

Schengen area under pressure: controversial responses and worrying signs

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Hopes deriving from the "Arab Spring" have been accompanied by concerns of how to manage migration flows. This question has quickly become extremely contentious and, to a certain extent, it has overshadowed the reality taking place in Tunisia and Egypt, where new political systems based on democracy are being created, and the extremely worrying situations in Libya and Syria.

Since the beginning of the popular revolutions in North Africa, frightening scenarios including that of a "biblical exodus" have been heralded by some European leaders. Despite wild overestimations of new arrivals and political rhetoric some responses to the situation have been taken. At European level, financial and operational support is being provided to both sides of the Mediterranean. Responses at national level have been more questionable as Italy and France have begun a strange and unclear game, the latest development of which is the signature of a joint letter by Silvio Berlusconi and Nicolas Sarkozy asking for the modification of Schengen rules. These developments need analysis to better understand Schengen's functioning and demonstrate that the proposed modifications might severely undermine the whole philosophy of the system.

Political gestures and legal confusion

Faced with the arrival of around 25,000 Tunisians and not satisfied with the support from the EU and other Member States, Italy decided to grant temporary residence permits and travel documents to migrants who were transferred from Lampedusa to the Italian mainland. Such a decision, from the perspective of the Italian authorities, would allow the permits holders to move freely within the Schengen area, and presumably to France. But it is not certain that such a decision is in line with Schengen rules.

Under the Schengen system, Member States are responsible for the entry and residence of third country nationals on their territory. Taking into account the purpose of the stay and their financial and other means, those who fulfil the conditions are granted a short-stay visa or residence permit entitling them to move within the Schengen area. This possibility exists precisely because these persons are residing legally and have appropriate means, such as tourists or workers. In order to ensure a proper functioning of the system, Member States communicate to the Commission a list of residence permits allowing their holders to move within the area. In certain circumstances however, third country nationals do not fulfil the necessary conditions but are nevertheless granted a residence permit for humanitarian reasons. In this situation, the residence permit is only valid for the territory of the Member State that issued it and not for the entire Schengen area.

In the Italian case, it is unclear whether the residence permits and travel documents issued in the last few weeks belong to the list of residence permits communicated to the Commission or are "humanitarian" residence permits. This difference is important, as in the first scenario, migrants are entitled to move within the area, subject to limited internal checks rather than systematic internal border checks, such as being asked to prove they have sufficient resources. In the second scenario, migrants who hold a 'humanitarian' permit are not entitled to move and can be sent back to Italy. The matter in the Italian-French situation is that a grey zone is attached to the legal nature of the Italian permits.

There are two additional points: first, by issuing the temporary/humanitarian permits Italy has implemented obligations deriving from the EU's 2008 "Return Directive", which obliges national authorities faced with an irregular migrant to either expel the person or to grant the person a legal status. Second, after the arrival of some 3,500 Tunisians in France, the reaction of the French authorities has been to study the possibility of restoring internal border checks. Is this reaction proportionate when Tunisian and Egyptian authorities, with the help of the UNHCR and the IOM, have kept their borders open in order to cope with more than 600,000 people fleeing war in Libya? In the final analysis, this looks like a fool's game fuelled by national policy considerations.

Joint letter, old tools and mutual mistrust

After weeks of tension and controversial responses, Italy and France sent a joint letter to Van Rompuy and Barroso to present their common views on actions to be taken or reinforced at EU level. They mainly rely on old tools and methods. The "new partnership" is conditional on cooperation in the fight against irregular migration and enhanced solidarity between Member States based on existing schemes and rules. Most controversial is the proposal to reinforce security within the Schengen area. Alongside the usual calls for reinforcing Frontex's mandate and resources, both leaders call for more collective discipline and cohesion at all protection stages of common external borders. This would firstly take the form of a modification and reinforcement of the Schengen evaluation system involving more closely Member States' experts, the Frontex Agency and other agencies acting in the field of justice and home affairs. This move does not bode well for further enlargement of the Schengen area to Bulgaria and Romania. It would secondly introduce the possibility of restoring internal border controls in the case of 'exceptional difficulties'. In the joint press conference, Sarkozy and Berlusconi made it clear that they want to modify the Schengen safety clause to make the conditions for restoring internal border controls easier. Such a proposal implies a revision of the Schengen Border Code that would require a proposal from the Commission and be subject to co-decision. It will be interesting to analyse the content of the Commission's response to this idea.

If the modification of the Schengen rules is adopted, according to Sarkozy and Berlusconi's wishes, this will lead to a complete reversal of the Schengen philosophy. Since its inception, the Schengen system has been based on mutual trust between members. Each party had confidence in the border controls operated by its neighbour to the extent that the only possibility for restoring internal border controls was based on a serious threat to public order and internal security. This does not seem to be the case for a country with a population of 60 million receiving 25,000 foreigners. The Italian-French idea seems to suggest a broadening and softening of Schengen rules to restore internal border control due, not only to a threat to public order, but also in yet-to-be-defined exceptional circumstances. In such a situation, which could correspond to the situation where an EU member State fails to secure its borders due to exceptional difficulties, Member States could presumably be allowed to restore internal border controls, and, in other words, protect themselves behind their own borders. As a consequence, the driving force of this proposal does not rely on mutual trust and solidarity but rather on mutual distrust. In this regard, the Italian-French proposal would constitute a complete reversal of the philosophy underlying the Schengen system.

Alongside these EU internal political and legal considerations, the main signal the EU and Member States are sending to our southern neighbours is focused on border controls, be they exercised at the external or the internal border. Is this the new partnership we want to build?

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