

The possibilities of temporary reintroduction of border control at the internal borders of the Schengen Area in the light of current challenges

Możliwości tymczasowego przywrócenia kontroli granicznej na granicach wewnętrznych strefy Schengen w świetle obecnych wyzwań

Возможности временного восстановления пограничного контроля на внутренних границах в Шенгенской зоне в свете текущих вызовов

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Summary: The creation of the Schengen Area was one of the greatest, most socially appreciated achievements of cooperation between 22 Member States of the European Union and Iceland, Liechtenstein, Norway and Switzerland. The rules on crossing the borders of European Union Member States are common policies subject to specific regimes, but membership of the Schengen Area has numerous consequences in terms of, among other things, border controls, as defined in the Schengen Borders Code. One of the most important of these is the abolition of controls at the internal borders of the countries which make up the Area.

The adoption of common rules has not, however, deprived the countries which make up the Schengen Area of certain prerogatives to restore border control at internal borders in exceptional cases. This justification is a serious threat to public order or internal security.

France made the first use of this possibility on 21 October 2006, by reintroducing control at the land border with Spain for a few hours because of the Youth Days of radical young Basques in Saint-Pée-sur-Nivelle and the demonstration organised in Bayonne by the support committee of Philippe Bidart. Since then, the countries have made repeated use of the instrument available and the year 2020, which runs in the shadow of COVID-19, brings new challenges in this regard. The submitted article will analyse the possibility of the temporary reintroduction of border control at the internal borders of the Schengen Area in the context of the current challenges of the modern world.

Key words: Schengen zone, internal borders, temporary reintroduction of border control

Streszczenie: Utworzenie strefy Schengen było jednym z największych, najbardziej docenianych społecznie osiągnięć współpracy 22 państw członkowskich Unii Europejskiej oraz Islandii, Liechtensteinu, Norwegii i Szwajcarii. Zasady przekraczania granic państw członkowskich UE należą do polityk wspólnych, poddanych szczególnym reżimom, ale zwłaszcza członkostwo w strefie Schengen wiąże się z licznymi konsekwencjami w zakresie m.in. kontroli granicznej, określonymi w Kodeksie granicznym Schengen. Jedną z najważniejszych jest zniesienie kontroli na granicach wewnętrznych państw tworzących tę strefę.

Przyjęcie wspólnych reguł nie pozbawiło jednak państw znajdujących się w strefie Schengen pewnych prerogatyw do przywrócenia kontroli granicznej na granicach wewnętrznych w wyjątkowych przypadkach. Takim uzasadnieniem jest w szczególności poważne zagrożenie dla porządku publicznego lub bezpieczeństwa wewnętrznego.

Po raz pierwszy z tej możliwości skorzystała Francja 21 października 2006 r., przywracając na kilka godzin kontrolę na granicy lądowej z Hiszpanią z uwagi na Dni Młodzieży radykalnych młodych Basków w Saint-Pée-sur-Nivelle oraz demonstracje zorganizowane w Bayonne przez komitet wspierający Philippe'a Bidarta. Od tego

czasu państwa wielokrotnie korzystały z dostępnego instrumentu. Zwłaszcza rok 2020, który upłynął w cieniu COVID-19, przyniósł w tej kwestii nowe wyzwania. W artykule dokonano analizy możliwości tymczasowego przywrócenia przez państwa kontroli granicznej na granicach wewnętrznych strefy Schengen w kontekście aktualnych wyzwań współczesnego świata.

Słowa kluczowe: strefa Schengen, granice wewnętrzne, tymczasowe przywrócenie kontroli granicznej

Резюме: Создание Шенгенской зоны стало одним из величайших, наиболее высоко оцененных обществом достижений сотрудничества между 22 государствами-членами Европейского Союза, Исландией, Лихтенштейном, Норвегией и Швейцарией. Правила пересечения границ государств-членов ЕС являются общей политикой, подчиняющейся определенным режимам, но, особенно, членство в Шенгенской зоне влечет за собой многочисленные последствия, в частности, в плане пограничного контроля, как это определено в Шенгенском кодексе о границах. Одним из наиболее важных из них является отмена контроля на внутренних границах стран, входящих в Шенгенскую зону.

Принятие общих правил, однако, не лишило страны Шенгенской зоны определенных прерогатив по восстановлению пограничного контроля на внутренних границах в исключительных случаях. Предпосылкой для восстановления пограничного контроля, в частности, является серьезная угроза общественному порядку или внутренней безопасности.

Франция впервые воспользовалась этой возможностью 21 октября 2006 года, восстанавливая контроль на сухопутной границе с Испанией на несколько часов в связи с проведением Дней молодежи радикально настроенных молодых басков в Сен-Пе-сюр-Нивель и демонстраций, организованных в Байонне комитетом в поддержку Филиппа Бидара. С тех пор страны неоднократно использовали имеющийся инструмент. В частности, 2020 год, прошедший под знаком COVID-19, принес новые вызовы относительно этого вопроса. В статье анализируется возможность временного восстановления государствами пограничного контроля на внутренних границах Шенгенской зоны в контексте актуальных вызовов современного мира.

Ключевые слова: Шенгенская зона, внутренние границы, временное восстановление пограничного контроля

Introduction

The creation of the Schengen Area, which allows free movement without border controls, is undoubtedly one of the greatest achievements of the European Union. However, it should be remembered that the original regulations in this area were adopted outside the *acquis communautaire*. The Schengen Agreement was signed in June 1985 by Belgium, Germany, France, Luxembourg and the Netherlands.¹ The Schengen Agreement was supplemented in 1990 by the convention imple-

¹ Cf. The Schengen *acquis* as referred to in Article 1 (2) of Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*, OJ L 176, 10.07.1999, pp. 1–16; The Schengen *acquis* – Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.09.2000, pp. 13–18.

menting the Schengen Agreement (signed by the same states).² The Implementing Convention provided for the definitive abolition of internal border controls as well as a number of necessary accompanying measures, including, inter alia, the strengthening of external border controls, the establishment of a uniform visa issuing procedure, the establishment of the Schengen Information System SIS, and the strengthening of police cooperation at internal borders. The convention entered into force in March 1995, resulting in the abolition of border controls between Belgium, the Netherlands, Luxembourg, France, Germany, Spain and Portugal.³ It was only in 1997 that the Schengen acquis was incorporated into European Union law. The Schengen area has gradually expanded and now includes 26 European countries: 22 EU member states (apart from Ireland, which manages its own common travel area under an opt-out clause, and Bulgaria, Croatia, Cyprus and Romania, which are due to join the Schengen area once they meet the necessary conditions) and 4 non-EU countries (Iceland, Norway, Switzerland and Liechtenstein).

Migration policy, including the rules on crossing the borders of the European Union Member States, is uniformly established for all member states as one of the so-called common policies. It should be noted that the basic regulations defining the rules for crossing borders are contained in the Schengen Borders Code.⁴ This regulation is comprehensive and also applies to internal borders of the area (Title III). According to the introduced regulations, internal borders can be crossed at any place without a border check on persons, regardless of their nationality. However, in the event of a serious threat to public policy or internal security in a member state, or in the event of exceptional circumstances threatening the overall functioning of the area without internal border controls, exceptions are allowed.⁵

² The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.09.2000, pp. 19–62.

³ Spain and Portugal signed the Agreement in June 1991.

⁴ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.03.2016, pp. 1–52 (with amendments).

⁵ A. Doliwa-Klepacka, T. Dubowski, *Tymczasowe przywracanie kontroli granicznej na granicach wewnętrznych Schengen jako instrument zapewnienia bezpieczeństwa i porządku publicznego podczas imprez masowych – doświadczenia wybranych krajów*, ed. M. Zdanowicz, D. Lutyński, Kętrzyn 2011, pp. 9–23, E. Evrard, B. Nienaber, A. Sommaribas, *The Temporary Reintroduction of Border Controls Inside the Schengen Area: Towards a Spatial Perspective*, Journal of Borderlands Studies 2020, vol. 35, no. 3, pp. 369–383.

1. Principles and conditions governing the temporary reintroduction of border control at internal borders of the Schengen area

Chapter II of Title III of the Schengen Borders Code lays down the rules and conditions for the temporary reintroduction of border controls at certain internal borders in the Schengen area. In general, the Code contains three legal grounds for the temporary reintroduction of border control at internal borders in the Schengen area. On the grounds of a serious threat to public policy or internal security: (1) in foreseeable extraordinary events (e.g., special sports event, climate summit, etc.) and (2) in the event of imminent danger requiring immediate action and (3) in a situation threatening the overall functioning of the Schengen area in the event of persistent serious deficiencies regarding the external borders.

The first two of the above-mentioned cases concern specific situations in individual member states of the zone. It should be borne in mind that the reintroduction of border control is the prerogative of member states. The commission can give its opinion on the necessity and proportionality of this measure, but it cannot block a member state's decision to temporarily reintroduce border control. Where there is a serious threat to public policy or internal security, a member state may exceptionally temporarily reintroduce border control at all or part of its internal borders within the framework of the general rules laid down in Articles 25 to 28 of the Schengen Borders Code.

Firstly, control at the internal borders of the Schengen area may be reintroduced for a limited period of no more than 30 days⁶ or, if the duration of the serious threat is expected to exceed 30 days, for the entire duration of the foreseeable risk.⁷ It is important to note that the scope and duration of any temporary reintroduction of border control at internal borders must be necessary and proportionate. They may not go beyond what is necessary to respond to the serious threat concerned and should be used only as a last resort. If, after the expiry of the period for which border control is reintroduced, the serious threat to public policy or internal security in the member

⁶ For example, temporary introduction of border controls in the context of political summits (e.g. at the Finnish borders during the informal meeting of Heads of States and Government in Lahti on 9–21 October 2006), or at the Austrian borders during EURO 2008 (2 June 2008 – 1 July 2008) etc. Taking Poland as an example, the justifications for temporarily reintroducing border control at the Polish borders, pursuant to Article 25 of the Schengen Borders Code, were: EURO 2012 (4 June 2012 – 1 July 2012), NATO Summit, World Youth Days and visit of Pope 4 July 2016 – 2 August 2016), 19th session of the Conference of the Parties to the UN Framework Convention on Climate Change – UNFCCC (8–23 November 2013), climate conference COPT 24 (22 November 2018 – 16 December 2018).

⁷ E.g., the reintroduction of temporary border controls by countries due to significantly increased migratory flows (e.g., Norway 26 November 2015 – 15 January 2016) etc.

state concerned persists, border control may be prolonged for renewable periods of up to 30 days. The total period of the reintroduction of border control at internal borders, including any prolongation, shall in principle not exceed six months. Secondly, both at the time of the reintroduction of border control and at the time of prolongation of the initial period of border control, the state which intends to apply this measure shall assess the effectiveness of the reintroduction of border control in resolving the threat to public policy or internal security and the proportionality of this measure to the threat, but also the likely impact of such a measure on the free movement of persons within the area without internal border control.

A Schengen Member State may temporarily reintroduce internal border controls in the area as planned (based on Articles 25 and 26 of the Borders Code) or in exceptional cases requiring urgent action (on the basis of Article 28 of the Borders Code). Under the first option, the member state planning to temporarily reintroduce border control is obliged (Article 27 of the Borders Code) to notify the other member states and the commission of its intention. As a rule, the notification should be made no later than four weeks prior to the planned reintroduction of border control, and exceptionally a shorter deadline is possible (when the circumstances giving rise to the need to reintroduce border control at internal borders become known less than four weeks before the planned reintroduction). The notification document should include, in particular: 1) detailed reasons for the planned reintroduction of control, 2) the scope of the proposed reintroduction of control indicating the relevant section of the border, 3) the names of the authorised border crossing points, 4) the duration of the planned reintroduction of control. This information shall also be forwarded to the European Parliament and the Council.

If necessary, the European Commission may ask the member state concerned for additional information. The commission (and the other member state) may issue an opinion on the planned temporary reintroduction of border control, on the necessity and/or proportionality of such a measure. Such an opinion, together with the information submitted by the member state planning to reintroduce border control, shall form the subject of consultations between the member state planning to reintroduce border control at internal borders, the other member states, especially the member states directly affected by such measures, and the commission. Their purpose shall be to organise mutual cooperation between the member states and to examine the proportionality of the planned measures to the events giving rise to the reintroduction of border control and the threat to public policy or internal security. Such consultations shall take place at least ten days before the date on which border control is scheduled to be reintroduced.

In cases of threats to public policy or internal security in a Member State requiring immediate action, the special procedure set out in Article 28 of the Borders Code shall apply. In such a situation, a member state may exceptionally and immediately reintroduce border control at internal borders for a limited period of no more than ten days. When reintroducing internal border control, the member state concerned shall simultaneously notify the other member states and the commission accordingly. In doing so, it must provide all the information required in principle (as in planned situations), and in addition the reasons for the special procedure. If the serious threat to public policy or internal security persists beyond the initial period (maximum 10 days), the member state may decide to prolong border control at internal borders for renewable periods of no more than 20 days (the total duration of the reintroduced border control shall not exceed two months). All requirements and conditions that apply in cases where temporary border control is to be reintroduced shall apply accordingly.

The third possible option of temporarily reintroducing border control at internal borders consists of the cases provided for in Article 29 of the Borders Code. These are exceptional circumstances putting the overall functioning of the Schengen area at risk, in particular because of persistent serious deficiencies related to external border control. To the extent that these circumstances constitute a serious threat to public policy or internal security in the area without internal border control or parts of it, border control at internal borders may be reintroduced for a period of no more than six months. If the circumstances justifying the reintroduction of border control persist, this period may be prolonged up to three times for further periods of no more than six months. The reintroduction of controls at internal borders of the Schengen area under this option may take place to protect common interests as a last resort, if all other measures cannot effectively remove the serious threat identified. In the event of extraordinary circumstances as referred to in Article 29 of the Borders Code, the total period for the reintroduction of internal border controls can be prolonged up to a maximum of two years.

Border control can be reintroduced by one or more member states on a recommendation of the council made on a proposal from the commission (own initiative of the commission or the member states). Before reintroducing internal border controls in such a case, the State shall notify the other member states, the European Parliament and the European Commission accordingly. If a member state does not follow the abovementioned Council recommendation, it shall immediately inform the Commission in writing of the reasons for non-compliance. The commission shall then submit a report to the European Parliament and the Council in which it

shall assess the reasons given by the member state concerned and the implications for the protection of the common interests in the Schengen area.

Where necessary, and in accordance with Article 29 (2) of the Borders Code, the council shall recommend the temporary reintroduction of border control at one or more internal borders or at least one section thereof, it shall assess the effectiveness and proportionality of the measure in relation to the threat involved. The council's assessment shall be based on detailed information from member states and the European Commission. The assessment shall take into account in particular (1) the availability of technical and/or financial support measures (e.g. from Europol), (2) the current and likely future impact of the identified serious deficiencies in relation to external border control and (3) the likely impact of the reintroduction of border control at internal borders on the free movement of persons within the area without internal border control.

At least once a year the commission must present a report to the European Parliament and the council on the functioning of the area without internal border controls. This report must list all decisions taken to reintroduce border control at internal borders during the year in question.

2. Previous cases of the temporary reintroduction of border control at internal borders in the Schengen area

At the time of submission of this article, a total of 300 notifications of the temporary reintroduction of border control at internal borders (pursuant to Article 25 and 28 et seq. of the Schengen Borders Code)⁸ have been submitted to the European Commission. In 168 cases, coronavirus COVID-19 was cited as the justification for the reintroduction of border control. In 41 cases, foreseen extraordinary events ("summits" of a group of countries, sports competitions, World Youth Days and visit of Pope, etc.) were cited as justification for the reintroduction of border control. The remaining cases were related to terrorist threats and increased migratory pressure (91 cases).

Clear trends dominating the different periods are also evident. As a matter of fact, until the beginning of the 2015 migration crisis, most of the reported notifications

⁸ Full list of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code (PDF), <https://ec.europa.eu/home-affairs/system/files/2021-10/Full%20list%20of%20notifications%2025102021.pdf> [access: 30.03.2021].

on the temporary reintroduction of border control at internal borders (29 out of 36 total reported notifications from 2006 to mid-2015) were related to exceptional events/encounters, the remainder (7 out of 36 total reported notifications during this period) were related to the risk of terrorist attacks.

In the following period – from mid-2015 to the beginning of 2020 – the cases of temporary reintroduction of internal border controls were dominated by unprecedented influx of persons (72 out of 85 notifications in this period); only 13 out of a total of 85 notifications in this period were justified by international events/meetings of a special kind, such as climate summits, NATO summits or G7 summits.⁹ The migration crisis and the much more frequent reintroduction of temporary border controls have undoubtedly affected the functioning of the Schengen area, causing both economic, social and political costs. According to a 2016 European Parliamentary Research Service study, the economic costs of a two-year suspension of the Schengen Area by all participating countries would be between €25 billion and €50 billion, while the costs of an indefinite suspension would be between €100 billion and €230 billion over 10 years.¹⁰ It is also worth noting data from an analysis conducted by the European Commission in the context of the 2017 proposal to amend the Schengen Borders Code.¹¹ According to data from the commission's analysis of the direct economic costs of Schengen suspension cases (when border controls were reintroduced for an extended period), border delays would have a significant impact on cross-border transport (especially road transport), tourism, public administration and cross-border workers and travellers. For these categories, direct costs are estimated between €5 and €18 billion per year (or 0,06%–0,13% of GDP), depending on the time lost due to delays. Indirect medium-term costs resulting from the suspension of the Schengen area could be much higher than the direct estimates, and the scale of the impact on intra-Community trade, investment and mobility would be unprecedented.

It is worth recalling that the peak of the migrant crisis of 2015 and 2016 and the unprecedented scale of migrants who arrived in the territory of the European

⁹ Cf. M. Votoupalová, *The Wrong Critiques: Why Internal Border Controls Don't Mean the End of Schengen*, New Perspectives. Interdisciplinary Journal of Central & East European Politics and International Relations 2019, vol. 27, no. 1, pp. 85–86.

¹⁰ *The Cost of Non-Schengen. Impact of Border Controls within Schengen on the Single Market*, European Parliamentary Research Service, April 2016, https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581383/EPRS_STU%282016%29581383_EN.pdf [access: 15.03.2021].

¹¹ Cf. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM/2017/0571 final – 2017/0245 (COD), Brussels, 27.09.2017, p. 3, <https://eur-lex.europa.eu/legal-content/EN/ALL/?qid=1620502319366&uri=CELEX%3A52017PC0571> [access: 18.03.2021].

Union Member States caused long-term changes in the functioning of the Schengen Area. Nine member states, namely Austria, Belgium, Denmark, France, Germany, Hungary, Norway, Slovenia and Sweden, reintroduced internal border controls using Article 29 of the Schengen Borders Code, which allows for the reintroduction of border controls when “serious deficiencies in external border control [...] threaten the general functioning of an area without internal border controls”. These were intended to be temporary, but in practice they have often been maintained for more than four years. After exhausting the two-year period allowed under Article 29, six of the nine countries identified (i.e., Austria, Denmark, France, Germany, Norway and Sweden) chose other legal paths, which allowed them to extend border controls arbitrarily, despite objections from, for example, the European Parliament. Interestingly, despite the decline in migrant arrivals, the positions of EU leaders regarding “significant secondary movements” and the ongoing threat to security at the countries’ internal borders. This seems to be in close relation rather to the expectations of some nationalist or populist electorates of the states.¹²

And finally, the third period – since the outbreak of the COVID-19 pandemic in Europe – has been dominated by the fight against the spread of the coronavirus, an important element of which has become the control of border traffic, or in some periods even the closure of state borders.¹³ Out of 177 notifications of temporary reintroduction of border control at internal borders of the Schengen area, as many as 168 cited COVID-19 as the justification. The remaining 9 (out of 177) cases were related to terrorist threats and secondary movements of persons. In response to COVID-19 related epidemic threats, countries introduced restrictions on border traffic.¹⁴ These were aimed at slowing the spread of the virus and flattening the disease curve, thus protecting national health systems from inefficiency.

It is worth noting that since 2015 internal border controls have been reintroduced three times more often than they were during the first nine years.

¹² J. Galaski, *Are Schengen Border Controls the New Norm?*, <https://www.liberties.eu/en/stories/are-schengen-border-controls-the-new-norm/17201> [access: 15.03.2021].

¹³ Cf. A. Doliwa-Klepacka, M. Zdanowicz, *The European Union Current Asylum Policy: Selected Problems in the Shadow of COVID-19*, *International Journal for the Semiotics of Law* 2020, <https://link.springer.com/article/10.1007%2Fs11196-020-09744-3> [access: 15.03.2021].

¹⁴ C. Dumbrava, *Towards a Common EU Approach to Lifting Coronavirus-related Restrictions on Freedom of Movement*, European Parliamentary Research Service, November 2020, pp. 2–5, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659368/EPRS_BRI\(2020\)659368_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659368/EPRS_BRI(2020)659368_EN.pdf) [access: 15.03.2021]; E. Guild, *Covid-19 Using Border Controls to Fight a Pandemic? Reflections From the European Union*, *Frontiers in Human Dynamics* 2020, vol. 2, pp. 2673–2726; M. De Somer, *Schengen: Quo Vadis?*, *European Journal of Migration and Law* 2020, vol. 22, pp. 178–197.

Regarding the grounds for the temporary reintroduction of internal border controls under Article 29 of the Schengen Borders Code (the existence – as identified in the Schengen evaluation report – of persistent serious deficiencies in external border controls that could lead to the reintroduction of internal border controls), the situation is quite different here. This provision during the first multiannual evaluation programme (until 2019) was applied only once. In the autumn of 2015, during an unannounced visit to Greece, serious deficiencies in the management of the external borders were identified which were considered to threaten the overall functioning of the area without internal border controls.¹⁵ As a result, five Member States jointly reintroduced internal border controls.¹⁶ The Council adopted recommendations on measures to be taken by Greece, which submitted an action plan and progress reports as required by the Schengen evaluation regulation.¹⁷ The evaluation carried out in 2016 already indicated that serious deficiencies had been corrected.

3. The perspective of amending the rules and conditions for the temporary reintroduction of controls at internal borders within the Schengen area

The current Schengen Borders Code is set out in Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, which entered into force on 12 April 2016. This act replaced the previous version of the Borders Code, established by Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006.¹⁸ Since its entry into force, the current Schengen Borders Code has been amended three times.

¹⁵ Communication from the Commission to the European Parliament, the European Council and the Council. Back to Schengen – A Roadmap, COM/2016/120 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0120&qid=1620660572851> [access: 15.03.2021].

¹⁶ Council Implementing Decision (EU) 2016/1989 of 11 November 2016 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 306, 15.11.2016, pp. 13–15.

¹⁷ Communication from the Commission to the European Parliament and the Council on preserving and strengthening Schengen, COM/2017/570 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0570&qid=1620674235655> [access: 15.03.2021].

¹⁸ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.04.2006, pp. 1–32.

In the context of the subject matter of this study, attention should be drawn to the draft amendment of the Borders Code which was presented by the Commission in September 2017¹⁹ (to date, however, the legislative procedure has not been completed). This proposal concerned a regulation amending the provisions applicable to the temporary reintroduction of internal border controls and aimed at adjusting the maximum periods of application of these measures to allow member states to respond adequately to serious threats to public policy or internal security. In the explanatory memorandum to the legislative proposal, the Commission stressed that, in the light of the migratory crisis and the risks posed by increased secondary movements, the rules and procedures for the prolongation of temporary internal border controls had nevertheless proved insufficient to address the growing threats to public policy or internal security. It was also pointed out that the existing provisions do not encourage the choice of alternative measures to mitigate serious threats.

The main objectives of the proposal to amend the Schengen Borders Code were to ensure that the time limits applicable to temporary internal border controls allow member states to take necessary measures to respond to a serious threat to public policy or internal security. And secondly, to introduce better procedural safeguards to ensure that the decision on temporary internal border controls or their prolongation is based on an adequate risk assessment, in cooperation with the other member states concerned. Indeed, it is essential to ensure that the application of internal border controls remains exceptional and proportionate. Member States have the possibility to use other measures instead of internal border controls, such as police checks and international police cooperation.

The commission has also proposed new time limits for the temporary reintroduction of border control at internal borders. As a rule, the reintroduction of controls for the foreseeable duration of a serious threat has been extended to one year (instead of six months), and the limit on the length of extension periods has been increased from 30 days to six months. A new possibility to extend internal border controls for a period not exceeding two years is also proposed if a serious threat to public policy or internal security persists after one year. However, it is to be a precondition that they can be attributed to the same cause (e.g., a threat linked to the activities of cross-border terrorist networks) and that proportionate national emergency measures are taken to counter the threat (e.g., a state of emergency).

¹⁹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399...

In the legislative procedure initiated by the above commission proposal, the position of the European Parliament was adopted at first reading (4 April 2019).²⁰ The European Parliament has already repeatedly condemned the frequent reintroduction of internal border controls as this undermines, in its view, the fundamental principles of the Schengen area. It has called for important procedural safeguards, to maintain a strict deadline for the reintroduction of internal border controls.²¹ In its resolution on the proposal for a regulation amending the rules applicable to the temporary reintroduction of border controls, the parliament underlined that the Schengen area is one of the main achievements of the Union. It stressed the need for a common response to situations seriously affecting public policy or internal security in the Schengen area. However, it pointed out that the temporary reintroduction of border controls at internal borders should only take place in exceptional circumstances and as a last resort. Parliament generally shared the commission's proposal that, in the event of a long-term threat, it should be possible to prolong internal border controls for longer than six months. However, it took the view that this could not lead to a further extension of temporary border controls for more than one year (whereas the commission had proposed a maximum period of two years). At this stage of the procedure, the position of the other co-legislator, the council, has not yet been adopted.

It is also worth noting the Pact on Asylum and Migration,²² submitted by the commission in September 2020, which presents a comprehensive approach to the issue of external borders, the asylum and return system and the functioning of the Schengen area. The issue of the functioning of the internal borders of the Schengen area is addressed in section 4.4 of the Pact. The European Commission pointed out here that the longer periods of 'temporary' reintroduction of internal border controls last, the more doubts arise as to their genuinely 'temporary' nature and their proportionality to the risks identified. The commission announced in the Pact that it would be putting forward new initiatives for a "stronger and more complete Schengen area", without presenting specific objectives in this regard. Only a "new direction" for work on the Schengen Borders Code was mentioned, which seems

²⁰ Ibidem.

²¹ Cf. European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area (2017/2256[INI]), P8_TA/2018/0228, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0228_EN.html [access: 15.03.2021].

²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A52020DC0609> [access: 15.03.2021].

to imply the withdrawal of the commission's 2017 legislative proposal to extend the possibility of reintroducing internal border controls based on public security considerations. The legislative procedure in this case was de facto stalled at the first reading stage anyway, as no council position has been formulated to date.

The new strategy is also intended to include proposals to improve the Schengen evaluation mechanism and to adopt a model that favours controls within the territory of a given state (using the new technological means available) instead of reintroducing internal border controls. There is also a call for "less intrusive controls", for example through greater use of video surveillance or targeted checks.

In fact, the only real innovation presented in the pact was the introduction of the Schengen Forum. This is to bring together the relevant national authorities (e.g., interior ministries and border services at national and regional level) to stimulate more concrete cooperation and greater trust between states, but the exact role of the Forum remains undefined. The first meeting of the Schengen Forum took place on 30 November 2020. Just before this meeting, on 25 November 2020, the commission published a report on the implementation of the Schengen acquis and the functioning of the Schengen evaluation and monitoring mechanism for the period 2015–2019 (the current Schengen evaluation and monitoring mechanism has been in force since 2015).²³ The report became the starting point for discussions in the Schengen Forum on the need and assumptions for future reform of the functioning of the Schengen area.

Conclusion

Freedom of movement is one of the most fundamental and at the same time one of the most highly appreciated fundamental consequences of the integration processes in Europe. The possibility to move freely within the Schengen area without internal border controls is of particular importance here. The provisions of the Schengen Borders Code providing for the possibility of the exceptional, temporary reintroduction of controls at the internal borders of Member States are logical in principle, as they concern incidental and last resort controls. However, the prac-

²³ Report from the Commission to the Council and the European Parliament on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to Article 22 of Council Regulation (EU) No 1053/2013. First Multiannual Evaluation Programme (2015–2019), COM/2020/779 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0779&qid=1620658188896> [access: 15.03.2021].

tice of some countries, especially since the migration crisis of 2015 and then the COVID-19 pandemic, has taken forms that are not fully consistent with the original assumption of proportionality, temporariness and finality of reintroduced border controls at internal borders of the zone. Considering these challenges, the need for an effective reform of the existing legal model, to reduce the potential for abuse of exclusionary measures, seems justified.

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