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published in

CEPS Policy Briefs
2015

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Brouwer, E. R., Guild, E., Groenendijk, C. A., & Carrera, S. (2015). What is happening to the Schengen borders? *CEPS Policy Briefs*, 86(2015).

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What is happening to the Schengen borders?

**Elsbeth Guild, Evelien Brouwer, Kees Groenendijk
and Sergio Carrera**

No. 86/December 2015

Abstract

What is happening to the Schengen borders? Is Schengen in 'crisis'? This paper examines the state of play in the Schengen system in light of the developments during 2015. It critically examines the assertion that Schengen is 'in crisis' and seeks to set the record straight on what has been happening to the intra-Schengen border-free and common external borders system. The paper argues that Schengen is here to stay and that reports about the reintroduction of internal border checks are exaggerated as they are in full compliance with the EU rule of law model laid down in the Schengen Borders Code and subject to scrutiny by the European Commission. It also examines the legal challenges inherent to police checks within the internal border areas as having an equivalent effect to border checks as well as the newly adopted proposal for a European Border and Coast Guard system. The analysis shows that the most far-reaching challenge to the current and future configurations of EU border policies relates to ensuring that they are in full compliance with fundamental human rights obligations to refugees, effective accountability and independent monitoring of the implementation of EU legal standards. This should be accompanied by a transparent and informed discussion on which 'Schengen' and which 'common European Border and Coast Guard Agency' we exactly want within current democratic rule of law and fundamental rights remits.

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Research for this paper was carried out in the framework of the SOURCE (Societal Security) Network of Excellence, a research project funded by the European Union's Seventh Framework Programme for Research).

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CEPS Paper in Liberty and Security in Europe No. 86/December 2015

1. Introduction

Since September 2015, the press in Europe has been awash in stories about the demise of the Schengen area of border control-free travel. This paper examines these claims and seeks to set the record straight on what has been happening to Schengen and why and what it means for the longer term. Five key points are of immediate importance:

- **First, the language of ‘crisis’, whether a migration crisis, refugee crisis or border-control crisis is much exaggerated.** We do not yet have figures of exactly how many people came to the EU this year to seek international protection, but it is unlikely to much exceed one million. Yet, according to FRONTEX, the EU’s external border agency, more than 320 million foreigners entered the EU in 2014 – most of them tourists¹ – and cause no disturbance to the external borders of the Schengen area. If there is a crisis at all, it is a policy crisis regarding the admission and reception of refugees, as emphasised in points 4 and 5 below.
- **Second, Schengen open borders are here to stay; reports of reintroduction of intra-Schengen border controls are much exaggerated.** Only five Schengen states have exceptionally introduced such controls, and one (Slovenia) has already lifted them; two states (France and Malta) had already planned border controls for substantial events in their states; and only France has announced the prolongation of the controls in light of the Paris attacks of 13 November 2015. Furthermore, the controls have been carefully targeted at a small number of border-crossing points and according to the European Commission have not given rise to any complaints by EU citizens of interference with their free movement rights.
- **Third, all member states that have overtly reintroduced controls with other Schengen states have done so in accordance with the EU-driven rule of law model of re-introduction of internal border checks as laid down in Articles 23–25 Schengen Borders Code (SBC),** which since 2013 is subject to the scrutiny by the European Commission as regards their justification, proportionality and necessity.
- **Fourth, the real challenge for Schengen border controls is ensuring that they are carried out in a manner consistent with the member states’ international obligations to refugees, and the EU Charter of Fundamental Rights, including the right to non-discrimination.** The introduction or removal of Schengen border controls should have no impact on the right of asylum-seekers to cross the external and internal Schengen borders to seek asylum. Refugees are entitled to seek asylum and to enter and stay on the territory of a host state for this purpose. Those whose application for international protection receives a negative decision must be given effective remedies in light of Article 47 of the EU Charter of Fundamental Rights.
- **Fifth, the Schengen external border must be a place where human dignity is respected and asylum-seekers receive the legal protection they are entitled to.** This is what the EU institutions and member states need to work on in the next generation of EU integrated border management. A key challenge for

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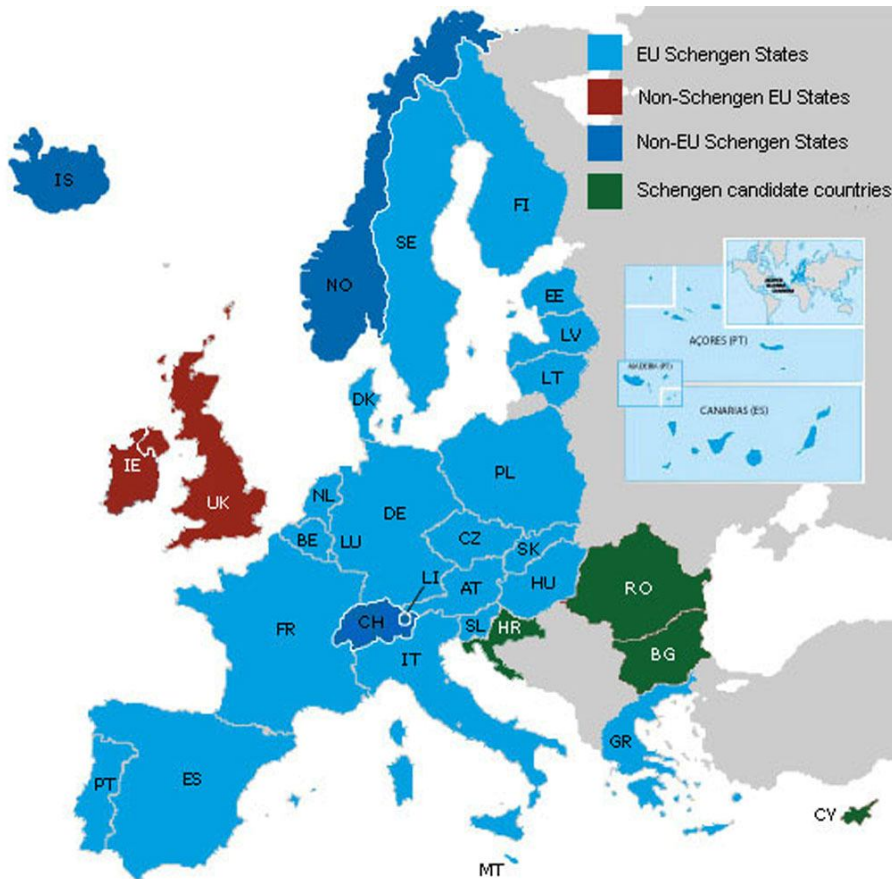
¹ See the Agency’s risk analysis for 2014 http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf

any new European Border and Coast Guard model will be what a refugee and fundamental rights friendly external border control will look like. It also calls for a transparent and informed discussion on which ‘Schengen’ we exactly want within current democratic rule of law and fundamental rights remits.

2. Where is ‘Schengenland’?

Where is Schengen? This map indicates the 22 EU member states and the four non-EU states that are signatories to the Schengen agreement plus the six EU states outside Schengen (Bulgaria, Croatia, Cyprus, Ireland, Romania and the UK).

Map of the Schengen area as of 1/7/2013



Source: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm

In the midst of much press coverage about the current state of disarray in the Schengen intra-member state border control system and whether that system can survive, it is time to have a cool look at the documents before reaching any conclusions.

The Schengen border control system developed from the 1985 Schengen agreement between five EU member states – Belgium, France, Germany, Luxembourg and the Netherlands. It operated as a separate system outside EU law until 1999. In 1990, the second agreement (Schengen Implementing Agreement) was signed and the participating states were committed to abolishing intra-member state border controls on persons and establishing a common system of external border control on the entry of people into the Schengen area. The abolition of border controls on the movement of persons across the Schengen area actually took place on 20 March 1995 (although France dragged its heels on account of the Dutch policy on soft drugs).

Between 1995 and 1999, all member states joined the system except Ireland and the UK. Non-EU member states Iceland, Norway, Liechtenstein and Switzerland also joined the system. By the end of 2007, all the 2004 member states had joined the Schengen system of no border controls on persons with the sole exception of Cyprus, owing to its problems in controlling its borders. The 2007 and 2013 member states have not yet been admitted to the Schengen border control system.

The Schengen Borders Code (SBC) of 2006 codified most of the relevant Schengen rules (from the Schengen Implementing Agreement 1990 and other Schengen instruments) concerning a) controls at external borders, b) removal of controls at internal Schengen borders (and their temporary re-introduction) and c) police controls of the zone behind the internal border.²

There followed a 2011 spat between France and Italy over the arrival of Tunisians in Italy and their alleged onward movement to France.³ This intergovernmental challenge to the Schengen system was rapidly followed by a similar plan developed by Denmark in May 2011 to intensify customs controls which it eventually shelved in October of that year.⁴ At the heart of these two efforts was an attempt to introduce more ‘intergovernmentalism’ into the Schengen system and reduce its EU legal character.

However, **neither of these attempts succeeded. In the end the EU legislator chose to increase the EU component of the Schengen system providing greater clarity to the legal conditions under which temporary border controls intra-Schengen could be introduced** (discussed in section 3 below). The decision was taken to grant more power to the Commission by way of an obligation to carry out checks on the operation of Schengen and the duty to evaluate the use of any of the exceptional measures (see below on the Commission’s first evaluation on the use of Article 25 SBC).⁵

Indeed, **in 2011 the European Commission proposed a series of important amendments to the SBC** that took the form of two separate amendments⁶ and came into force in 2013.⁷ The amendments set out the circumstances, time limits and grounds under which participating Schengen states are entitled to introduce intra-state border controls on persons. The justification for such a measure, taken on an emergency basis, is codified in the Regulation and the Commission is charged with ensuring that there is an evaluation of the reasons and application of the emergency measures.

3. The legal provisions on reintroducing controls at internal Schengen borders

Article 23 SBC provides the general framework for the temporary reintroduction of border controls at internal borders (those between Schengen participating states). The first requirement is that there is a “serious threat to public policy or internal security” in a member state. Where there is such an emergency, the state may exceptionally reintroduce border control at all or specific parts of its internal borders **for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its extension exceeds 30 days**. But the scope and duration of the temporary reintroduction of border controls **must not exceed what is strictly**

² Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, 15 March 2006, OJ L 105/1, 13.04.2006.

³ See Carrera et al. (2011).

⁴ See Hobbing (2011).

⁵ See Carrera (2011).

⁶ Commission proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, COM(2011)559, 16.09.2011, Brussels; and Commission proposal for a Regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011)560, 16.09.2011, Brussels.

⁷ Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 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; and Council Regulation (EU) No 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.

necessary to respond to the serious threat. Furthermore, border controls can only be reintroduced as a last resort and in accordance with the procedure set out in Articles 24, 25 and 26.

If the serious threat to public policy or internal security persists beyond the period provided, it may be prolonged subject to further criteria (see below). Yet all new elements must be taken into account and the renewal must be for 30-day periods only. The total period of the reintroduction of border controls must not exceed six months. In exceptional circumstances set out in Article 26, the total period may be extended to a maximum length of two years.

The Article 23.a criteria require that a member state decide that the measure is ‘**a last resort**’ and that the **reintroduction of border controls is temporary in nature**. On prolonging the internal border controls, the state must assess whether the measure is likely to adequately remedy the threat and the proportionality of the measure in relation to the specific threat. In doing so, the state must take into account the following:

- i. the likely impact of any threats to its public policy or internal security including following terrorist incidents or threats including those posed by organised crime; and
- ii. the likely impact of the measure on free movement of persons within the Schengen area.

Article 24 sets out the procedure for the temporary introduction of border controls. The first step is that the state must inform the other Schengen states, the Commission, the European Parliament and the Council – for ‘normal’ foreseen threats the latest four weeks before the introduction of the border controls. A shorter period is permitted where the circumstances become known less than four weeks before the planned reintroduction of controls. **The notification must include four elements:**

- i. the reason for the proposed introduction, including all relevant data detailing the events that constitute a serious threat to public policy or internal security;
- ii. the scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced;
- iii. the names of the affected crossing points; and
- iv. the date and duration of the planned reintroduction.

The Commission is entitled to request further information. The state can classify parts of the information as confidential. This cannot deprive the Commission and European Parliament of the totality of the information. When a state makes a notification, the Commission and the member states are entitled to issue opinions. For the Commission this means that if it has concerns regarding the necessity or proportionality of the measure or if it considers that consultation is appropriate, it should issue such an opinion. Article 24 also provides for consultation including joint meetings among member states on reintroduction of controls. These should take place at least 10 days before the reintroduction.

In cases requiring immediate action, Article 25 applies. Where there is a serious threat to public policy or internal security that requires immediate action, a state may, exceptionally, reintroduce controls for a period of up to ten days. It must notify the other member states and the Commission (and the European Parliament) and supply the Article 24 justifications and justify the use of the Article 25 emergency procedure. The Commission may consult other states on receipt of the notification. Where the serious threat continues beyond the initial ten days, the state can prolong the border controls for a period of up to 20 days. Again, the state must take into account the Article 23 criteria in an assessment of necessity, proportionality and any new elements. Consultations and opinion are permitted here too. The Article 25 procedure can only be renewed for a total of two months.

Finally, Article 26 provides for 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. This is not the basis for any of the measures taken by Schengen states since the critical 13 September notification by Germany invoking an Article 25 border control with Austria, but it is included in the proposals

of the Presidency of 1 December 2015, which will be discussed at the European Council foreseen for 17–18 December 2015 (see below).⁸

However, it is worth remembering that **Schengen states have frequently reintroduced temporary border controls with one another, usually under the normal procedure for the purposes of safeguarding international events taking place in their countries, in attempts to restrict irregular immigration, as a response to serious health scares and similar circumstances.** Groenendijk (2004) undertook an analysis of these activities in his 2004 publication.⁹

On 1 December 2015, the Council published a proposal entitled “Integrity of the Schengen Area” (14300/15). Aside from other measures dealing with the reinforcement of external border controls (deployment of RABITS at the external ‘green land borders’ and of Frontex at the northern borders of Greece), the Council proposed to apply Article 26 for the reintroduction of internal border controls. According to Article 26.2 SBC, this would allow the Council to recommend, based on a proposal of the Commission, that one or more member states reintroduce border controls at ‘all of specific parts’ of their internal borders for two years. Even as this leaked document was presented as directed to Greece with the intention of throwing this country out of the Schengen area, the impact of using Article 26 can be broader, as this implies a long term reintroduction of internal border controls within the Schengen area. We will return to this document and the Greek non-paper in response to it in section 11 below.

4. Which Schengen states invoked Article 25 in autumn 2015?

4.1 Germany

On 13 September 2015, the German Interior Minister notified the Secretary General of the Council that Germany was reintroducing temporary border controls under Article 25 effective immediately. The reason set out in the notification is the “uncontrolled and unmanageable influx of third country nationals into German territory”.¹⁰ The German Minister confirmed that the controls would only be as extensive and intense as needed to ensure security. The controls would be concentrated on the German-Austrian land border. The notification stated that “further arrivals would endanger the public order and internal security.”

As justification for the reintroduction of the controls, the letter stated that under EU law Germany is not responsible for the large majority of the people arriving, as the Common European Asylum System applies to the first state to register these people, which is also responsible for their protection needs and claims. The letter finished by stating that a single European legal framework can function in totality only if all member states act in solidarity to face the common responsibility.

On 12 October,¹¹ the same German Minister notified the Council of a prolongation of the temporary controls. The letter refers to a second renewal letter of 22 September but that document is not available on the Council register. In the letter of 12 October, the Minister notes that the Council has requested reasons justifying the reintroduction of border checks.¹² He confirmed that after another careful examination, Germany would be extending the checks for a further 20 days in accordance with Article 25. He assured the Council that the checks would be limited to the level required by the actual security needs, are focused on the German-Austrian border and carried out in a flexible manner. Again on 27 October,¹³ the Minister notified the Council that Germany would be extending the controls under Article 25 until 13 November (the final date possible under Article 25) and thereafter in accordance with a letter to the Council of 9 October (not on the Council register) border checks would be carried out under Articles 23 and 24 for a further three months.

⁸ See <http://www.consilium.europa.eu/en/meetings/european-council/2015/12/17-18/>

⁹ For a more recent overview, see the Annex to Carrera et al. (2011).

¹⁰ Council Document 11986/15

¹¹ Council Document 12985/15

¹² The Commission published an Opinion on the necessity and proportionality of Germany and Austria’s use of Article 25 on 23 October 2015, which will be discussed below.

¹³ Council Document 13569/15.

The justification for the extension of the Article 25 controls was the unprecedented and uncontrolled influx of migrants seeking asylum (not the change of language from third country nationals to ‘migrants seeking asylum’). According to the Minister no other EU country was as affected as Germany. The influx affected public order and internal security in Germany. Internal border checks were necessary to replace at least to a certain degree uncontrolled migration with an orderly procedure. The Minister again referred to the lack of responsibility by other member states, now classified as transit countries. He also stated that persons may have been radicalised in crisis and conflict regions and human smuggling and related crimes are not acceptable. This paragraph appears disassociated from the argument.

The Minister also highlighted that the situation was unlikely to be resolved soon and thus the move to Article 23 and 24 border controls. Finally, the Minister confirmed that negative effects on cross-border transport would be kept to a minimum. A rather ambiguous statement is also included: “We are currently examining whether in the future borders can be crossed only at certain border crossing points.” The Minister finished by confirming Germany’s commitment to the Schengen area and free movement as pillars of European integration.

4.2 Austria

Austria notified the Council on 15 September that it would be reintroducing controls under Article 25 from 16 September.¹⁴ The justification set out in its letter was the security situation caused by the huge migration flow to and via Austria and the reintroduction of controls by Germany on 13 September. The letter confirmed that the controls would be applied gradually and flexibly, adapted in time and to the circumstances. Specific reference was made to cross-border human trafficking and the need to combat it.

The Austrian authorities undertook to limit the controls to the extent necessary for security. The focus of the land border controls were between Austria and Hungary, Italy, Slovenia and Slovakia. In addition to the threat to public order and internal security, the Austrian authorities referred to a continuous overburdening of the police, emergency services and public infrastructure and the need for the Austrian Federal Police to perform their duties thoroughly at internal borders. Austria also stated that it was not responsible for the “vast majority of the persons concerned” and confirmed that “asylum seekers must also accept that they cannot choose which member state will grant them protection”.

On 24 September the Austrian authorities notified the Council they would be extending the controls for a further 20 days because between 18 and 21 September about 33,000 persons entered Austria irregularly.¹⁵ 17,700 individual accommodation places had been created over the preceding days and the Austrian authorities considered that their systems were overburdened. On 15 October the Austrian authorities once again prolonged the controls for a further 20 days and notified the Council that it would be invoking Articles 23 and 24 for further controls after that date.¹⁶ In justification for the prolongation the Austrian letter stated that between 5 September and 8 October, 238,485 persons were apprehended at the south-eastern border of Austria of which 9,017 applied for asylum. The difference between refugees transiting Austria and those staying is evident in these figures.

Finally, on 13 November, the Austrian authorities notified the Council of the prolongation of controls under Articles 23 and 24.¹⁷ This letter is particularly well prepared referring to the relevant legal provisions. The justification remained the same – mass inflows of migrants (note again the change of language) and the security challenge which this presented. Austria provided in an annex a list of all designated border crossing points as required by Article 23, and indicated that two crossing points were specifically affected: Nickelsdorf and Spielfeld.

¹⁴Council Document 12110/15.

¹⁵Council Document 12435/15.

¹⁶Council Document 13127/15.

¹⁷Council Document 14211/15.

4.3 Slovenia

On 16 September the Slovenian authorities notified the Council that as of the following day they would be reintroducing border controls.¹⁸ The justification given in the letter¹⁹ was uncontrollable migration flows and the measures adopted in the neighbouring countries. This presented a serious threat to Slovenia's national security. The letter finished by stating: "Slovenia sincerely hopes that all member states especially those at the external borders will ensure appropriate level of border control in line with the Schengen standards and introduce adequate migration procedures to avoid having to apply this extraordinary measure at the internal borders. In keeping with principles of solidarity, Slovenia will continue within its capacities to take an active part in joint measures..." The use of the term solidarity here rings somewhat hollow.

On 24 September Slovenia prolonged the measures for a further 20 days specifically at the border with Hungary.²⁰ The letter noted the lack of any change in the situation of uncontrollable migration flows. However, on 16 October the Slovenian authorities notified the Council that they would not prolong the temporary measures any further.²¹ The impact of the Slovenian decision and the extent to which the measures continued to be necessary has not been analysed. As both the Austrian and German authorities invoked the principle of solidarity as a reason for the reintroduction of temporary border controls, an assessment of the requirements of solidarity may be needed.

4.4 Sweden

On 12 November 2015, the Swedish authorities notified the Council that they were temporarily reintroducing border controls under Articles 23 and 25, thus paving the way for immediate and extended border controls.²² The initial period was 12–21 November. The justification provided was a serious threat to public policy and internal security resulting from the unprecedented migratory pressure and "the ensuing significant challenges to the functioning of the Swedish society..."

According to the letter after detailed consideration, other measures had been deemed insufficient. The letter stated that the controls extend to all internal borders as determined by the Swedish Police Authority. However, the initial focus was on selected harbours in the south and the Øresund Bridge. The Swedish authorities wrote: "the flows are mixed and may include asylum seekers, economic migrants, potential criminals such as smugglers or traffickers in human beings, but also potential victims of crime." Further it stated that people arriving but not legalising their stay constituted easy targets for perpetrators ready to abuse their vulnerability. According to the letter, the Swedish Migration Agency had registered over 2,000 asylum-seekers on 9 November 2015 and 11,000 between 3-9 November 2015.

The Swedish Civil Contingencies Agency reported that migratory flows led to extreme and increasing challenges regarding the functionality of the Swedish society which is one of the three goals of Swedish security. The strains were particularly on housing, health care, schooling and social services. By letter dated 19 November these controls were extended until 11 December on the basis of the remaining serious threat to public policy and internal security.²³ On 10 December the controls were extended again until 20 December. The Swedish government noted that the influx of asylum-seekers in Sweden has decreased but remains very high.²⁴

¹⁸Council Document 12111/15.

¹⁹Council Document 12111/15.

²⁰Council Document 12418/15.

²¹Council Document 13170/15.

²²Council Document 14047/15.

²³Council Document 14383/15.

²⁴ Council Document 15253/15.

4.5 Norway

On 25 November, the Norwegian authorities notified the Commission and the Council that they would reintroduce border controls the following day in accordance with Articles 23 and 25.²⁵ The justification was shorter than the Swedish one referring to unpredictable migratory flows amounting to a serious threat to public policy and internal security. On 3 December the Norwegian Government decided to extend the controls until 26 December. In the notification it was observed that the number of “migrants applying for asylum in Norway” is decreasing but still very high.²⁶

4.6 France and Malta

Two other member states have also notified the Council of the reintroduction of border controls – but both on the basis of Article 23. On 15 October France notified the Council that it would be doing so for the COP21 climate change conference from 13 November to 13 December.²⁷ These controls were retained as indicated by the French President in his speech on 16 November 2015 after the attacks in Paris.²⁸ In a letter of 8 December the French authorities announced that the controls at the internal borders would be continued for the duration of the state of emergency until 26 February 2016.²⁹

Malta notified its reintroduction of border controls on 28 September for the Valletta conference on migration 11 and 12 November and the Commonwealth Heads of Government Meeting on 27 and 28 November.³⁰ The controls took effect on 4 November and have been extended continuously.³¹

5. A limited reintroduction of controls at internal border

Since September 2015 seven of the 26 Schengen states re-introduced temporary controls at internal borders of the Schengen area: Austria, France, Germany, Malta, Norway, Slovenia and Sweden. The large majority (19) of the Schengen states did not take that step.

Most of the seven states introduced controls only at a small part of their internal borders or at certain specific points. Germany introduced controls at the border with Austria, but not at its borders with the other seven neighbouring states. For Austria the main focus was the land border with Hungary, but initially it also covered land borders with Italy, Slovenia and Slovakia. Austria did not introduce controls at its border with Switzerland. Norway informed the Council and the Commission on 25 November 2015 that the re-introduced controls may extend to all internal land, sea and air borders, but would initially focus on ports with ferry connections to Norway. The temporary re-introduction of controls by Slovenia only related to its border with Hungary. Sweden introduced controls only in certain harbours and at the Øresund Bridge between Denmark and Sweden. Only France and Malta, the two of the seven states that re-introduced controls for reasons not related to the large number of refugees seeking asylum in EU via Greece, did so at all their internal borders.

Why did the 19 Schengen states not resort to this exceptional measure? Iceland, Portugal, Spain and Italy were not seriously affected by the movement of refugees from Greece. Greece itself does not have internal land borders with other Schengen states. From the seven Central European states that acceded to the EU, only in Hungary did large numbers of refugees apply for asylum until the barbed wire fence was installed at its external border with Serbia and Croatia. For all seven states the high symbolic value of the freedom to travel across borders probably played a role too.

²⁵Council Document 14633/15.

²⁶Council Document 14996/15.

²⁷Council Document 13171/15.

²⁸<http://www.elysee.fr/declarations/article/discours-du-president-de-la-republique-devant-le-parlement-reuni-en-congres-3/>

²⁹Council Document 15181/15.

³⁰Council Document 13129/15.

³¹Council Document 14269/15, 13788/15 and 14731/15.

In six Schengen states (Belgium, Denmark, Finland, Luxembourg, Netherlands and Switzerland) relatively large numbers of asylum requests were filed during the third quarter of 2015. But these countries did not introduce controls at their internal borders. Belgium and the Netherlands intensified the (police) controls in the zones behind their internal borders rather than introduce controls at those borders. In most of these six countries economic and practical reasons will have influenced the decision not to introduce controls at the borders. Systematic controls at the highways between Antwerp and the Netherlands, at the borders near Basel and Geneva or at the Øresund Bridge would create massive congestion of cross-frontier workers commuting by car.

In Denmark, the anti-immigrant Danish Peoples Party and other right-wing parties supporting the minority government strongly advocated following the Swedish example and called for the introduction of controls at the border with Germany. The government decided to introduce a package of more than 30 measures aiming to make it less attractive for refugees to apply for asylum in Denmark.³² It was reported that the Danish Prime Minister in a telephone conversation with his Swedish colleague received assurances that Sweden would not close its border to refugees. The Danish Prime Minister also argued that controls at the internal borders might well have a counterproductive effect: persons intending to travel on to countries further north could well apply for asylum in Denmark.³³

It is worth noting how few member states have re-introduced intra-Schengen border controls and the reasons for which they did so. Contrary to some press reports, **there has not been a stampede among the Schengen states to do so and even those that have reintroduced border controls have done so in a very restrained manner.** The reason has consistently been related to the arrival of refugees in numbers larger than the member state had anticipated. For some, the issue has been rather the passage through their territory rather than the arrival of persons in search of international protection on their territory. The only exception has been France, which has extended the controls during the state of emergency declared after the attacks in Paris on November 13th.

6. The Commission's assessment of Germany and Austria's reintroduction of controls

On 28 October, **the Commission published its opinion on the necessity and proportionality of the reintroduction of border controls by Germany and Austria.**³⁴ It set out the relevant law and history of the introduction and prolongation of controls by the two states (with reference also to Slovenia, which, by the time of the report, had abandoned controls).

The Commission was sympathetic to Germany's justification regarding the extraordinary influx of people seeking international protection and the insecurity it created. It was not satisfied, however, that the possibility of 'radicalised people' hiding among the refugees had been established and considered that such a suggestion would need further substantiation before it could be considered sufficient to constitute a serious threat to public policy or internal security. It indicated that such a fear would need to be justified by quantifying the warnings received on persons who may have had contacts or fought with militant groups in crisis regions.

Despite this lack of evidence, **the Commission found that the measures provided an adequate response** to the "identified threat to the internal security and public policy consisting of the uncontrolled influx of exceptionally large numbers of undocumented/improperly documented persons and the risk related to organized crime and terrorist threats".

The Commission highlighted that the introduction of border controls had not impinged on the rights of persons seeking international protection. It noted that in 2013 during the negotiations surrounding the addition of Article 25 in the SBC, the legislator agreed that migratory flows could not justify the reintroduction of controls, but it considered that the sheer numbers of people entering Germany were beyond that anticipated

³² Migration News Sheet, December 2015, p. 10.

³³ <http://www.thelocal.dk/20151112/denmark-will-not-implement-border-controls>, visited 11.12.2015.

³⁴ COM(2015)7100

by the legislator in 2013. This was expressly included in the new Regulation³⁵ at recital 5 which states: “Migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security.”

The Commission considered that the national measure was an adequate response to the threat to internal security and public policy posed by “uncontrolled influx of exceptionally large numbers of undocumented/improperly documented persons and the risk related to organised crime and terrorist threat”. It considered that the measures were proportionate in view of the streamlining of the registration procedure and reception of persons seeking international protection. It also noted that **it had not received any complaints from EU citizens about the way in which Germany was carrying out border controls**. With respect to Austria, the Commission came to a similar conclusion.

7. What about the refugees?

One aspect of the Schengen border control debate as set out above is the absence of discussion about refugees, other than the Commission’s rather bland statement that the controls had not affected the right of people seeking international protection. While it is clear that in every case the Schengen state reintroducing controls with its neighbours was inspired to do so on the basis of seeking to stem the arrival of asylum-seekers and refugees on their territory, the language in the first documents is carefully chosen to deflect this aspect both by member states and by the Commission.

According to Article 3 SBC, the scope of the Regulation is without prejudice to “the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.” **This means that the introduction or removal of Schengen border controls should have no impact on the right of asylum-seekers to cross the external and (arguably) internal Schengen borders to seek asylum.**

Further, when amended in 2013 the legislator added a new Article 3a to the SCB “When applying this Regulation, member states shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights); relevant international law, including the Convention Relating to the Status of Refugees concluded at Geneva on 28 July 1951 (Geneva Convention’; obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis.”

The Dublin III Regulation (604/2013) determines which member state should be responsible for caring for and determining the asylum application of anyone seeking international protection. But the Court of Justice of the EU has, from 2011 stopped any Dublin returns to Greece on the basis of the lack of reception conditions there.³⁶ The European Court of Human Rights in Strasbourg has required additional assessment of reception capacities in Italy where families are being considered for Dublin returns.³⁷ In any event, only 3% of asylum-seekers in the EU are ever actually subjected to a Dublin transfer decision.³⁸ Member states are prohibited from interfering with the right to non-refoulement and their internal system of reallocation has fallen into desuetude as a result of failing reception conditions in countries with substantial external land and sea borders.

Rather than addressing these problems, Schengen states appear to have chosen to reintroduce border controls among themselves in part justifying this on the need to arrange registration for asylum-seekers,

³⁵ Regulation 1051/2013.

³⁶ *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011: (www.refworld.org/docid/4ef1ed702.html).

³⁷ *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014 (www.refworld.org/docid/5458abfd4.html).

³⁸ See EASO report, “Dublin transfers were made in the case of only about 3% of those making an asylum claim in the EU (35)” (<https://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf>); European Parliament report 15 July 2015 ([www.europarl.europa.eu/RegData/.../IPOL_STU\(2015\)519234_EN.pdf](http://www.europarl.europa.eu/RegData/.../IPOL_STU(2015)519234_EN.pdf)).

but also as a measure of public policy and internal security on the basis of threats such as terrorism. In our view, this discussion is out of place, when the real problem posed by refugees fleeing the regional war primarily taking place in Iraq and Syria is how to ensure safe access to the EU, the correct application of reception conditions and swift processing of asylum applications.

One of the key questions that must be asked of the member states is **what a refugee and fundamental rights-friendly external border control would look like.** As one can see from the reasons given by the member states for the re-introduction of border controls, the failure of southern states to apply the external border controls properly arises in both the German and Austrian notifications. Yet, what would they like the Greek and Italian border guards to do? What more severe action would they suggest be taken in external border controls and how would that be consistent with the commitment of all the member states to non-refoulement?

As regards intra-member state border controls, it is equally unclear precisely what the northern member states want their southern colleagues to do (leaving aside correct application of the CEAS *acquis* which would of course be an excellent starting place). Similarly, the frequent references to solidarity in the justification letters is puzzling as it is unclear with whom states are supposed to be showing more solidarity: refugees or other Schengen states? The suggestion seems to be that Italy and Greece should be showing more solidarity with the northern Schengen states by keeping asylum-seekers in their territory. But as noted above, even the Dublin rules cannot be applied to Greece and only partially to Italy, indicating that the supranational courts do not consider sending asylum-seekers back to either of those countries consistent with solidarity with refugees.

Here the Schengen states find themselves in a kind of ‘solidarity-trap’, where on the one hand, the reintroduction of internal border controls is used as a sanction against those states that are not effectively controlling their external borders, and where on the other hand, the frontier states are reluctant or unable to manage the first registration of the large groups of asylum-seekers in order to activate the Dublin mechanism.

8. Rule of law and the reintroduction of border controls

One of the aspects of the Schengen states’ actions regarding the reintroduction of border controls among themselves is the attention paid to respecting the rule of law. It would seem that the amendments to the SBC in 2013 have had the intended effect of bringing more EU legal control into the system and removing vestiges of ‘intergovernmentalism’, which caused incoherence in the 2011 situations France-Italy and Denmark. **All member states that have overtly reintroduced controls with other Schengen states have done so in accordance with Articles 23–25 SBC.**

While the arguments set out in the notifications are not always of the highest quality, **the notifications nonetheless appear to have been prompt and follow the letter of the law.** The grounds tend to be formulaic – following the wording of Article 25 with consistent references to public policy and internal security. One could criticise the justifications for failing to provide specific information about what aspect of public policy or internal security were at stake. The Austrians seem to suggest that their police cannot do their normal work because they are spending too much time with asylum-seekers, but they do not provide any detail. The Swedish authorities have provided quite a lot of detail about the Swedish concept of internal security, which includes as a central pillar the functionality of Swedish society. One wonders whether **a further investigation into what exactly is meant by this might not turn up grounds that are not consistent with the EU Charter’s specific prohibition of discrimination.** Nonetheless, the Swedish references to questions about health care, housing and education seem legitimate, although further investigation might be in order.

More interesting is the fact, highlighted by the Commission, that in the legislator’s negotiations of the new 2013 provisions of the SBC, **the member states specifically rejected the assertion that migratory movements could be sufficient grounds to activate the exceptional intra-state border controls under Article 25.** The Commission notes this fact but then exonerates the member states, which in our view seems inconsistent with the negotiated objectives of the new provision.

In a couple of cases, Schengen states use the explicit Article 23.a reference to public policy and internal security as including following terrorist incidents, although no Schengen state actually uses the problem of organised crime (the other ground in Article 23.a). The Commission does not appear to be particularly impressed with this selective approach to Article 23.a specifically as regards the threat of terrorism. It suggests that further

detail would be needed to justify such a claim, such as quantifying the warnings received on persons suspected of engagement with terrorism.

In general however, the Schengen states have complied with their SBC obligations to the letter of the new rules on reintroducing controls. While the justifications may seem somewhat formulaic, also with regard to the proportionality and effectiveness of these measures, they are there. More questionable has been whether the Schengen states have been fully complying with Article 6 SBC, which states:

1. Border guards shall, in the performance of their duties, fully respect human dignity. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.
2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This is reinforced by Recital 7 SBC, which states: “Border checks should be carried out in such a way as to fully respect human dignity. Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued.” The images of refugees travelling into and out of the Schengen area and across parts of it make difficult viewing. **It is not always evident that the human dignity of those seeking to cross Schengen borders is fully respected.**

9. What states are missing?

It is worth noting that the only 2004 member state to have reintroduced border controls was Slovenia and this was for a very limited time and it was not repeated. Although Austria reintroduced border controls with Slovakia and Hungary, neither of those two states reciprocated. It would seem that **the 2004 member states in the Schengen system attach great importance to border control-free movement of persons and are reluctant to destabilise the Schengen system, no doubt, as the longer-term effects are hard to predict.**

The position of Hungary in this constellation of actions merits further attention. The Hungarian authorities have been heavily criticised for their most unwelcoming reception of refugees travelling through their country.³⁹ Hungarian Prime Minister Viktor Orbán declared that the Dublin system of allocating asylum-seekers was dead but at the same time insisted that the Schengen border control-free areas were very much alive.⁴⁰ The Hungarian authorities’ decision to build fences to keep refugees out has been criticised and rightly so.⁴¹ The first fence was with Serbia, built at the end of the summer 2015 by the army with cadres of prisoners and unemployed persons, and extending 175 kilometres. A second fence with Croatia is 41 kilometres long. But all the Hungarian fences are with non-Schengen states – Croatia, Macedonia, Serbia and Romania. There is only one exception, when Hungary threatened to build a fence on the Slovenian-Hungarian border (an intra-Schengen border) but the official explanation was that this was not a fence, but only earthworks.⁴²

Once again two things become clear: i) **even the Hungarian authorities are unwilling to enter into a direct challenge to EU rule of law and ii) they appear reluctant to challenge the Schengen border-free system directly.** In December 2015, however, Austria began building a fence with another Schengen state – Slovenia – whose stated purpose is better to manage refugees”.⁴³ This fence is planned to be 3.7 kilometres long and will be the first between Schengen states.

It should be remembered that the 2004 Schengen states were only allowed into the control-free system on 21 December 2007 under the Presidency of Portugal, which undertook Herculean efforts to resolve the problem of Schengen Information System access for a Schengen of 25. The SIS4All system which was designed under

³⁹ See www.amnesty.org/en/latest/news/2015/10/hungary-eu-must-formally-warn-hungary-over-refugee-crisis-violations/

⁴⁰http://magyarhirlap.hu/cikk/40842/Dublin_is_Dead_Schengen_Lives

⁴¹<http://www.reuters.com/article/us-europe-migrants-hungary-fence-insight-idUSKCN0RN0FW20150923>

⁴²<http://hungarianspectrum.org/2015/09/26/the-experimental-fence-between-slovenia-and-hungary/>

⁴³<http://www.dw.com/en/austria-begins-erecting-fence-on-border-with-slovenia/a-18900764>

the Portuguese presidency and provided free of charge by it to all the participating states was central to making the abolition of border controls possible before Christmas.

The importance and symbolism for the 2004 Schengen states should not be underestimated. This is evidenced in the Joint Statement issued by the four Visegrad states (Czech Republic, Hungary, Poland and Slovakia) on 3 December 2015, in which their prime ministers confirmed that Schengen remains a key practical and symbolic achievement for European integration. They expressed their determination to preserve the system so that European citizens and businesses can continue to fully enjoy the benefits. Just in case there was any doubt, they stated: “We underline the need for respecting Schengen rules and declare our openness to discuss how to best improve them. A proper functioning of Schengen and the preservation of free movement is not a divisive issue but must remain the key objective for all member states and the European Institutions.”⁴⁴

10. The Presidency on the integrity of the Schengen area

On December 1st the Presidency issued a document entitled “The Integrity of the Schengen area”. This was covered in a number of newspapers, most infamously the *Financial Times*, which headed its coverage: “Greece warned EU will re-impose border controls”.⁴⁵ This was followed the next day by a comment in *The Guardian*,⁴⁶ suggesting that such a measure would be unwarranted.

The Presidency document acknowledged that the refugee crisis of the EU since the summer of 2015 has become a Schengen borders crisis as well. The attacks in Paris of November 13th have only complicated the various crises, adding a further dose of terror threat into the already fairly toxic mix. The document builds on the Council Conclusions of November 9th, which called for action across the EU on reception capacities, the creation of so-called hotspots for reception and registration of refugees in Lampedusa and Sicily, Italy and on a number of islands in Greece, including Lesbos. The new relocation provisions for a total of 160,000 asylum-seekers was also agreed as well as the decision to put more pressure on FRONTEX to carry out expulsions and use more effectively the EU’s readmission agreements with third countries. Those conclusions placed fault on refugees for their lack of cooperation with state officials and called for more contingency planning.

In preparation for a debate planned for the upcoming 17–18 December European Council meeting, the Presidency issued questionnaires⁴⁷ to the member states regarding the temporary introduction of controls at internal borders. The document contains **four proposals for discussion at the meeting**:

- First, there needs to be greater consultation between member states before the use of emergency Article 25 SBC measures. The Presidency proposes that even in emergency situations member states should make all efforts to inform their neighbours sufficiently in advance to reduce negative impacts – to this end member states must reconfirm their commitment made as recently as March 2015, to improve information-sharing on border controls.⁴⁸
- Secondly, member states should make more efforts to prevent illegal border crossing (entry and exit) through external land borders and ensure that borders are crossed only at border-crossing points, as designated in the SBC. The Council proposes that the Frontex RABITs (the emergency border teams that can be called in by member states)⁴⁹ should be deployed as necessary for this purpose, in particular at the Western Balkan countries’ borders with EU member states and specifically Greece.
- Thirdly, member states should use their powers to check people regarding their immigration status within their own borders (see the section below on this approach as used in the Netherlands). The

⁴⁴ See www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151204

⁴⁵ Alex Barker and Duncan Robinson, “Warned EU will reimpose border controls”, *Financial Times*, 1 December 2015.

⁴⁶ See www.theguardian.com/commentisfree/2015/dec/02/refugee-crisis--greece-schengen-europe-border-controls

⁴⁷ Not accessible to the public on the Council Register.

⁴⁸ Council Document 5685/15.

⁴⁹ Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199, 31.7.2007.

Presidency recommends the full use of relevant databases (presumably a reference to the widening of access to the EURODAC database for law enforcement purposes) to ensure that irregular migrants are detected and registered.

- Finally, the Presidency invited the Commission to present a proposal ‘as appropriate’ under Article 26 SBC that one or more member states decide to reintroduce border controls at all or at specific parts of their internal borders. This is the proposal that some press reports have suggested means the ejection of Greece from the Schengen system.

Regarding the first proposal – better coordination and advance sharing of information (subject to proper legal accountability checks) is always a good idea in this field. It is clear from the events of the autumn that unilateral border action has caused great distress and chaos at some Western Balkan borders in particular. On the other hand, the suggestion of the use of the RABITs is questionable. Only once have the RABITs been invited by a state to assist in border control activities and that was in Greece at the Greek-Turkish border in 2010.⁵⁰ The FRONTEX evaluation of the exercise is fairly neutral, although criticism from NGOs was substantial.⁵¹

A report by Human Rights Watch highlighted the challenges posed by the participation of RABITs in sending persons to Greek detention centres who had been apprehended while irregularly crossing the external frontier into Greece. The conditions were so squalid and the treatment so unacceptable that the European Court of Human Rights has on more than one occasion found the Greek detention centres to contravene the human right that prohibits torture, inhumane and degrading treatment or punishment.⁵² There is less use of detention of irregularly arriving refugees now in Greece, although any closing of the borders that would impede onward ‘self-relocation’ would likely create new pressures for detention at least from other member states.

Regarding the third suggestion, we examine below the legal constraints and outcomes of its use in the Netherlands, one of the member states that has acquired substantial experience concerning the legality of these checks. The final proposal resulted in a rapid response from Greece in the form of a non-paper, which we consider in the next section. Regarding the legality of the proposal, Peers published a devastating analysis of the proposal on December 2nd reminding the EU institutions of the basic rules that they themselves have established.⁵³

11. The Greek non-paper

Following the Presidency document of 1 December, the Greek authorities issued a non-paper entitled “The Future of Dublin”. It is dated December 2015 but is unnumbered. It is a ringing indictment of the Dublin system of allocating asylum-seekers and responsibility for them across the member states. It sets out three main negative results: i) encouraging member states to avoid responsibility under the allocation criteria; ii) discouraging asylum-seekers from making their claims, as they will be stuck in a member state where they do not want to be; and iii) creating untenable and disproportionate pressure on the processing systems of member states of first entry. The counterbalancing measures of the Dublin system are inadequate, according to the non-paper – asylum-seekers do not in fact get sent back in any event.

In the longer term, **the non-paper calls for a transformation of the system of allocating responsibility for asylum-seekers in a manner that corresponds to the reality of refugee movements and that is accompanied by an EU-wide recognised refugee status, which would allow refugees to move freely within the EU.** Applications for international protection need to be processed in a uniform manner, potentially by a special European agency designated for this purpose.

⁵⁰ See <http://frontex.europa.eu/news/frontex-evaluation-report-on-rabits-publicly-available-MwGa0e>

⁵¹ See www.hrw.org/news/2011/09/21/eu-border-agency-exposes-migrants-abusive-conditions

⁵² *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011 (www.refworld.org/docid/4d39bc7f2.html).

⁵³ See <http://eulawanalysis.blogspot.co.uk/2015/12/can-schengen-be-suspended-because-of.html>

The non-paper's link with the Schengen system is evident. Articles 3, 4.3 and 13 as well as recital 20 SBC obliged the member state of first entry to take responsibility for an asylum claim and to process it in accordance with the CEAS, as long as the claim is not manifestly unfounded. For the purpose of processing an asylum application, the individual must be admitted to the territory. So far, neither the southern nor the northern member states have actually examined the 'distributive' effects of the Dublin system of allocating responsibility for asylum-seekers. While northern member states blame southern member states for failing to control their borders, there has been no proper evaluation of what the outcomes actually are. All member states are responsible for the current unfortunate situation.

The Greek non-paper also stresses that the use of the Dublin asylum-allocation system is that asylum-seekers themselves end up in prolonged procedures that lead to little in the way of effective returns but provide member states with an excuse not to consider the merits of the applicants' cases. Instead of spending resources on trying to find out the travel routes of refugees, member states could better devote those resources to determining their protection claims.

In this same vein regarding the actual outcome of the Dublin system, the non-paper notes that it is clear from the EURODAC reports **that the outcome for many member states in terms of the number of asylum-seekers being sent or returned to other member states is negligible, but huge in terms of the stress and anxiety created for refugees.** It constitutes a large administrative burden at enormous social and human cost.

12. The short life of mini-Schengen

In the two weeks before the Presidency's document of 1 December was published, another 'solution' was presented and rejected. In mid-November, both the Dutch Prime Minister Mark Rutte and the Minister of Finance Jeroen Dijsselbloem, representing both parties constituting the current government, publicly voiced the idea of a 'mini-Schengen', consisting of the three Benelux countries, Germany and Austria with free travel within the area and strict controls at its external borders.⁵⁴

This was perceived in the press as another way of excluding Greece. But the proposal excluded France, and all southern and eastern member states too. The German Minister of Interior Thomas de Maizière told the press that his Dutch colleagues had repeatedly presented this idea to him, but that he had his reservations, insisting that his political aim was to make the whole Schengen area function as smoothly as possible.⁵⁵ The idea of excluding France and reintroducing border controls at the border between Germany and its eastern neighbours (Poland and the Czech Republic) could not be very attractive from Germany's perspective.

The four eastern member states of the Visegrad Group rejected this proposal in a strongly worded declaration of December 3rd: "Any opportunistic proposals for revolutionary transformation of the current Schengen into the so-called "mini-Schengens", in whatever possible forms and extents, are not acceptable and so would be any open or hidden attempts to limit free movement that would go beyond the legal framework and endanger the major achievements of European integration. Such proposals do not address the root causes of the current situation but only divert political attention."⁵⁶

After this unfavourable reception and after the Dutch Parliament had sent a list of almost 50 written questions to the government, **the plan was apparently dropped.** The government stated that no formal proposal on a mini-Schengen had been presented and that the problems in the Schengen area should be solved by the 26 Schengen states together.⁵⁷ In the public debate in the Netherlands on this issue, nobody raised the question **whether the European Commission would be willing to make the proposal for the far-reaching amendments of the SBC necessary to realise this plan** or whether the required qualified majority could be formed in the Council in support of such a proposal.

⁵⁴ See Volkskrant, 19 November 2015; NRC-Handelsblad, 19 November 2015.

⁵⁵ "De Maiziere lehnt Vorschlag eines Mini-Schengen ab", Reuters, 19 November 2015.

⁵⁶ See www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151204

⁵⁷ Answer to written question TK 2015-2016, No. 803 of 8 December 2015.

13. Border controls or police controls behind the internal borders?

As the Presidency proposal suggests, from its perspective, internal identity checks would be preferable to the use of Articles 23-25 SBC to introduce border checks. The relationship of internal controls with border checks was a matter of much negotiation when the SBC was first presented. The legislator was particularly concerned that internal identity checks should not become alternative forms of border control and drafted Article 21 SBC accordingly. Thus it is incumbent now to have a short look at Article 21 identity checks and how they have been used and with what outcomes.

Aside from the aforementioned possibility of temporary reintroduction of internal border controls, Article 21 SBC includes another exception to the principle in Article 20 on the abolition of internal border controls.⁵⁸ It allows police checks within the internal border areas as long as the exercise of these police powers do not “have an effect equivalent to border checks”. For this purpose, Article 21 clarifies that the exercise of police measures must:

- i) not have border control as an objective;
- ii) should be based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;
- iii) be devised and executed in a manner clearly distinct from systematic checks on persons at the external borders and
- iv) be carried out on the basis of spot-checks.

The use by the Dutch authorities of Article 21 SBC in response to the arrival of large groups of migrants in 2015, raises the question: **What exactly is the difference between police checks within the border area and internal border controls?**

In the Netherlands, national rules in the use of mobile border checks (MTV or *Mobiel Toezicht Veiligheid* or mobile security checks), have been amended following two rulings of the Court of Justice of the European Union (CJEU) on the interpretation of Articles 20 and 21 SBC. In the case *Melki and Abdeli*, the CJEU clarified that Articles 20 and 21 of the SBC apply to border areas within 20 km of the internal borders and preclude national legislation which grants to the police authorities of the member state the power to check the identity of any person, “irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks”.⁵⁹

Based on this judgement, the Netherlands specified for example the number of train carriages and the frequency with which they would be checked in any one day. In the judgement *Adil* of 2012, the CJEU found that the Dutch rules did not exceed the conditions of Article 21 SBC.⁶⁰ In this judgment, the CJEU held that Articles 20 and 21 SBC allowed police controls for the purpose of immigration control and would enable “border officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks [...] with a view to establishing whether the persons stopped satisfy the requirements for lawful residence applicable in the Member State concerned”.

After this judgement, the Dutch government increased the frequency and intensity of police controls in 2014. Furthermore, it added a new rule according to which on a temporary basis, the controls at land, sea, and aerial borders could be intensified in the case of “a sudden or expected increase of irregular migrants crossing at the

⁵⁸ 20 SBC reads: ‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’

⁵⁹ CJEU 22 June 2010, Joined Cases C-188/10 and C-189/10 (*Melki and Abdeli*)

⁶⁰ CJEU 19 July 2012 C-278/12 PPU (*Adil*).

borders” (Article 4.17b *Vreemdelingenbesluit*). Unlike the Articles 23-26 SBC, Article 21 does not oblige the Schengen states to inform the European Commission or other member states.

This new measure was applied for the first time in September 2015, in order to deal with the increasing number of refugees.⁶¹ The Dutch government justified the intensification of these police checks, amongst others, on the necessity of ‘preventing human smugglers from abusing the vulnerable position of asylum-seekers’. Since September 2015, the Dutch government extended the use of this exceptional rule twice, on 16 October and 23 November 2015.⁶² In this latter decision, also referring to the terrorist attacks in Paris of 13 November, the Secretary of State for Security and Justice repeated the three goals of the intensification of police checks: 1) to fight against irregular migration and human smuggling, 2) to prevent humanly degrading incidents (such as persons dying in trucks) and 3) to prevent substantial incidents affecting public order and national security in the Netherlands.

Since its use, two Dutch lower courts dealt with the application of these intensified checks, when deciding on the lawfulness of the immigration detention of migrants apprehended under the new measure. The fact that both courts reached an opposite conclusion illustrates **the uncertainty of the legal basis and the goals of police checks within the area behind the internal border**. Where the Groningen Court (16 November 2015) found that the decision of 16 October on the use of intensified police checks did not violate the conditions of the SBC, the Rotterdam Court found the reasons of the Dutch government to introduce this measure insufficient (3 December 2015).⁶³ According to this second court, the new measure adopted on 16 October was incompatible with Dutch law and was to be annulled (and the detention based on this decision to be cancelled) as the Dutch government had not provided sufficient information on the expectations of irregular migration, justifying the intensification. The court explicitly argued that a higher number of asylum-seekers entering the Netherlands does not amount to a “considerable increase of unlawful residence” (the criteria used in the Dutch law implementing Article 21 SBC), implicitly recognising that asylum-seekers are not irregular migrants but lawful residents in the country.

In our view, **the national practice of police controls behind the internal borders, the temporary reintroduction of internal border controls and the Presidency proposal in the aforementioned note “The integrity of the Schengen area” for a full exploitation of possibilities for checking persons inside the Schengen area,**⁶⁴ **cannot be assessed separately**. First, this requires **a transparent and informed discussion on which ‘Schengen’ we exactly want**. If states agree that the main goal is still to protect the free movement of persons as laid down in Article 20 SBC, with only limited and conditioned options for internal border checks, this principle should not be circumvented by intensifying the use of so-called police checks in the border areas, or proposals for a systematic control of citizens within the Schengen area. Second, and this warrants a role for the European Commission and possibly the CJEU, it should be made clear that the arrival of large groups of asylum-seekers and refugees is not a valid reason to reinstate or intensify internal border checks.

⁶¹ *Staatscourant* (Dutch official publication of state decisions) 18 September 2015, no. 31186, allowing police checks for a maximum of 180 hours a month, and a maximum of 12 hours a day at a specific water or roadway; to check specific parts of a maximum of six trains on one specific route, and a maximum of 40 trains a day; and to check on one particular flight route one-half of the total number of passengers from one-half of the total number of flights.

⁶² For the publication of these decisions, see *Staatscourant*, 20 October 2015, no. 36592, resp. *Staatscourant*, 25 November 2015, No. 42807.

⁶³ Rechtbank Groningen 16 November 2015, AWB 15/9361; Rechtbank Rotterdam 3 December 2015, AWB 15/19730.

⁶⁴ The full text of this proposal reads: “The Presidency proposes that: the possibilities for checking persons inside the Schengen area, including by the use of relevant databases, are fully exploited to ensure that irregular migrants are detected and registered and their cases processed”, Council Document 14300/156, 1 December 2015, p. 5.

14. A European border and coast guard

The debates surrounding the 2015 refugee crisis have also brought back an old idea, dating back to 2011, to establish a European system of border guards.⁶⁵ The European Agenda on Migration adopted in May 2015 anticipated that “within the scope of the Treaties and its relevant Protocols”, the European Commission would launch a reflection on how to foster “a shared management of the European border”. It stipulated that

a European System of Border Guards... would cover a new approach to coastguard functions in the EU, looking at initiatives such as asset sharing, joint exercises and dual use of resources as well as a the possibility of moving towards a European Coastguard.⁶⁶

The President of the European Commission, Jean-Claude Juncker, declared in his state of the union speech⁶⁷ the need to significantly reinforce Frontex’s competences and “develop it into a fully operational European border and coast guard system.”⁶⁸ This was reflected in the Commission’s Work Programme for 2016, “No Time for Business as Usual”,⁶⁹ which anticipated the presentation of proposals before the end of 2015 “for a European Border and Coast Guard, building on a significant strengthening of Frontex”. In the European Council Conclusions of October 15th, EU member states’ representatives called for the need to

in accordance with the distribution of competences under the Treaty, in full respect of the national competence of the member states, enhance the mandate of Frontex in the context of discussions over the development of a European Border and Coast Guard System, including as regards the deployment of Rapid Border Intervention Teams in cases where Schengen evaluations or risk analysis demonstrate the need for robust and prompt action, in cooperation with the member state concerned.⁷⁰

A recently leaked document has revealed the specifics of the upcoming Commission’s plans in following up these calls. This will take the form of a Communication⁷¹ and a set of accompanying legislative measures.⁷² The Communication “A European Border and Coast Guard and effective management of Europe’s external borders” COM(2015) 673 lays down the main components of the Commission’s initiatives. When it comes to the European Border and Coast Guard, this new system, which will be developed in the shape of a Regulation under the ordinary legislative procedure, would be based on a new European Border and Coast Guard Agency of semi-military nature.

The Agency would be built from Frontex, and the EU member states’ authorities responsible for border control as well as national coastal guard authorities when they perform ‘maritime border surveillance’,

⁶⁵ For an analysis of the background, see Carrera (2010) and also European Commission, Communication on a Common Policy on Illegal Immigration, COM(2001) 672, Brussels, 15 November 2001.

⁶⁶ European Agenda on Migration, COM(2015) 240, 13.5.2015, p. 17.

⁶⁷ See http://ec.europa.eu/priorities/soteu/docs/state_of_the_union_2015_en.pdf

⁶⁸ Juncker continued by saying: “It is certainly feasible. But it will cost money. The Commission believes this is money well invested. This is why we will propose ambitious steps towards a European Border and Coast Guard before the end of the year.”

⁶⁹ European Commission, Communication, “Commission Work Programme 2016: No Time for Business as Usual”, COM(2015) 610, 27.10.2015.

⁷⁰ See <http://www.consilium.europa.eu/en/press/press-releases/2015/10/16-euco-conclusions/>

⁷¹ See <http://www.statewatch.org/news/2015/dec/eu-com-draft-com-eu-border-guards..pdf>

⁷² These will also include measures seeking to “achieve uniform and more harmonised implementation of the existing rules and better consolidate the Schengen acquis as a ‘single rulebook’ of measures for border management, the Commission will work towards replacing the ‘soft law’ provisions by legally binding measures”, page 8 of the Communication. The Commission is also proposing a modification of the Schengen Borders Code to allow checks of EU citizens against databases such as the Schengen Information System, the Stolen and Lost Travel Documents Database as well as relevant national systems, page 9 of the Communication. These come along a Regulation on a common European travel document for return and a revised EUROSUR Handbook, providing guidance for the implementation and management of the system.

which include military actors. The Proposal for a Regulation builds upon and aims at taking a decisive step towards the objective laid down in Article 77.1.c of the Treaty on the Functioning of the European Union (TFEU) to gradually introduce an integrated management system for EU's external borders.

The European Border and Coast Guard would be involved in all the phases comprising EU border management. It would aim at: first, facilitating the development and implementation of common EU border management standards (so that the rules in place are duly and effectively implemented); and second, operationally support frontline EU member states whose national border authorities are not effectively coping with the challenges on the ground.

The proposal for ensuring that Schengen members' domestic systems 'fit the purpose' for effectively implementing the common Schengen rules on common external border management is indeed a welcome step. The Commission additionally proposes to increase the obligation of cooperation and sharing of information between EU member state authorities and the new Agency. This has proved to be one of the most controversial components affecting the work of Frontex during the last 10 years.⁷³ **Frontex has been highly dependent on EU member states' political willingness to share human resources, assets/tools and relevant information, which has by and large limited its autonomy.**

The Communication also highlights the Commission's intention to set up "a monitoring and risk analysis centre in the Agency to monitor the migratory flows towards and within the European Union".⁷⁴ **The model running the Agency would work on the basis of liaison officers who would be sent to or seconded by the Agency to the EU member states concerned.** They would be fully integrated into the national authorities' work and information systems, so that the Agency would be informed 'in real time'. The EU border officers would identify 'weaknesses in the system' and propose recommendations to overcome them. The Commission is also proposing to reinforce the Agency's existing 'vulnerability test' by transforming it into a mandatory mechanism of vulnerability assessment.⁷⁵

The Agency would acquire important evaluation powers over "the resources and equipment of the member states as well as their contingency planning", and its decisions concerning "corrective actions" to address deficits or gaps would be binding upon EU member states. If the proposed corrective action would not be implemented by the member states within the stipulated time, the proposed Regulation would grant the Agency the competence to deploy European Border and Coast Guard Teams to the country involved.

The current Frontex model already allows EU member states to seek support at EU level in cases of need, through joint operations and rapid border intervention teams. **The Commission's proposal aims at addressing two limitations affecting the current system of EU operational support:** first, by creating a mandatory rapid reserve pool and a technical equipment pool from EU member states;⁷⁶ and second, by granting the Agency the power or right to intervene in urgent situations to a particular fraction of the EU

⁷³ See Carrera, den Hertog & Parkin (2013).

⁷⁴ See p 4 of the Communication. It would also make it mandatory for EU member states to use the Common Integrated Risk Analysis Model (CIRAM) developed by the Agency.

⁷⁵ According to the Communication, "It will be designed in a way so as to complement the Schengen evaluation mechanism and will ensure that the specific needs of those sections of the external border exposed to threats, such as disproportionate migratory pressures, can be adequately met. The information necessary for carrying out this vulnerability assessment will be complemented by the seconded liaison officers who will be feeding in data collected during their work on the ground" (pp. 4 and 5).

⁷⁶ According to the Communication (pp. 5-6), "a rapid reserve pool of experts will be created as a standing corps put at the disposal of the Agency. ... the Agency will be able to call on this pool within a very limited timeframe in circumstances requiring immediate response. Member States will have to make available at least 1,500 border guards to be deployed by the Agency in rapid border interventions within days. Similarly, the Agency will have at its disposal a technical equipment pool where Member States will be required to make available at immediate notice operational equipment acquired at a 90% co-financing rate under the additional allocations of specific actions⁸ of the Internal Security Fund."

external border, irrespective of an EU member state requesting it or not.⁷⁷ In these last cases, the Agency would first recommend the member state(s) in question to launch a joint operation or rapid border intervention. If the deficiencies would persist, and the states concerned would not call for EU support, the Agency would have the power to adopt a decision allowing it to intervene with European Border and Coast Guards Teams.

The key tasks of the new Agency would include the further development of the so-called ‘hotspot’ approach,⁷⁸ and the coordination of operational cooperation with third neighbouring countries.⁷⁹ It would also entail a **stronger mandate in comparison to the one currently held by Frontex in the field of return procedures and interventions.** The Agency would be entitled to initiate return operations and support member states with the acquisition of relevant travel documents. A new Return Office within the Agency would coordinate all the tasks related to ‘return’ and would provide EU member states with the necessary technical and operational reinforcement for carrying them out. The Communication foresees the establishment of European Return Intervention Teams (which would be composed of escorts, monitors and return specialists), which would be deployed to member states facing “pressures on their return system”.⁸⁰

A welcomed component of the Commission’s proposal is envisaging **the establishment of a common complaint mechanism in those situations where persons’ fundamental rights would be potentially violated or jeopardised in the conduct of operational tasks and interventions.** The need to secure a genuine and effective complaint mechanism had already been proposed by the European Ombudsman as a necessary measure to be secured under the current guises of the Frontex agency⁸¹ and where sadly no follow-up action has been so far taken. The Communication only foresees an administrative complaint procedure through the reinforcement of the currently existing Fundamental Rights Officer inside Frontex so that it could receive “complaints in a structured manner and refer these to the Executive Director and the Member States concerned.”⁸² The Communication also stipulates that:

in cases of violations of fundamental rights or international protection obligations which are of a serious nature or are likely to persist, the Executive Director of the Agency would be able to decide

⁷⁷ The Communication states that “such action could be necessary due to a disproportionate increase in the pressure at that section of the external border where the national border guard authorities (and coastguards to the extent that they have border control tasks) are not able to cope with the crisis which has developed. On the other hand, the requirement of urgent action at a particular section of the external border could be due to a deficiency in the border management system of a member state which the Agency had identified as a result of a vulnerability assessment and had recommended corrective measures which the member state concerned failed to implement within the set time limits.”, page 6.

⁷⁸ According to the European Agenda on Migration (p. 6), “a new ‘Hotspot’ approach, where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline member states to swiftly identify, register and fingerprint incoming migrants”. For an explanation refer to (<https://www.ceps.eu/system/files/PB334%20RefugeeRelocationProgramme.pdf>).

⁷⁹ In this respect the Communication (p. 6) states that “This will notably remedy the situation which is currently faced in the cooperation with the Western Balkan countries where, despite the agreement of the third countries in question, Frontex is unable to provide operational assistance as it does not have the mandate to send border guard teams to countries such as Serbia and the former Yugoslav Republic of Macedonia.”.

⁸⁰ See p. 7 of the Communication.

⁸¹ Refer to <http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark> According to the European Ombudsman own-initiative inquiry OI/5/2012/BEH-MHZ “38. Bearing in mind the division of responsibility as set out in Frontex’s detailed opinion, the following complaint scenarios are foreseeable: (i) complaints about the conduct of Frontex staff members for which Frontex must take responsibility; (ii) complaints about the conduct of officers who are not staff members of Frontex, including guest officers who act under the responsibility of the relevant (p. 60s but wear a Frontex armband); (iii) complaints about the organisation, execution or consequences of a joint operation, which do not refer to the conduct of specific individuals.”

⁸² It also stipulates that “Member States will be required to provide information on the outcome and follow up to the complaint. This administrative process will be without prejudice to any judicial remedies”.

not only on the suspension or termination of the operational activities led by the Agency, but also on the withdrawal of financial support for the operation in question.

It is of concern that this new complaint mechanism **would not be independent from the Agency** and judicial in nature. **Nor is it accompanied by the establishment of an independent EU border monitor**, which would in turn ensure a constant supervision of the compliance of the Agency's operational activities with EU law and fundamental rights.⁸³ The Agency will play a key role with the registrations in the 'hot spots' and an enhanced role in returns. That notwithstanding, there is a fundamental gap in the proposed European Border and Coast Guard model in that no proper consideration has been given to two missing links or steps in between these two competences, namely i) the decision on who is in need of international protection and who is not; and ii) the effective remedies against unfavourable or negative decisions (**obligatory under Article 47 EU Charter**). This oversight constitutes a fundamental flaw in the Commission's proposal and the envisaged European border and coast guard model.

Furthermore, a key question that should be discussed carefully during the inter-institutional negotiations of the Commission's proposed Regulation is **the proper character of the common European border and coast guard that the Schengen system would have in the decades to come**. The Commission envisages that the new Agency would combine both the 'traditional' Schengen border control (civilian in nature) authorities, with those responsible for maritime border surveillance, which are of a military nature. It calls for a 'functional approach' so that coast guard authorities would fall under the remit of the Agency when conducting 'border control tasks'. These national actors include both civilian and military authorities.

The Communication states that by merging the 'border' and 'coastal' authorities, the new Agency would see its role in search and rescue operations strengthened. The Communication calls for the need to ensure better coordination among the "wide range of – more than 300 – national authorities performing coastguard functions" including "areas such as maritime safety, security, search and rescue, border control, fisheries control, customs control, general law enforcement and environmental protection". The Commission envisages this taking place by 'aligning' the mandates of the new Agency with those of the European Maritime Safety Agency and the European Fisheries Control Agency.⁸⁴

This merging of authorities, however, stands in sharp contradiction with the existing Schengen model of border control and surveillance, which, with a few exceptions, has been predominantly 'civilian' and non-military in nature.⁸⁵ A key challenge of military intervention relates to the **difficulty of ensuring proper legal, judicial and democratic accountability and rule-of-law compliance with border surveillance actions.**⁸⁶ In fact, the EU Schengen Border Catalogue expressly declares:

Border management is a task which requires a high level of professionalism. There should be one main responsible public authority (not military) for implementing the IBM concept in each Member State, especially and necessarily with regard to border control, preventing illegal immigration along external borders and combating illegal immigration inside the Member State's territory. There should be centralized command, control, supervision and instructions especially for border control, risk analysis and criminal investigation as well as for inter-agency and international cooperation with regard to

⁸³ See Guild, Groenendijk & Carrera (2008) and Carrera (2010).

⁸⁴ The Communication (p. 7) explains: "This will mean that the Agency will, for example, be able to access new information on vessels used for illegal immigration and cross-border crime which have been detected during maritime surveillance operations whose primary mission is not border control, but fisheries control and oil spill detection. Furthermore, the three EU Agencies will be able to launch multi-purpose surveillance operations together, for instance by jointly operating Remotely Piloted Aircraft Systems (drones) in the Mediterranean Sea".

⁸⁵ Council of the European Union, EU Schengen Catalogue: External Border Control, Removal and Readmission, General Secretariat DG H, Brussels, February 2002; and Council of the EU, Updated EU Schengen Catalogue, 7864/09, Brussels, 19 March 2009.

⁸⁶ See Carrera & den Hertog (2015).

preventing and combating illegal immigration. The responsible authority, typically Border Guard or Border Police, should be centralised and clearly structured.⁸⁷

Conclusions

The regional war in Iraq and Syria has forced more than 4 million Syrian refugees alone to flee their country.⁸⁸ The EU is a large and prosperous region near this regional war, and recently an increasing number of EU countries have chosen to participate in it. It is not so surprising then that the EU should receive substantial numbers of refugees from the region. The situation was fairly similar in the period 1992-95, when the regional civil war in the former Yugoslavia raged. The arrival of refugees in 2015, however, is substantially different from 1992-95, not least as the EU has been given competence (since 1999) for the creation of a Common European Asylum System and a common external border control system. Thus, the reception of refugees is an EU matter today, whereas it was a state issue in 1992.

The events of 2015 have revealed substantial weaknesses, which are well known to all but have been left unaddressed for reasons of political discord both in the CEAS and the external control of the Schengen border. As the regional war in Syria and Iraq has intensified, more refugees have left the region, fleeing farther afield in fear of further contagion of the hostilities. Their arrival in the EU has first triggered a ‘crisis’ of the Schengen system and simultaneously a crisis in the CEAS. Neither crisis is likely to be resolved quickly, but some home truths need to be acknowledged.

1. The Schengen system of control free movement of persons among the Schengen states is here to stay. The ruffled edges revealed by some member states introducing minimal border controls at common borders are unlikely to be sufficient to disrupt or transform the system in any major way. The strongest defenders of the Schengen system appear to be members of the Visegrad group – sufficiently numerous and strong to prevent any change to the system requiring a qualified majority vote.
2. Refugee-friendly external border controls at the EU external borders are an international obligation under the Refugee Convention, a regional obligation under the European Convention on Human Rights and an EU obligation under the EU Charter of Fundamental Rights. It is also a cornerstone of the CEAS. Calls for member states with substantial external land and sea borders to ‘harden’ their external border controls and keep out the unwanted arrivals are contrary to all of these obligations in so far as these ‘unwanted arrivals’ are refugees (which everyone seems to agree is the case for the Iraqis and Syrians). It is hypocritical for some member states to seek to push external border member states to breach their human rights obligations in order to relieve those member states farther from those external borders from having to step up to the plate to fulfil their human rights obligations.
3. The EU Dublin system of allocation of asylum-seekers does not work for member states or refugees. Adding a temporary relocation system on the side is unlikely to fully address the challenge. However, a permanent relocation system could be an important step to reinforce the solidarity and fairer sharing of legal responsibilities between EU member states towards refugees and asylum-seekers as long as it would include the personal preferences of asylum-seekers among the criteria for distributing responsibility. The European Council should seriously consider the Greek non-paper in its deliberations.
4. Increasing identity checks inside EU member states is likely to cause new tensions within states. Already the heightened concerns about terrorism by Islamic State sympathisers is giving rise to increased identity controls on Muslims in some parts of the EU. Identity checks must be used in a proportionate, non-discriminatory and responsible way and triggered by reasonable suspicion of crime. Seeking asylum is not a crime. The European Court of Human Rights has struck down identity checks that are not based

⁸⁷ Ibid., p. 9.

⁸⁸ <http://www.unhcr.org/559d67d46.html>

on reasonable suspicion and in so doing expressed concern that these kinds of checks tend to have disproportionate impacts on visible ethnic minorities.⁸⁹

5. An in-depth and democratic discussion should carefully examine the kind of border guard and border controls the next generation of the Schengen system needs within existing EU rule-of-law remits. The new Commission proposal for a European border and coast guard model and Agency will be a welcome step forward as long as the civilian (non-military) nature and scope of the new authority are properly ensured. A European border and coast guard must go hand-to-hand with proper accountability, independent monitoring and effective/judicial complaint mechanisms. Ensuring that the new system complies with a refugee and fundamental rights-compliant Schengen border remains an outstanding challenge.

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⁸⁹ *Gillan and Quinton v. United Kingdom* - 4158/05 [2010] ECHR 28, 12 January 2010; See also Council of Europe (2009).



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