

Internal border controls in the Schengen area: much ado about nothing?

Yves Pascouau

Among other topics, the reintroduction of internal border controls in the Schengen area was very high on the European Council's June Agenda. The issue has been discussed intensely by EU leaders and the results are far from what was expected by those who initiated the discussion. The Council agreed to establish a mechanism to restore internal border checks but its implementation remains uncertain.

A contentious issue

Following their quarrel about the management of migrants coming from Tunisia, Presidents Sarkozy and Berlusconi sent a joint letter to the Presidents of the European Council and Commission asking them to examine the possibility of restoring internal borders checks in case of exceptional difficulties in the management of external borders.

On this basis, the Commission presented in a communication the outline of a mechanism allowing the reintroduction of border controls. Broadly speaking, such an action would be possible in two situations: where a Member State does not fulfill its obligations to control external borders or where the external border of an EU country is under unexpected and heavy pressure. The Commission added that the decision to reintroduce controls should be taken as a last resort and at EU level.

This mechanism was not unanimously accepted by Member States. Some considered that the decision to reintroduce border checks was a national responsibility and should not be grounded on a community-based mechanism. Others pointed out that the reintroduction of border checks in case of unexpected and heavy pressure is not fair because such a situation does not fall within their responsibility. Indeed, events occurring in Libya or Syria and leading to movement of persons are not EU countries' fault.

In a short period of time, the question relating to the mechanism to restore internal border checks became one of the most contentious points negotiated during the European Council. This is understandable, because beyond the definition of conditions related to the implementation of the mechanism the principle of freedom of movement in the Schengen area was endangered. Conclusions adopted during the summit fortunately limit this threat by the way the mechanism is framed.

Framing the mechanism

The mechanism for reintroducing internal border checks is based on a two-pronged approach.

First, where a Member State is facing heavy pressure at its external border, a series of measures should be implemented in order to assist the EU country concerned. Council conclusions underline that these measures could include "inspections, visits, and technical and financial support, as well as assistance, coordination and intervention from Frontex". In other words, the mechanism plans, at first hand, progressive and coordinated assistance rather than sanctions.

It is only as a "very last resort", then, that reintroduction of internal border controls could be decided. But here, the European Council enumerates a series of additional conditions. Restoration of border checks is exceptional and should intervene "in a truly critical situation" i.e. where a

Member State “is no longer able to comply with its obligations under the Schengen rules”. In other words, where the country concerned is not able to control its external borders. In such a situation however, the decision to restore border checks is taken “on the basis of specified objective criteria and a common evaluation, for a strictly limited scope and period of time, taking into account the need to be able to react in urgent cases”.

To sum up, the Summit Conclusions strongly framed the possibility of re-establishing internal border controls, which are made possible as a very last resort on the basis of specified objective criteria and following a common evaluation. *A priori*, the perspective of a reintroduction of internal border checks in the Schengen area looks rather thin.

Forthcoming negotiations and uncertain outcomes

Alongside this assessment, it is not entirely sure that the mechanism will be put in place. Indeed, additional conditions set by the European Council open the door to numerous questions and details that still remain unanswered and unresolved. For instance, how will the “specified objective criteria” be defined? Will they be numerous and exhaustive? What degree of precision or margins of appreciation will they have or leave to Member States? What does “common assessment” mean? Does that concern an assessment provided by Member States, the Commission or an agency such as Frontex? Which authority will decide the reintroduction of internal border checks? The Commission, or Member States? Finally, what does the sentence “taking into account the need to be able to react in urgent cases” mean?

It seems evident, therefore, that while the European Council has in some ways closed the debate about the modification of Schengen rules in framing the conditions to be fulfilled to implement the mechanisms it has, on the other hand, opened an uncertain discussion regarding the content of these conditions. The forthcoming legislative process could be long and tricky.

It will be up to the Commission to present a proposal in September that takes on board parameters defined by the European Council as well as options that please the majority of Member States. This will be a hard task, as EU governments are already opposed on several grounds. For instance, regarding the authority competent to decide the reintroduction of internal border controls, France and Germany wish this mechanism to remain in the hands of governments, whereas others consider that it should fall within the realm of EU institutions. It is therefore not certain that the Commission will find the right balance and that Member States will agree on the proposal. Moreover, the position of the European Parliament on this question remains unknown. Discussion among the Council and the European Parliament may prove very difficult, particularly if the principle of freedom of movement is perceived to be under attack. As a possible consequence, the process could become even more complex. Future discussions could be tough, with the ‘devil in the details’.

In the end, and whenever a text is finally adopted, the practical reintroduction of such controls remains uncertain. Indeed, the vast majority of Member States have dismantled premises and other means necessary to organise proper border controls. Such actions could therefore be difficult, not to say impossible to organise in practice.

Much ado about nothing?

Summing up, one can wonder whether the story is “much ado about nothing”. From a technical point of view, perhaps. Indeed, the outcome of forthcoming negotiations is very uncertain. There is no certainty that the legislative process would lead to a modification of the Schengen rules and even if it did, there is no certainty that it could be implemented according to the strict conditions outlined in the European Council Conclusions. From a conceptual point of view, however, there is a lot to be concerned about. The possibility of limiting and dismantling free movement has been voiced and accepted. Hence, whatever the outcome of the story, this constitutes in itself a worrying perspective that deserves debate and monitoring.

Yves Pascouau is a Senior Policy Analyst at the European Policy Centre.
