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The Schengen area in crisis – the temptation of reinstalling borders

For the Schengen cooperation 2015 was to herald its 30th anniversary, a symbolic stage in its development [1]. As a sign of history this anniversary coincided, give or take a few days, with the start of Luxembourg's six-monthly presidency of the Council of the European Union. Indeed it was in this Member State, in a village on the borders of Germany and France that the Schengen Agreement was signed on 14th June 1985. It seemed that all conditions would be met to celebrate, in all simplicity, given the political and economic context, one of the most important achievements in European integration.

However the celebration turned sour. The terrorist attacks that occurred in Europe at the beginning of 2015, along with the significant rise in the number of asylum seekers – Syrians, Eritreans; Afghans, Iraqis etc. at the end of the summer each led, in their own way, to Schengen finding itself in the dock. Although the challenge made to the failings and the shortfalls of Schengen is not new, it came at a time which exacerbated its pitch. Hence 30 years after its launch and nearly 20 years after its effective opening, the Schengen Area has been called into question and faces the States' temptation to withdraw behind their national borders.

Although this response might find justification in the unstable situation experienced by Europe at present, its source lies in the construction of the Schengen Area, which has always accommodated national sovereignties. As a result events in 2015 have meant that certain States have privileged unilateral interpretation and also action to the detriment of a collective approach, which was however required in a collective context. The result has been a weakening of the Schengen Area in which the unprecedented re-establishment of internal borders brings it face to face with prophecies of its demise. Although the Schengen Area is in a "comatose" state, as highlighted by the

President of the European Commission, it is vital to put forward the treatment we have to give it in order to keep it alive.

THE SCHENGEN AREA: THE CONSTRUCTION OF A COMPLEX AND INCOMPLETE ENTITY

Judging by the admission of the five Secretaries of State who met in Schengen in 1985 to sign the agreement regarding the progressive lifting of controls on their common borders, "no one understood the stakes" of what would, thirty years on, become the world symbol of the freedom of movement.

A success story

If we look at it from just a general point of view, the achievement is indeed remarkable. From the five founding States, Schengen has grown to comprise 26 countries. Initiated as part of an intergovernmental cooperation agreement, Schengen became part of the European Union via the 1997 Amsterdam Treaty. Today, millions of people travel yearly within the Schengen Area without being controlled when they cross over internal borders. Young Europeans have an abstract idea of the internal border and their parents have easily adapted to the lifting of previously established controls. Finally, and this is by no means its smallest success, Schengen has led to the unprecedented integration of European economies. It is difficult in this context not to acknowledge Schengen's success.

However success is not yet total. If we take a closer look, the construction of the borderless area includes many features which make it complex and incomplete.

A complex area

The complexity lies mainly in the existence of a space that does not match the map of the European Union.

1. This text was published in the « Schuman Report on Europe, the state of the Union 2016 », Lignes de repères éditions, April 2016

Hence 22 Member States out of 28 partake fully in the Schengen area. Amongst them Denmark applies the Schengen *acquis* but as part of international law and not Union law (i.e. it has no voting rights in the Council). However 6 Member States do not participate fully in Schengen, but for different reasons and with various statuses. The UK and Ireland enjoy an opt-out clause, under which they do not take part in the Schengen *acquis* at all and continue to control the gateways to their territories. Conversely, four member States (Romania, Bulgaria, Cyprus and Croatia) belong to the Schengen area and apply all or some of the Schengen *acquis*, but they have to maintain controls on the interior borders. Finally Schengen has four associate States which are not members of the European Union (Iceland, Norway, Switzerland and Liechtenstein) which apply all of the Schengen *acquis* and do not undertake controls on the internal borders. Schengen is therefore a territorially specific and legally complex area since each situation matches a specific legal regime.

The influence of national sovereignty

The incomplete nature of Schengen lies in the difficulty in overcoming the notion of national sovereignty. Indeed, the States' resistance to relinquishing their sovereign rights regarding border controls and internal security have made it difficult to develop and adapt the Schengen cooperation.

This firstly has involved the issue of external border controls. The principle of abolishing internal border controls means that these then fall to the area's external frontiers. But in the Schengen system and in application of the principle of sovereignty, the external border is the national one, which is controlled by the national authorities. Hence each State controls its share of the external border in the interest of the other States.

This system is based on the assumption that all of the States implement the common rules and exercise the same kind of control on entry into the Schengen area. Although this assumption was acceptable when the Schengen area only involved a small number of States

with homogeneous practices, it has been weakened as the number of partner countries has grown. Since 1985 the eastern border of the Schengen area has increased significantly and now belongs to 10 States which guarantee its control from Finland in the North to Greece in the South. Moreover the difficulty in terms of this control is not the same depending on whether one is on the Aegean Sea or on the border between Estonia and Russia. Hence the myth of the uniform implementation of rules and controls is difficult to maintain.

For a long time however the evaluation of the controls undertaken on the external borders was based on an intergovernmental mechanism whose main goal it was to protect national sovereignty. In practice, the evaluations were undertaken by the States between themselves and on the basis of a pre-defined timetable, in other words, on invitation. It was only in 2013 that the States accepted a more integrated system providing for unplanned visits and the attribution of an overall coordination role to the European Commission in the introduction of the evaluation programmes.

The influence of national sovereignty has also impeded the development of the security chapter in the Schengen cooperation. Hence all of the experts stress that the grip exercised by the States has affected the development of effective cooperation, particularly in terms of the exchange of information or the implementation of further measures. There is nothing surprising in this if we recall that this rationale is included in article 4 of the TEU, which stresses that national security remains the sole responsibility of the States.

Finally this approach has only enabled partial adaptation by Schengen to geopolitical transformation. Although the States have created Frontex for the coordination of the operational cooperation on the external borders in preparation of the opening of the Schengen area to the countries of central and eastern Europe, the adaptation to rapid, deep geopolitical changes has not followed suit. Hence it has been according to "a constant logic" with ill-adapted instruments that the Member States have faced the collapse of dictatorial

regimes, which played the role of border guard, and also the destabilisation of entire regions, which in turn has forced millions of people fleeing war and terrorism into exile.

SCHENGEN UNDER PRESSURE AND THE TEMPTATION OF REINTRODUCING BORDERS

In reality the Schengen area, which is free of internal border controls, developed successfully as long as pressure on the system remained “acceptable”. In support of some adaptations the Member States relied on the common rules and operational measures, whilst retaining control over their external borders. But the refugee crisis and the 2015 terrorist attacks highlighted the limits of this method, whether this involved the failings of the States in terms of border controls, the inadequate nature of the rules governing the distribution of the asylum seekers or the lacuna in police information exchange and cooperation.

A head-in-the-sand policy and unilateral responses

The refugee crisis was the first trigger, revealing the essentially national interpretation of migratory issues and the responses to be given to the problem. Whilst everything indicated that asylum seekers would arrive *en masse* in Europe, because of the conflict in Syria, but not just that, the Member States refused to plan and organise their arrival. By employing a head-in-the-sand policy, as they refused to acknowledge all of the signals sent by Frontex and the UN’s agencies (UNHCR and PAM), by eschewing the issue of the re-settlement of Syrian refugees living in Turkey, Lebanon and in Jordan and by adhering to a national interpretation of migratory issues, the Member States created the conditions for the chaos that hit the European Union as of August 2015.

For want of planning together and as a result, acting together, the Member States had no other option but to react. But in an area in which sovereignty plays its full role, the response was unilateral to the detriment of a European one. And as in a game of dominos, there was a chain reaction.

Suffering increasing migratory pressure Greece and Italy were overwhelmed and allowed refugees and asylum seekers into their territory without identifying or registering them, i.e. to the detriment of the rules. The growing number of asylum seekers in Europe led Germany to review the outlook for 2015 and to take two steps. Firstly Germany guaranteed that it would apply the asylum rules and that it would take in the 800,000 asylum seekers who were due to arrive within its territory. Then, but without any prior consultation with its partners, it announced that it would no longer send back the Syrian refugees arriving there in application of the humanitarian clause that is part of the so-called Dublin regulation. This announcement has led to a change in migratory routes in the direction of Germany. As a result an increasing number of asylum seekers took the route through the Western Balkans, which placed a great amount of pressure on several States and transformed those countries into zones of transit. Some States went as far as organising the transfer of some asylum seekers from their territory towards Germany. In this context the Hungarian authorities started to build a border fence with Serbia to halt the arrival of the migrants. But this obstacle simply diverted the migratory route, transferring pressure over to Croatia.

The ripple effect in the re-establishment of internal border controls

After an initial border re-establishment, there was second ripple of disorganised response. As it faced a continuous stream of Syrian refugees, Germany decided mid-September to re-introduce its border controls temporarily with Austria. The latter did the same on its borders with Italy, Hungary, Slovenia and Slovakia. The next day Slovenia and Hungary also re-established border controls on their joint borders. Within a few days several States had re-introduced internal border controls. Although these measures were taken in application of the Schengen Borders Code they bear witness to an extremely tense political situation, in which disorganisation, mistrust and resistance regarding the issue of relocating asylum seekers led to the choice of withdrawing behind the national border.

After this unprecedented series of events in the history of Schengen tension remained high. Hence mid-November Sweden announced that it was to re-establish controls on its borders. Both Germany and Austria extended them, whilst Norway decided to re-introduce them due to migratory pressure.

Finally, a further step was taken by Austria, which announced that it intended to build a permanent barrier along its border with Slovenia. The announcement was surprising since it meant transposing the Hungarian method, that of a fence, but within the Schengen area, in other words re-establishing a permanent control along the country's internal borders. Although to date the project has not been implemented, this announcement further weakened the Schengen system.

Increased pressure after the November 2015 attacks

The hardest blow came after the fatal attacks on Paris on 13th November. In addition to the heavy count of victims came an increasingly sharp criticism of the failings of Schengen. This criticism grew when the press announced that one of the terrorists had entered Europe via Greece and had taken the route through the Balkans. Inadequate controls on entry were then pinpointed and the long term future of Schengen came under fire.

The "Justice/Internal Affairs" Council of 20th November might have provided an opportunity to deal Schengen the final blow. But this was not the case. Due to some remarkable work by the Luxembourg Presidency, ministers adopted conclusions, the outcome of which was to save Schengen rather than destroy it. This said, and in an extremely sensitive context, its survival still hangs in the balance.

AN UNCERTAIN FUTURE: THE NEED FOR STRONG, DETERMINED ACTION

To quote Jean-Claude Juncker Schengen is "partly in a coma". To save the patient strong medicine has to be prescribed. The situation demands the adoption of strong measures which must protect Schengen via

the significant strengthening of the way it functions. As a result the States will now have to accept what they previously refused, i.e. greater integration of the Schengen cooperation.

The upkeep of internal border controls within the context of the Schengen rules

The first part of the treatment must comprise the guarantee of continued internal border controls under the rules defined by the Schengen Borders Code. Indeed the events that have punctuated 2015 have deeply changed the idea of what the "threat to public order" is which is now viewed from the long term. Before 2015 threats to public order which justified the re-introduction of border controls were temporary (sporting competitions, political events, meetings and executive visits) and did not lead to controls over 30 days. Since 2015 the terrorist threat (in the case of France) and the arrival of refugees and asylum seekers (mainly in the direction of Germany and Austria) which led to the re-introduction of controls are now part of the long term, leading to an unprecedented implementation of rules pertaining to border controls.

For the first time ever the Member States have used the possibility of extending border controls and combined procedures. In this case Germany and Austria are perfect illustrations of this new rationale. These Member States re-introduced "emergency" controls for an initial period of ten days and then extended them for a maximum of two months. After this period they maintained the border controls on the basis of another procedure which allowed them to continue thus for a further six month period maximum.

Then within a context in which the threat to public order might last some time, and in which the idea of the national border acts as the only defence against external threats brings all of its weight to bear, the temporary nature of border controls might then become a constraint. Hence it is highly likely that the States will want to maintain internal border controls after the expiry of the maximal duration provided for, i.e. in the spring of 2016 regarding Germany and Austria.

In this situation two scenarios are possible. The first would comprise assisting permanent border controls ignoring the Schengen rules. De facto this would mean the end of Schengen and “breaking it”. The second possibility would be to use the margin offered by the Schengen Borders Code to extend the upkeep of controls for a maximum period of two years. The Schengen Code indeed includes a measure (article 26) which enables, under certain precisely defined circumstances and according to a specific procedure involving the Commission and the Council, the recommendation that one or several Member States maintain or re-introduce their internal border controls. However the use of this measure is decisive to ensure that controls continue to be exercised under the rules defined by the Schengen Borders Control and not outside of this. This measure has been understood by the Member States which discussed its implementation of this procedure during Council on 4th December 2015.

The use of operational tools

With this stage complete, the second phase of the treatment must lie in the implementation of all available operational tools and which are likely to guarantee a significant strengthening of external border controls. Whether this means obligatory controls or checks on entry into the territory, the establishment of hotspots, the intervention of Frontex and even the use of rapid response teams, the States that lie on the front-line have to accept the principle of the deployment of these on their external border, and the partner States must indeed help towards their implementation financially, materially and from a human point of view. From a security point of view the States must supply common databases and step up cooperation between the competent national services.

Legislative developments

The third stage of the treatment supposes the creation of further measures to which the Council referred in part. This involves, amongst others, the modification of the Schengen Borders Code in order systematically to control European citizens entering the Schengen Area, to adopt the PNR (Passenger Name Record) and to

create a European Border Guard. Moreover the States will not be able to avoid looking into how the Schengen and Dublin rules can be more effectively combined since the crisis has shown that they are now resolutely interlinked.

Vital external action

Finally action and measures must be supported by coordinated, balanced external action. The Western Balkans and Turkey, along with the Maghreb to a lesser degree, are now deemed to be partners in the management of the refugee crisis. However this must not mask the importance of continuing to aid the displaced within Syria itself, and also those in neighbouring countries like Lebanon and Jordan. Likewise the preference to settling the refugee crisis as a matter of urgency must not become a reason for delaying indefinitely thought about the establishment of a European Security and Defence Policy.

Although the President of the European Commission diagnosed Schengen’s comatose condition, another sickness threatens it – and that is gangrene. To be convinced of this we simply have to stress the determination of some to “punish” the States deemed to be at fault by excluding them from Schengen or to recall the Dutch proposal to create a ‘mini-Schengen’, to understand that we are quite close to the rationale of amputation, i.e. the removal of the “diseased part”.

To save Schengen the treatment to be administered is heavy. Its implementation will oblige the States to take a stance on painful issues, notably the transfer of sovereignty and their financial and budgetary implications. In reality the States face their own turpitude which has consisted in believing that we could build an area of freedom, security and justice easily without relinquishing sovereignty.

Beyond the medical metaphor the Schengen area is threatened by the temptation of a return to internal borders, which may deal it the final blow. It is therefore urgent to implement measures that will prevent

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its disappearance as a result of the unilateral re-introduction of internal border controls, without regard of the common rules.

The question of losing Schengen is a serious one and deserves our close attention. Politically first of all, Schengen is the expression of the European project, i.e. the construction of a space in which the quest for more freedom plays a central role. If we backtrack over Schengen we shall bring this quest to an end, thereby directly indicating that we have acquired “too much” freedom.

Secondly, from an economic point of view Schengen has been a decisive driver behind European economic integration thanks to the improved circulation of goods and people. If internal border controls are re-introduced there would immediately be long-term economic slowing for which all citizens would pay, via the food on their tables and their tax bills.

Finally, by bringing Schengen into question, cooperation in terms of security, which is vital to counter transnational threats, might also come under threat.

In order to protect the Schengen area the challenge comprises implementing measures that will strengthen the way the external border operates, in terms of a filter, and security cooperation. Although this action should ensure improved confidence between players and citizens in terms of the common project it requires a pro-active political stance together with a transfer of sovereignty. In virtue of this the future of Schengen will not be decided in Brussels but in the capital cities of Europe.

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