based on the *occurred* terrorist attack rather than the potential *threat* of future terrorist attacks.

56 Council Documents 11098/05; 11909/05; 12052/05; 13124/05; 14139/05; 15239/05; 5148/06; 6055/06.

57 J. Apap & S. Carrera, *Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?*, CEPS Policy Brief No. 41 (November 2003).

for a residence permit.⁵⁸ In order to prevent possible new arrivals during this period of time as a result of the campaign, the Belgian authorities reintroduced border controls temporarily.⁵⁹ As a response, the Luxembourg Government also reinstated border controls during the same period of time to ‘avoid illegal immigrants who (...) use our territory as a country of transit, prejudicing public order when refused access to Belgium.’⁶⁰ Later in the same year, Belgium again reintroduced border controls to ‘manage as well as possible the risk of a sudden temporary increase in asylum seekers who might be tempted to enter Belgium at this time in the hope of qualifying for the reception and assistance arrangements still in force, knowing that new measures (regarding reception, material assistance, fast-track procedures for handling asylum applications, etc.) will enter into force on 10 January 2001. It is also a signal to illegal immigration networks.’⁶¹ Apart from this particular issue, crimmigration rationales and/or the fear of immigration nevertheless do not seem to play a major role in the invocation of the exception clause by which border controls can be temporarily reinstated. In fact, such factors do not seem to play a role at all post-2000. For the crimmigration debate, then, the invoked reasons for temporary border control reinstatements under the old Schengen rules appear to be significantly less relevant than the political turmoil that has pre-empted and inspired the introduction of a new regime, embodied by the Franco-Italian dispute and the former Danish plan to reinstate structural internal border controls, as discussed above.

There are, however, reasons to approach these considerations with caution. First, only official reasons as stated in the notification letters have been scrutinised in the analysis above. Although it cannot thus be concluded that other, more crimmigration-inspired reasons have informed some instances of temporary border reinstatement, it cannot be fully ruled out either. However, it should be noted that border control reintroductions turn out to be genuinely temporary: from a further analysis of the total duration of each unique case, it turns out that, on average, border reinstatements last for 14.2 days, although substantial differences exist between the various cases. Thus, while some border reinstatements only last for approximately half a day (i.e. those in relation to demonstrations by groups related to the ETA⁶² and those in relation to the terrorist attacks in Norway in 2011⁶³), others last for more than a month. For example, in 2004, Portugal notified in a single letter that it would close its internal borders for 40 days ‘in view of the music festival ‘Rock in Rio’ and of the European Football Championship, Euro 2004, and the resulting need for special security measures to ensure that public order is maintained while these events are taking place.’⁶⁴ Even more so, as previously outlined, France closed its borders for almost eight months due to terrorism threats.⁶⁵ In this regard, it could be debated whether a reinstatement of such proportions can still be considered temporary, and whether the threat of terrorism provides sufficient justification for such a rather drastic measure. In the large majority of the cases, however, the border reinstatements appear to be genuinely temporary: when they are linked to events held in a Member State, which is most often the case as outlined in Table 3, the period of time during which borders are temporarily reinstated is limited to the duration of the event concerned, with sometimes a few days prior to, and following, the event being included. As such, the principle of proportionality seems overall to be safeguarded in the temporary reinstatement practices of the Member States. Consequently, unofficial crimmigration rationales seem to play, at most, a very limited role in almost all cases: indeed, the short-term nature of the border reinstatements will generally not allow for a substantial macro impact on immigration rates.

Second, the aforementioned German case, of which no letter of notification is available, raises questions about the efficiency and accuracy of the procedures. Indeed, while the European Commission had apparent knowledge of a German occasion of temporary border control,⁶⁶ the Council simultaneously outlined that no according notification letter had been filed. As mentioned above, this raises the question whether there are further instances in which border controls have *de facto* been temporarily reinstated

58 Ibid.

59 Council Document 5381/00.

60 Council Documents 5380/00; 5816/00.

61 Council Document 14943/00.

62 Council Documents 6825/06; 14285/06; 13603/08; 13613/09.

63 Ibid.

64 Council Documents 13292/11; 13293/11.

65 Council Documents 11098/05; 11909/05; 12052/05; 13124/05; 14139/05; 15239/05; 5148/06; 6055/06.

66 COM(2010) 554 final.

without an according notification letter. At the very least, the procedure as it currently stands seems to be open to discrepancies as illustrated by the German case.

Third, from the letters of notification, it becomes apparent that many states request the cooperation and support of their neighbouring countries in implementing temporary border reinstatements. However, it is unclear what this means in practice. For example, in February 2014, the authorities of the Netherlands sent two letters of notification concerning the temporary reinstatement of border controls because of the Nuclear Security Summit that took place on the 24th and 25th of March 2014: one to the European Council and one to the European Commission, European Parliament and the Council of the European Union.⁶⁷ In the latter, it is stated that '[a]ll Member States are kindly requested to provide any relevant information and cooperate to putting the abovementioned measures into effect.'⁶⁸ Subsequent news reports have stated that the Belgian and German police were also involved in conducting border controls during the stated period of time.⁶⁹ It thus appears to be the case that in the present example, the Belgian and German authorities also *de facto* closed their internal Schengen borders with the Netherlands by carrying out border controls. These countries, however, did not send a letter of notification about these *de facto* temporary border control reinstatements, which could potentially undermine the entire procedural system as set up in the Schengen *acquis*. In the end, it is up to the relevant European institutions to decide whether they find it acceptable that, if one country files a letter of notification, neighbouring countries can simultaneously start conducting border controls without sending a subsequent letter of notification.

Table 3 Events triggering the temporary reinstatements of internal border controls

Event	Number of cases
European Council meetings and events scheduled by EU Presidency	10
Similar events: G8, G20, European Economic Forum, European Social Forum, UN Conference, Nato Summit, World Bank Conference, etc.	28
Terrorism threat	8
Demonstrations by groups related to ETA	7
Large Sports and Music Events (e.g. Football Championships)	7
Ceremonies (incl. royal weddings, remembrances, Nobel Prize Ceremony, etc.)	5
State Visit by Head of State or political leaders	4
Vacations by 'high-ranking persons' in border area	3
Immigration policy-related purposes	3
Due to attacks in Norway in July 2011	2
EU Council of Ministers' meetings	1
Introduction of the euro	1
Unknown reason or unknown event	3
TOTAL	82

5. Countering crimmigration with the Schengen Governance Package?

As aforementioned, the Schengen Governance Package is the European Council's response to the Schengen 'crisis' resulting from political turmoil, such as the Franco-Italian dispute, the later Franco-Italian joint request to reinforce Member States' control of the Schengen mechanism and the former

67 Council Document 6289/1/14 REV 1.

68 Ibid.

69 See 'Border controls back during nuclear summit in The Hague', <http://www.dutchnews.nl/news/archives/2014/02/border_controls_back_during_nu.php> (last visited 17 December 2014); see 'Tijdelijke grenscontroles tijdens nucleaire top in Den Haag', <<http://www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3604525/2014/02/27/Tijdelijk-grenscontroles-tijdens-nucleaire-top-in-Den-Haag.dhtml>> (last visited 17 December 2014).

Danish plans to implement structural internal border controls. However, the Package warrants further scrutiny: indeed, while it seems to be aimed at preventing future abuse of the exception clause for, e.g., crimmigration-inspired rationales, as has been shown in the analysis above it turns out that the old rules on the reinstatement of border controls have never officially been used to counter immigration or to tackle immigration-related issues. Whereas the lack of finding any past abuse of the temporary closure of internal borders does not warrant future abuse, our analysis does raise questions on the impact of the new rules introduced by the Schengen Governance Package from a crimmigration perspective.

The Schengen Governance Package resulted in two important changes: the adoption of a new evaluation mechanism verifying the application of the Schengen rules by Member States and a greater clarification of the conditions under which and how states can reintroduce controls at their internal borders. In line with the scope of this paper, we will particularly focus on the second set of changes.

5.1. Internal border controls under the Schengen Governance Package: a new procedure and new conditions

5.1.1. A new procedure

Under the 'old' Schengen Borders Code, Member States who are planning to reintroduce border control or have done so in an emergency situation should inform the other Member States of the reasons for the intended reintroduction and provide details of 'the events that constitute a serious threat to public policy'. Under the Schengen Governance Package, states must 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. However, as outlined above, under the current system, Member States hardly ever object against the invocation of the Schengen provisions to temporary reinstate border controls.

In addition, the amendment states that the European Commission may, if necessary, 'request additional information from the Member State concerned'. The subsequent obligation to supply more information is accompanied by an extended consultation process. Within this procedure, information provided by the concerned Member State, including classified information, is presented to the European Parliament and Council. This demonstrates a certain 'Communitarisation' of procedure and allows for political supervision, notably by the European Parliament. Furthermore, the European Commission, and now the Member States too, can issue an opinion on the submitted information. The European Commission is even 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. These procedures provide all parties with the opportunity to examine the necessity and proportionality of the intended measures and may alleviate some of the concerns about the de facto border control reinstatement of neighbouring countries.

5.1.2. New conditions

The new Article 26 of the Schengen Borders Code provides for the possibility of a 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'. It furthermore 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.⁷⁰

Secondly, the Schengen Borders Code clarifies the maximum duration for which the border control may be reintroduced, whether it is planned or in an emergency. Planned reintroduction is still authorised

70 Regarding this point see the Commission's biannual reports on the functioning of the Schengen Area.

for an initial 30-day period, and 30-day prolongation periods remain 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. As the analysis has shown, the impact of this new condition will most likely be limited: except for the French border reinstatements due to terrorism threats as envisaged above, no Member State has reintroduced border control for periods exceeding these newly introduced limits during the examined period.

The third clarification is, however, more significant. The regulation highlights that the concerned measures 'should only be adopted as a last resort'. Furthermore, it outlines that this requirement should be read in combination with the new article defining the criteria which must be met for border controls 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*. Thus, when a state considers reintroducing border control, it must first evaluate whether the reinstatement would be 'likely to adequately remedy the threat to public policy', and second, assess the proportionality of the measure in relation to the threat.

According to the Schengen Borders Code, in its assessment the state should take two further elements into consideration. First of all, 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 the envisaged measure on the free movement of persons. Concretely, these measures oblige Member States to weigh 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 whilst interfering less 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'.⁷¹

5.2. The Schengen Governance Package and crimmigration in the EU

Looking at the new legal framework – both in terms of conditions and procedure – on internal border controls, it seems safe to say that Italy and France ended up getting precisely the opposite of what they were asking for. Instead of obtaining greater leeway to limit Europe's no-borders regime, the Schengen Governance Package seems to have made it more difficult and cumbersome to temporarily reinstate border controls. As Pascouau in his sharp analysis of the Schengen Governance Package states, the new conditions and procedure are 'similar to a nuclear weapon; the important thing is not to use it, but rather to possess it'.⁷² This is well illustrated by the recent written reply by the Dutch State Secretary for Safety and Justice to questions by Members of Parliament concerning an alleged increasing asylum influx, in which he states that such a situation does not fulfil the new conditions to temporarily close the borders.⁷³

It seems difficult to explain the almost 'extreme' response by the European Commission to the Franco-Italian dispute. Although the Schengen *acquis* was modestly challenged by the large influx of immigrants from Northern Africa, critics might question whether the current tightening of the rules was necessary, especially given the fact that an analysis of the use of the exception provisions under the 'old' Schengen Borders Code does not point at an overuse for the sake of crimmigration-inspired rationales. As Section 4 shows, under the old Schengen Borders Code it was rather easy, perhaps too easy, for Member States to temporarily close their internal borders, even in instances where high-ranking officials would spend their vacations in a border region.⁷⁴ Nevertheless, the data indeed simultaneously show that – barring some exceptions – Member States did not seem to abuse this power.

71 Point 6 of the preamble to Regulation (EU) No 1051/2013, OJ L 295, 6.11.2013, p. 2.

72 Pascouau, *supra* note 24.

73 <<http://www.rijksoverheid.nl/documenten-en-publicaties/brieven/2014/05/19/kamerbrief-stand-van-zaken-ontwikkelingen-asielinstroom-vanuit-eritrea.html>> (last visited 17 December 2014); see also 'Eritrea-brief: smokkelaars opgepakt' <<http://nos.nl/artikel/650004-eritrea-brief-smokkelaars-opgepakt.html>> (last visited 17 December 2014).

74 Apap & Carrera, *supra* note 57.

Nevertheless, we also illustrated that the Franco-Italian dispute about the Tunisian immigrants should not be seen as an event on its own, but rather as part of the broader development of the securitization of migration on the European continent. Against this background, the Franco-Italian dispute, the Danish developments towards encompassing border controls and the anti-immigrant and pro-internal border control responses from other Member States might just have pinpointed to the European Commission the importance of tightening the rules in order to prevent *future* abuses. Under the Schengen Governance Package, it is explicitly mentioned that ‘a large number of third country nationals crossing the external border of one or more Member States’ *could* provide a reason to temporarily close the internal borders. Obviously, this will only be possible if the new rules and procedures are taken into account and ‘insofar as the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level’, which constitutes a nearly impossible benchmark to achieve.

Yet, knowing that crimmigration can materialize on various levels – not only in political discourse and decision-making – it is equally important to keep an eye open for other, perhaps more ‘veiled’ and less regulated ways in which Member States have been trying to monitor the flows of people entering their territories. Although, formally, there are no border checks in the Schengen Area, besides border surveillance through a network of immigration and crime-related databases,⁷⁵ over the past couple of years a variety of scattered non-border security controls have developed.⁷⁶ One of the most empirically understudied forms of border surveillance are the continuously expanding mobile police controls taking place in border areas in which – according to Article 21 SBC – random checks are allowed.

5.2.1. Scattered identity checks in border areas

Whereas security checks at the border are prohibited, the Schengen Borders Code leaves room for security checks in border areas as long as the way in which the checks are carried out does not make them equivalent to border checks. Over the past couple of years, many Member States have introduced these types of checks, mostly identity checks, some more structurally than others. To outline the structure of such flexible controls, a few examples will be discussed.

The Netherlands has introduced the so-called Mobile Security Monitor (MSM) since 1994. The MSM is carried out by the Royal Dutch Marechaussee, the Dutch military constabulary which also function as the Border Police. Based on the Aliens Law (*Vreemdelingenwet*) and the Aliens Decree (*Vreemdelingenbesluit*), the Border Police have the authority to patrol in a 20 km zone around the Dutch-German and Dutch-Belgian borders. In this 20 km zone, people entering Dutch territory (either by train or by motor vehicle) can be asked for their identification papers as well as residence permits without the necessity of their being a reasonable suspicion.⁷⁷ Whereas the original goal of the MSM was only to prevent illegal entry and irregular stay by aliens,⁷⁸ over the course of the years its scope seems to have unofficially widened to – besides combating illegal stay – combating a broad variety of cross-border crime.⁷⁹

Germany, like the Netherlands, has a long tradition of strictly controlling citizens and non-citizens at the border. Like the Dutch Border Police, the *Bundesgrenzschutz* (BGS), the German Border Police, are allowed to perform checks on aliens and Germans in a 30 km zone behind the borders. In addition, the BGS can perform identity checks on trains and at railway stations and airports across Germany if they have information that these places are generally used for illegal entry.

In Latvia, the State Border Guard’s Immigration Control Service is in charge of ‘mobile patrols operating near internal borders and performing selective checks of persons in the area of state borders.’⁸⁰ On the website of the agency, it has been outlined that the mobile patrol is utilized in a random order

75 The area where there is the closest relationship between migration and criminal matters is the Schengen Information System containing alerts about objects (associated with criminal activity) and aliens (third country nationals), who are considered a threat to the public policy or national security of an EU Member State.

76 Faure, *supra* note 15, p. 10.

77 Art. 50 Dutch Aliens Act in conjunction with Art. 4.17 Section 1 Dutch Aliens Decree.

78 *Kamerstukken II* 1994/95, 19 637, 115; *Kamerstukken II* 1994/95, 23 900, 2.

79 *Kamerstukken II* 2011/12, 19 637, 1393; *Kamerstukken II* 2011/12, 19 637, 1485; *Kamerstukken II* 2010/11, 32 317, 68.

80 Latvian Ministry of the Interior, *Annex 1 to Multi-Annual Programme 2008-2013* (submitted to the European Return Fund) <www.iem.gov.lv/files/text/COM_ARF_MAP.pdf> (last visited 17 December 2014).

on internal borders *every day*.⁸¹ In this regard, it is interesting to note that the Latvian Multi-Annual Programme 2008-2013, as submitted by the Ministry of the Interior to the European Return Fund, states that ‘the State Border Guard currently is capable of effectively combating illegal immigrants both at the state border, and inside the state by performing identification of illegal immigrants.’⁸²

In addition, amongst others, Austria, Italy and France are known to have similar ‘mobile identity controls’ taking place in border areas.⁸³ Other than the Netherlands, not all Member States have a clearly formulated national framework in place regulating these scattered police controls. It is therefore rather unsurprising that the legitimacy of these mobile controls has been questioned over the years in the light of them being arguably *de facto* equivalent to permanent border checks and also in relation to the disproportional profiling of not only third country nationals, but also citizens from certain EU Member States based on their alleged relation to cross-border crime.⁸⁴ Against the background of the ongoing criminalization of migration on the European continent, the fact that Member States and their border control agencies have a great amount of discretion in deciding how to exactly enforce these ‘Schengen-proof’ identity checks seems to be causing concern. Indeed, the control of identity documents has become crucial in the process of Member States deciding who has the right to enter their territory.

6. Conclusion and discussion

In this paper we aimed to answer the question of how the Schengen Governance Package, and especially the revised legal framework on temporarily reinstating internal border checks, should be valued within the broader process of crimmigration on the European continent. As we have illustrated, the Schengen Governance Package is the European Commission and Council’s response to the alleged Schengen ‘crisis’ that resulted from the increased influx of North-African immigrants through one of the weak patches in the EU’s external border and the subsequent anxious responses of both southern and northern European Member States. Indeed, as a result of this influx and in light of the Italian procedure of providing immigrants with residence permits, many Member States were announcing stricter border control measures.

Whereas it is understandable that the European Commission and the Council felt the need to respond to the uproar, the way in which they responded might be surprising. Instead of making it *easier* for Member States to close their internal borders, the new conditions and procedures seem to have made it more *difficult* to do so. As such, the objective of a borderless Schengen zone – rather than the political desires of the individual appealing Member States – is still at the core of the European policy response. Although the Commission and the Council do not give clear-cut reasons for their response, based on the great emphasis that is being placed on border reinstatement being a last resort, it appears as if they aim at preventing abuses of the exception rule which in itself is a valid reason for changing the legal framework.

Indeed, although our analysis of the period January 2001-May 2014 does not seem to show any abuse of the legal framework on temporarily reinstating internal border controls, the decision of the Commission to introduce the Schengen Governance Package cannot be seen apart from (political discussions on) the ever expanding criminalization of migration and immigrants throughout Europe. As such, the Package addresses the domestic anxieties and concerns caused by increased flows of people into and within the European Union, which in itself might become a trigger to increasingly close the internal border in order to protect the nation state’s territory. Several examples of growing negative sentiments not only towards third country nationals and irregular migrants, but also towards the population of new EU Member States – especially the Eastern European states – seem to illustrate this.

81 See <<http://www.rs.gov.lv/index.php?top=0&id=931>> (last visited 12 November 2014): ‘On internal borders every day works immigration mobile patrol, which in random order carries out immigration verification of suspicious persons and vehicles in territory of Republic of Latvia after they have crossed the State border [sic].’

82 Latvian Ministry of the Interior, *Multi-Annual Programme 2008-2013* (submitted to the European Return Fund), <www.iem.gov.lv/files/text/COM_AF_MAP.doc> (last visited 17 December 2014).

83 K. Groenendijk, ‘New Borders Behind Old Ones: Post-Schengen Controls Behind the Internal Borders and Inside the Netherlands and Germany’, in K. Groenendijk et al. (eds.), *In Search of Europe’s Borders*, 2003, pp. 131-146.

84 Court of Justice of the EU, 22 June 2010, Cases C-188/10 (*Melki*) and C 189/10 (*Abdeli*).

In relation to the criminalization of migration in Europe, and more specifically the process of crimmigration, the influence of the Schengen Governance Package remains to be seen in the present political context. Indeed, the recent nature of the legislative changes makes it impossible to draw firm conclusions on this part. What we have aimed to show is that if preventing abuse based on immigration fears was indeed one of the ulterior motives of the European Commission and the European Council – as it seems to be – the effect of the tighter legal framework might be counterproductive. By potentially making it more difficult for Member States to have their request to temporarily close the internal borders approved, there might be the risk of pushing Member States into the direction of finding ways around this last resort to monitor their borders. The ‘Schengen-proof’ security/identity checks that are being carried out in the border areas of many Member States are popular in that sense. With the scope of the SBC provisions on these checks not yet fully demarcated, Member States are constantly seeking the limits of the law in this regard.⁸⁵ In other words, closing the internal borders does not seem to be the ‘weapon of choice’ to monitor border crossings.

Consequently, it seems questionable whether Pascouau is right in stating that the Schengen ‘crisis’ ‘(...) illustrates a strong movement toward integration, where confrontations between the Community method and intergovernmental approach have given way to more subtle balance.’⁸⁶ Whilst this may have been the goal that the European institutions had in mind when proposing and adopting the Schengen Governance Package, if national authorities increasingly choose more flexible and less strictly regulated forms of border control over the more ‘accountable’ Schengen Governance Package provisions, this would in fact have a contrary effect: a deterioration of integration and Communitarisation. Although the new procedures grant EU institutions more say in the decision-making process on whether or not to reinstate internal border controls, this is nothing more than an empty shell if Member States choose their largely nationally regulated flexible identity and security checks over the European legal framework. As such, tightening the rules in relation to one particular bordering mechanism is not a guarantee that authorities will refrain from shifting towards a less well-regulated bordering practice. Even more so, since the ‘old’ Schengen rules were hardly ever misused as shown in the analysis part of this article, it is very questionable whether a tightening of procedural rules will have the desired effect.

Border control takes place in larger ‘border areas’ and – something we intentionally did not touch upon in this paper – in computerized databases. The result is an intricate, sometimes unclear or even contradictory picture of the conflicting functions of frontiers – especially the external frontiers and the anticipated future frontiers of the EU – with states torn between enhanced cooperation and integration (requiring open frontiers) and the perceived need for strict controls (requiring limits to this openness). This confusion produces a political discourse which highlights the issue of migration and an alleged need for harmonized and strict identity controls and police cooperation at the borders, in border zones, and far beyond national frontiers in a variety of bordering practices. Consequently, although internal borders have been formally abolished within the Schengen zone, national bordering mechanisms are still being relied upon in a plethora of ways. However, the way in which adjustments are currently made to avoid any misuse of the system may actually enhance misuse through more flexible and less-regulated forms of border control, potentially leaving the EU institutions with extended powers but within an abandoned legal framework. As such, the intentions seem to be spot on but the reformed model of border governance is unlikely to hit home. ¶

85 The possibilities to carry out MSM checks on trains and on the highways have recently been expanded: Decree of 02-07-2014, *Stb.* 2014, 250.

86 Pascouau, *supra* note 24.