

Migration flows and the reintroduction of internal border controls: assessing necessity and proportionality

Posted By *contentmaster* On November 12, 2015 @ 11:54 am In Borders,Schengen | [No Comments](#)

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The current arrival of large numbers of refugees and migrants to Europe is an important test of European states' capability to cooperate and to apply shared rules of asylum and migration law based on the principles of solidarity and mutual trust. 'Dublin' and 'Schengen' are two important mechanisms of this cooperation which seem no longer self-evident. Since September 2015, EU Member States including Slovenia, Germany, Hungary, Austria and the Netherlands reintroduced or reinforced border controls at the internal borders of the Schengen area.

On 23 October 2015, the European Commission published an opinion on the necessity and the proportionality of the internal border controls reintroduced by Germany and Austria [C\(2015\)7100](#). Only one week later, German authorities expressed their disapproval of the fact that their Austrian counterparts facilitated the onward movement of more than 5,000 refugees across the Austrian-German borders by bus. At the same time, relying on the Schengen principle of freedom of movement for short stays of a maximum of 3 months to allow migrants to move further to Germany, Austria considered building fences at the internal borders with Slovenia to prevent the entry of migrants and refugees arriving via the Balkan route. As a justification for letting Germany take care of the migrants, Austrian politicians referred to Merkel's announcement in September 2015, that Germany would not send back refugees and would not use the Dublin mechanism for transferring asylum seekers to another European state. According

to the Austrian politicians, and representatives of other Member States, this announcement functioned as a pull-factor, for which Germany had to take its responsibility.

The deficit of Dublin, and in particular the position of Germany, has been dealt with by Daniel Thym in his blog post, '[Beyond Dublin](#)'. This contribution focuses on 'Schengen' and the question of when the reintroduction of internal border controls within the Schengen area is allowed. After a short description of the background and legal basis of the abolition of internal border and the power to reintroduce internal border controls, it will explore the aforementioned opinion, arguing that the European Commission does not provide a high threshold for reintroducing internal border controls and rather easily accepts the argument of a 'security threat' connected to the arrival of migrants.

Schengen and the abolition of internal border controls

It is ironic that in 2015, the same year the meaning of the Schengen area without borders is challenged, Member States celebrated the 30 year anniversary of the Schengen Agreement. This intergovernmental treaty was signed by five European states on 14 June 1985 and formed the basis for the abolition of internal border controls. In practice, the free movement in the Schengen area was only achieved in 1995, with the operational launch of the Schengen Information System, which was one of the 'compensatory measures' for the abolishment of internal border controls. The Schengen acquis was integrated in EU law with the Amsterdam Treaty of 1997, and the principle of free movement is currently applied by 26 Schengen States (all EU states except the UK, Ireland, Croatia, Romania, Cyprus, and Bulgaria, as well as Norway, Iceland, Liechtenstein and Switzerland). Based on this expansion, the external borders of Schengen moved not only to the more Southern states but also to the Eastern states like Slovenia, Hungary and Poland. This meant, for example, that Germany—originally one of the states with the largest external borders—became

a state with only internal borders within the Schengen area, with the exception of non-Schengen flights at its airports. The EU competence to adopt rules on the functioning of internal and external border controls is provided in Article 77 of the [Treaty on the Functioning of the EU](#) (TFEU), stating that 'the Union shall develop a policy with a view to, amongst others:

- a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
- b) carrying out checks on persons and efficient monitoring of the crossing of external borders;
- c) the gradual introduction of an integrated management system for external borders'.

On the basis of this provision, rules on the external and internal border controls were adopted in [Regulation 562/2006](#) or the Schengen Borders Code (SBC). The central provision on the abolition of border controls is Article 20 of the SBC stating that internal borders may be crossed at any point without a border check carried out on persons irrespective of their nationality. Article 77 (a) of the TFEU and Article 20 of the SBC thus make clear that free movement applies not only to EU citizens but also to third-country nationals, meaning that as long as third-country nationals fulfill the entry conditions for stays not exceeding three months within a period of six months at the external borders, as provided in Article 5 of the SBC, they are allowed to move freely within the Schengen area.

Exceptions to the abolition of internal border controls

The SBC provides two exceptions to the abolition of internal border controls, both of which are currently used for the reintroduction of border controls in response to the arrival of large numbers of migrants.

The first exception is included in Article 21 of the SBC, which provides that abolition of border controls shall not affect the exercise of police powers 'insofar

as the exercise does not have an effect equivalent to border checks, that shall also apply to border areas'. The CJEU was asked to clarify the meaning of both 'equivalent' and 'internal border areas' in two landmark judgments in 2010 and 2012. In [Melki and Abdeli](#), the CJEU affirmed that Articles 20 and 21 of the SBC also apply to border areas within 20 km of the internal borders. However, according to the CJEU, these provisions in the SBC 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'. Based on this judgement, the Schengen States were obliged to specify in their national rules, the criteria and frequency of the internal borders controls to be applied. In the judgement [Adil](#), responding to the question of a Dutch court assessing the lawfulness of the national rules on mobile controls by the police ('MTV checks' or 'Mobiel Toezicht Veiligheid'), the CJEU held that Articles 20 and 21 of the SBC allowed police controls, not only for law enforcement purposes, but also for the purpose of immigration control within the area of 20 km from the land borders. According to the CJEU, Articles 20 and 21 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' . These checks must be based on "general information and experience regarding the illegal residence of persons at the places where the checks are to be made' , and the carrying out of those checks must be 'subject to certain limitations concerning, inter alia, their intensity and frequency' .

The second exception to the abolition of internal border controls is included in Article 23 SBC and concerns the temporary reintroduction of border controls. This is allowed where there is a serious threat to public policy or internal security, for no more than 30 days or for the foreseeable duration of the serious threat if this exceeds 30 days. This power for the temporary reintroduction is generally applied in the case of large sport or cultural events or during summits of heads of governments, for example, during the Nuclear Security Summit in the Netherlands in June 2014. Information about the temporary reintroduction of internal border controls is published in the European Commission's [bi-annual reports on the functioning of the Schengen area](#). Article 23 of the SBC was amended in 2013, following a first 'crisis' in the Schengen cooperation with regard to the arrival of large numbers of migrants in 2011 at the southern borders of the EU states. In 2011, after the fall of dictator Ben Ali in Tunisia, more than 20,000 Tunisian nationals fled to Italy. Claiming to be incapable of coping with that many migrants on its own, in April 2011, the Italian government issued temporary residence permits enabling those migrants to travel further within the Schengen area. This resulted in the reintroduction of internal border controls not only by France, pushing migrants back to Ventimiglia, an Italian township close to the French borders, but also by Belgium and the Netherlands. (See Sergio Carrera, Elspeth Guild, Massimo Merlino and Joanna Parkin, "A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair", CEPS Paper in Liberty and Security in Europe, April 2011). During its meeting on 23-24 June 2011, the European Council called for a mechanism to be 'introduced in order to respond to exceptional circumstances putting the overall functioning of the Schengen cooperation at risk, without jeopardising the principle of free movement of persons.' In September 2011, the Commission submitted a [proposal](#) on the basis of which the SBC was amended with the adoption of the [Regulation 1051/2013](#) of 21 October 2013. The new Article 23 includes further criteria for the reintroduction internal border controls: these shall only be reintroduced 'as last resort' and the total period of reintroducing

internal border controls may not exceed six months. Furthermore, Article 23a provides that the Member State must assess the adequacy and proportionality of this measure in relation to the threat of public policy and internal security. Article 26 of the amended SBC makes a direct relationship between external and internal border controls, allowing the prolongation of internal border controls in the case of 'persistent serious deficiencies relating to external border controls' . In this case, the period of six months can be prolonged three times to a maximum total of two years. As in the former text of the SBC, on the basis of Articles 25 and 26, the government reintroducing (or prolonging) the temporary border controls must inform the European Commission and other Member States without delay, submitting all relevant information and reasons justifying the reintroduction of border controls. According to a new preamble 5 included in the amended SBC of 2013, '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' .

Temporary reintroduction of internal border controls or (intensified) use of police powers?

Unlike the German and Austrian measures, the temporary reinforcement of internal border controls by the Netherlands, was based not on Article 23, but on Article 21 of the SBC. Following the aforementioned Adil judgment of the CJEU, Dutch rules on internal border controls have been [amended](#) in 2014 to intensify the frequency and duration of mobile border checks in the border areas. At the same time, a new rule was added according to which on a temporary basis, the controls at both land, sea, and aerial borders could be intensified in the case of 'a sudden or expected increase of irregular migrants crossing at the borders'. This option was applied in [September 2015](#) by the Dutch government to deal with the increasing number of refugees arriving in the Netherlands, based, amongst other factors, on the justification of 'preventing human smugglers from

abusing the vulnerable position of asylum seekers'. Using Article 21 of the SBC for 'intensifying internal border controls', the Dutch government is not bound by the obligation to inform the European Commission or other Member State, as provided in Article 23. Only following the advice of the Dutch Advisory Committee on Migration Affairs ([ACVZ](#) or Adviescommissie voor Vreemdelingenzaken), the government promised to inform the European Commission on a 'confidential basis'.

Commission: assessing necessity and proportionality?

In its opinion of 23 October 2015, the Commission assessed the reintroduction of border controls by Germany and Austria on the basis of the amended Articles 23 and 23a of the SBC. The Commission also mentioned the reintroduction of border controls by Slovenia at the internal borders with Hungary. According to the Slovenian notification of 16 September 2015, these controls were based on 'the situation involving uncontrollable migration flows in the region, presenting a serious threat to Slovenia's national security'. As the Slovenian government informed the Commission on 16 October 2015 that these controls were not to be prolonged, it was no longer necessary for the Commission to consider their necessity and proportionality. The Commission will present a separate opinion with regard to the temporary closure of the border by Hungary, which could lead to an infringement procedure, as pointed out [on this blog by Boldizsár Nagy](#).

Both Germany and Austria notified the European Commission on 13 and 15 September 2015 respectively on the temporary reintroduction of internal border controls, based on the 'extraordinary influx of persons seeking international protection' and both countries subsequently informed the Commission about the prolongation of these measures. As justification, Germany submitted immigration procedural grounds and internal security reasons for reintroducing the border controls. First, Germany referred to the necessity of 'streamlining the spontaneous inflow of migrants in accordance with its reception capacities,

an objective which was hampered by the fact that these persons were not registered in any other EU Member State'. Second, Germany pointed out to the risk that 'radicalised persons might be hiding among the bona fide asylum seekers entailing risks related to organized crime and terrorist threats'. Dealing with this latter claim, the Commission held that this assumption would need to be further substantiated, for example by quantifying the warning of persons who may have contact to or fought with militant groups in crisis regions. Nevertheless, it accepted the reasoning of the German government. Acknowledging both the need to register all persons concerned and the limited capacities of German law enforcement authorities to fulfill their tasks, the Commission concluded that the measures provide 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'. For the purpose of streamlining the registration and reception of persons seeking international protection, they were also found to be proportionate.

In contrast to Germany, the Austrian government did not explicitly connect the reintroduction of internal borders to the fight against organized crime and threat of terrorism. Austria emphasized the need to maintain control over the high number of migrants and the pressure this put on reception and transportation infrastructure. With regard to the Austrian measure of reintroducing internal border controls, the Commission also found these were both necessary and proportionate, based on the need to deal with high number of arrivals and the fact that this can cause a serious threat to public policy and internal security.

To conclude

The conclusions of the Commission seem disappointing in the sense that they do not offer clear criteria for the 'necessity and proportionality' of reintroducing

internal borders. Although the Commission implicitly refers to the aforementioned preamble 5 in the SBC, by stating that 'migration flows cannot per se justify the reintroduction of checks at internal borders', it only marginally assesses the reasons put forward by Germany and Austria. In this assessment, the relationship that is automatically applied between the arrival of migrants and security risks is taken for granted even if evidence for risks related to organized crime or terrorism is not available. This supports those who tend to present the arrival of refugees to Europe as a security issue, rather than a humanitarian crisis to be solved by the EU Member States on the basis of solidarity and shared responsibility. Finally, the use of both Article 21 (checks within the territory) and 23 (temporary reintroduction of internal border controls) of the SBC in response to the arrival of large number of migrants illustrate there is a grey zone between the meaning of internal border checks and border controls and the goals for which they were meant.

Article printed from EU Immigration and Asylum Law and Policy:

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