

From the Board

Cracks in the EU

In June 2014, the European Council, in response to concerns of the United Kingdom related to the future development of the EU, seemed to recognize the end of the ‘ever closer Union’ in its Council Conclusions.¹ It noted that the concept of an ever closer Union ‘allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further’. Marking specific state-protecting limits to the development of the EU is nothing new, and therefore less alarming than one may think. The present legal framework of the EU not only acknowledges a number of opt-outs or opt-ins in various policy fields, but also includes many possibilities for temporary derogations in case of special circumstances, both in primary and secondary law. However, there is a difference between not wanting to deepen integration any further beyond the present situation, and rolling back the *acquis* towards a situation of less integration.

Leaving aside the discussion whether allowing one or more Member States to explicitly end their commitment to an ever closer Union would be only symbolic or would have legal significance,² the fact remains that nearly six months after the European Council Conclusions of June 2014, the Court of Justice in Opinion 2/13 mentioned in an outline of the specific features of EU law, under reference to the second paragraph of Article 1, that the Member States are engaged in a process of creating an ever closer union among the peoples of Europe.³ The Court seems to imply that it is a part of the present legal structure of the EU. Arguably, a United Kingdom permanent exemption from the commitment to an ‘ever closer union’ could only be achieved by way of Treaty amendment through an ordinary revision procedure, and not via a legally binding decision of the Heads of State or

¹ European Council Conclusions 26 and 27 Jun. 2014, EUCO 79/14, point 27.

² See e.g., D. Wyatt, *What can the UK reform/negotiation package really hope to achieve?*, DELI Blog, 20 Nov. 2015, <https://delilawblog.wordpress.com/2015/11/20/derrick-wyatt-what-can-the-uk-reform-negotiation-package-really-hope-to-achieve/> (accessed 7 Feb. 2016).

³ Opinion 2/13 of 18 Dec. 2014 on the Draft international agreement on accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 167.

Governments that is part of the new settlement of the United Kingdom with the EU.⁴

The specific concerns of the United Kingdom related to the future development of the EU do not present the only signs that state-protecting limits become more prominent in today's EU. State-protecting limits do form part of the legal structure of the EU, and the challenge is to monitor them in such a way that Member States' behaviour in this respect does not run counter to the *acquis*. One telling example is that of the Schengen area, where reintroduction of internal border controls has led many newspapers to announce 'the end of Schengen'. This editorial seeks to consider to what extent the existing legal framework allows Member States to reintroduce internal border controls and how the EU monitors compliance.

According to Article 77 under a) TFEU, the Union shall develop a policy with a view to ensure the absence of any controls on persons, whatever their nationality, when crossing internal borders. Regulation 562/2006, the Schengen Borders Code (SBC),⁵ contains rules on internal and external border controls. The core provision within the chapter on internal border controls, Article 20 SBC, stipulates: 'Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.' Clearly, Article 77 under a) TFEU and Article 20 SBC aim at ensuring free movement of both EU citizens and third-country nationals. There is a double rationale underlying these provisions: on the one hand the completion of the single market demands the abolition of internal frontiers and free movement of citizens so that they have access to the economies of all Member States, and on the other hand the Area of Freedom, Security and Justice demands the absence of internal border controls.

The Schengen Borders Code distinguishes between reintroduction in foreseeable cases (Articles 23, 23a and 24), reintroduction in cases requiring immediate action (Article 25), and reintroduction in cases where exceptional circumstances put the overall functioning of the Schengen area at risk (Articles 26 and 26a). Most of the current internal border controls were introduced because immediate action was required, and prolonged because of foreseeable events. All Schengen States reintroducing and extending the duration of border controls (Austria, Belgium, Denmark, France, Germany, Norway, Sweden) justify these by reference to a '[continuous] threat of big influx of persons seeking international protection', except for France that introduced border controls further to the Paris

⁴ See the notice of the European council on a new settlement for the United Kingdom with the European Union. OJEU C69 I/1 of 23 Feb. 2016, Annex I, section C.

⁵ Regulation 562/2006 of the European Parliament and of the Council of 15 Mar. 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006, L105/1, last amended by Regulation 1051/2013.

attacks. The duration of these (prolonged) controls expires in April in the case of France, Austria and Germany in May). Hungary and Slovenia notified controls for periods in September and October 2015, with Slovenia informing the Commission it would not prolong border controls after 16 October 2016. A full list of the notified reintroduction of border controls can be found on the Commission's website.⁶

Article 23 SBC allows Member States, 'as last resort' and 'exceptionally', to reintroduce border control at their internal borders in case of a serious threat to public policy or internal security. Border control can be reintroduced for a period of thirty days, with a possibility to prolong the border controls for renewable periods up to thirty days, as long as the scope and duration of temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat. Furthermore, Article 23(4) SBC stipulates that the total period of reintroduced border controls shall not exceed six months.

The period of six months can be prolonged three times to a maximum of two years in case of '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' (Article 26 SBC). Such prolongation requires a Council recommendation. On 1 December 2015, the Council produced a document inviting the European Commission to issue a proposal for a Council recommendation that, *inter alia*, 'one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders'.⁷ The wording suggests a blank cheque to all Schengen States to reintroduce internal border control for a maximum of two years, but we will have to wait for the Commission proposal and the final text of the Council recommendation to know its exact scope.

To monitor the reintroduction of internal border control, the Schengen Borders Code provides in a procedure of notification of and consultation with the other Member States and the Commission, and the latter may issue an opinion 'without prejudice to article 72 TFEU'. The Commission considers the reintroduction of border controls a prerogative of the Member States, who nevertheless are obliged to assess the extent to which the controls are likely to adequately remedy the threat to public policy or internal security, the proportionality of the controls in relation to the threat, and they must take into account: (1) the impact of the threats to public policy or internal security 'including following terrorist incidents or threats and including those posed by

⁶ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm (accessed 29 Mar. 2016).

⁷ Council document 14300/15, of 1 Dec. 2015.

organized crime', as well as (2) the impact border controls have on the free movement of persons.⁸ As Article 23 SBC only allows internal border controls in case of serious threats to public policy or internal security, Member States have to frame the arrival of a large number of migrants as a serious threat to public policy or internal security whenever they reintroduce border control in response to their arrival. As far as internal security is concerned, the Court of Justice has no jurisdiction to review the validity or proportionality of these measures.⁹ The Commission or any other Member State may however issue an opinion with regard to the necessity of the measure and its proportionality, which together with the information provided at notification, are subject to a consultation between the Member States involved and the Commission.¹⁰ In an opinion with regard to the reintroduction of border controls by Austria and Germany, the Commission found the reintroduction of internal borders necessary and proportionate.¹¹ As has been noted by others, the Commission not only does not provide any clear criteria for assessing the necessity and proportionality of reintroduced border controls, but also seems to take for granted the relationship that is automatically applied between the arrival of migrants and risks for public order or internal security.¹² This monitoring system does not cover intensified mobile border checks in the border areas, as introduced by The Netherlands in response to the increasing number of refugees.¹³

The fence installed by Hungary along the borders with Serbia and Croatia is an external Schengen border and does not fall under the internal border notification system. However, the construction of the fence must be proportionate and must comply with the respect of fundamental rights and the rights resulting from the EU asylum *acquis*. In October, the Commission has expressed its concern on a number of new Hungarian laws of which the border control is one, and requested information in an administrative letter.¹⁴ On 10 December 2015, after examination of the Hungarian reply to its concerns, the Commission has addressed a letter of formal notice to Hungary, opening an infringement procedure concerning inter alia the applications for international protection made at the border.¹⁵ The infringement procedure does not concern incompatibility with the

⁸ Article 23a Schengen Borders Code.

⁹ Article 276 TFEU.

¹⁰ Article 24 Schengen Borders Code.

¹¹ Commission opinion C(2015) 7100 final of 23 Oct. 2015.

¹² See E. Brouwer, *Migration flows and the reintroduction of internal border controls: assessing necessity and proportionality*, <http://eumigrationlawblog.eu/migration-flows-and-the-reintroduction-of-internal-border-controls-assessing-necessity-and-proportionality/> (accessed 7 Feb. 2016).

¹³ Based on Art. 21 SBC. The scope of Arts 20 and 21 SBC was subject of Joined Cases C-188/10 and C-189/10, *Melki and Abdeli* ECLI:EU:C:2010:363, and Case C-278/12 PPU, ECLI:EU:2012:508.

¹⁴ See <http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf> (accessed 7 Feb. 2016).

¹⁵ See http://europa.eu/rapid/press-release_IP-15-6228_en.htm (accessed 7 Feb. 2016).

Schengen Borders Code, but with the recast Asylum Procedures Directive and the Directive on the right to interpretation and translation in criminal proceedings.¹⁶

On 15 December 2015, the Commission issued the half-yearly report on the functioning of the Schengen area.¹⁷ These reports generally give a broad overview of developments in the Schengen area, but in view of the migration crisis, the report discusses in particular the measures taken by Member States at their external and internal borders. In its report, the Commission explicitly takes the view ‘that the uncontrolled influx of high numbers of undocumented or inadequately documented persons, not registered upon their first entry to the EU, may constitute a serious threat to public policy and internal security and thus may justify’ the reintroduction of internal border controls.¹⁸ It concludes that none of the reintroduced border controls is in contradiction with the Schengen Borders Code.

The relationship between the strictness of external border controls and the need for internal border controls is implicitly made in a proposed amendment to the Schengen Borders Code on reinforcing checks at the external borders.¹⁹ The proposed amendment, a response to the terrorist attacks in Paris, Copenhagen and Brussels, aims at reinforcing control at the external border for the purpose of preventing any threat to the Member States’ internal security and public policy. It complements the systematic compulsory checks for public order and internal security of third-country nationals entering the Union, with compulsory systematic checks of third-country nationals leaving the Union, as well as similar checks of EU citizens and their family members entering the Union. Checks concern both travel documents and persons themselves against relevant databases. Though the explanatory memorandum of the proposal explicitly states that the external border measures are consistent with free movement rights for EU citizens and their families, one cannot deny that it does affect them.

The brief account above of the legal framework and monitoring system forming the framework for the reappearance of internal borders may lead us to conclude that the recently introduced controls are in compliance with the Schengen Borders Code, and that consequently there is no reason to announce the end of Schengen. True, the monitoring by the Commission might be criticized for its light touch upon the necessity and proportionality of the internal border

¹⁶ Directive 2013/32/EU and Directive 2010/64/EU.

¹⁷ Communication from the Commission to the European Parliament and the Council, Eighth biannual report on the functioning of the Schengen area 1 May–10 Dec. 2015, COM (2015)675 final.

¹⁸ *Ibid.*, p. 6. It is to be noted that the Commission within the same sentence refers to recital 5 of the preamble of Regulation 1051/2013 amending the SBC, stipulating: ‘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.’

¹⁹ COM(2015) 670 final, of 15 Dec. 2015.

controls with respect to the actual public policy or internal security interests at stake. However, the Commission's letter of formal notice to Hungary shows that the Commission is willing to police the imposition of border controls for their compatibility with EU law even in cases complying with the letter of the Schengen Borders Code.

The wider implications of the reintroduced border controls seem limited, at least for the Schengen Borders Code itself. However, concerns have been raised from a single market perspective on the area without internal borders. Unsurprisingly, organizations within the transport sector warn about the costs of intensified internal border controls. Furthermore, the French national planning office *France Stratégie* published a policy brief on the economic costs of 'rolling back' Schengen.²⁰ More notably, the prime ministers of the Visegrad Group countries issued a joint statement on 3 December 2015,²¹ in which they emphasize Schengen remains as a key practical and symbolic achievement of European integration and reaffirm their 'determination to preserve Schengen so that European citizens and businesses continue to fully enjoy its benefits'. They add that 'any open or hidden attempts to limit free movement that would go beyond the legal framework and endanger the major achievements of European integration' is not acceptable. A statement they might take with them if the UK new settlement deal takes effect, and proposals for amendments to secondary legislation will be on the table.

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²⁰ Available in English: http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/the_economic_cost_of_rolling_back_schengen_0.pdf (accessed 9 Feb. 2016).

²¹ <http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151204> (accessed 9 Feb. 2016).