Schengen area under pressure # 2: the Commission recalls the EU nature of the Schengen system

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The joint letter sent to EU officials by Nicolas Sarkozy and Silvio Berlusconi asking inter alia for a modification of Schengen rules has been considered as an attack on one of the EU’s greatest achievements. This request warranted a response from the European Commission, which came in a Communication on Migration issued on 4 May. The response is a rejection of the attempts by Italy and France to “renationalise” some parts of the Schengen system. Instead, the European Commission recalls the European nature of the system and proposes modifications based on EU mechanisms.

An attempt to “renationalise” the Schengen system

The Italian-French letter must be considered in an overall context and seen as the expression of a trend taking place in several Member States where mutual distrust and temptation to withdraw constitute strong political lines. This is the case in several Member States which have to struggle with or please nationalist parties and therefore develop stricter immigration policies. These national trends have a significant impact on dialogue and negotiations at EU level. This is one reason why focus on migration issues since the beginning of the “Arab Spring” has been so important.

The Italian-French proposal to restore internal border checks has to be considered not only as a sign of mutual distrust but also as an attempt to “renationalise” a vital element of the Schengen system. Indeed, the joint proposal calls for a modification of the safety clause. But this clause leaves wide margins of appreciation to Member States. For instance, where Member States plan to reintroduce border checks for public order matters, they only have to inform the Commission which issues an opinion and not a decision on such a proposal. Hence, in asking to develop the safety clause, Italy and France wish to enlarge the possibility of reintroducing border checks within a framework that secures their margins of manoeuvre and their sovereignty.

The announcement of the Italian-French joint letter in a widely covered press conference gave strong support to the initiative and accordingly put a lot of pressure on EU institutions. The highest pressure was applied to the Commission as the Italian-French proposal would require a modification of the Schengen Border Code and consequently a formal legislative proposal. The Commission could have chosen to ignore the proposal, arguing that such a modification was not on its agenda and that current provisions are sufficient to cope with the situation. Alternatively, it could have acceded to the Italian-French proposal, revealing signs of weakness as a consequence. In the end, the option chosen by the Commission was to respond to the Italian-French letter in a way that secures the EU approach.

A response to strengthen the EU approach

In the Communication issued on 4 May, the Commission opens the possibility of modifying Schengen rules regarding internal border checks. The scheme presented by the Commission, under the heading “Schengen governance”, is based on the idea that Schengen is a community achievement and must remain as such. In this regard, the Commission avoids any prospect of renationalisation of the Schengen system and even proposed further integration into EU law.
This concerns firstly the monitoring of the implementation of Schengen rules by Member States. Currently, the implementation of Schengen rules is monitored by Member States themselves and on the basis of planned on-the-spot inspections. More than two years ago, the Commission introduced a proposal to revise these rules. It proposed to establish a system of monitoring organised at EU level and comprising unexpected on-the-spot inspections. Up to now, Member States have not approved the proposal. Incorrect implementation of Schengen rules at EU external borders should not therefore come as a surprise, as this is the responsibility of Member States.

The second proposal concerns the possibility of restoring internal border checks in certain circumstances. Such a proposal was not planned at all by the Commission, either in the implementation report issued in October 2010, or in the proposal to modify the Schengen Border Code published in March 2011. Until the Italian-French letter, the only question of relevance was related to the limitation of internal border checks. In this regard, the joint letter has had the effect of changing the Commission’s position. The Commission proposes to enlarge the possibilities of restoring internal border checks in two situations: where a Member State is not fulfilling its obligations to control a section of external borders, and where the external border comes under unexpected and heavy pressure due to external events. The crux of the matter is to define whether this proposal is relevant according to existing rules.

A distinction must be made between the current procedure allowing the reintroduction of internal border checks and the one proposed, because their roots and regime are largely different. Current rules allow Member States to restore internal border checks in case of “serious threat to public order or internal security” and place them at the centre of the process. Indeed, Member States are the most well placed to determine where serious threats to public order may occur. In this regard, the Schengen Border Code allows them to restore border controls either for foreseeable events or in an emergency. Here, Member States are at the starting point of the procedure because public order remains mainly a national issue.

The situation is totally different in the case of failure to fulfil Schengen’s obligations and unexpected and heavy pressure at external borders. Management of external borders is an EU issue and any difficulty arising in this field should be dealt with at EU level. The mechanism presented by the Commission rightly follows this path. Where a Member State encounters difficulties in managing its external borders, the ability of other Member States to restore internal border checks is to be decided at EU level. Indeed, before approving such a limitation on free movement, the EU can activate all measures and supports available to help the Member State facing difficulties. This could for example take the form of financial support, the deployment of a Rapid Border Intervention Team (RABIT) or the deployment of national experts on the ground. It is “only at last resort [and] in truly critical situations” that a decision to restore internal border checks may be authorised. In other words, where alternative solutions have been unsuccessful or where the pressure on the external border is too high to cope with the situation, the decision to re-establish internal border checks may be taken. Such a decision should define which Member State is entitled to reintroduce internal checks and for how long. As a result this system would limit recourse to unilateral measures and consequent limitations on free movement in the Schengen area. With this position, the Commission preserves the distinction between public order, which remains principally a national issue, and management of external borders, which is an EU issue and deserves an EU-based answer.

In enhancing the EU’s role in the management of external borders, this mechanism will contribute to bringing more objectivity. According to the State concerned and the actions and support awarded, EU institutions will be able to determine on an objective basis whether or not 25,000 migrants arriving in a Member State constitutes a manageable situation, and thus be able to take appropriate measures. This will also avoid unilateral and unfounded expressions of distrust.

A legislative proposal containing the Commission’s suggestions will now be issued and it will be a matter for the Council and the European Parliament to adopt or reject it.

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