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POLICY PAPER

Schengen and solidarity: the fragile balance between mutual trust and mistrust

Yves Pascouau

Foreword

The way in which the area of free movement currently involving 25 European countries works is based on a few simple principles. The abolition of permanent border controls at "internal" borders and the share out of responsibilities for the control of common external borders. In strictly defined circumstances, the organization of far more effective spot checks to guarantee security and public order, on the condition that these spot checks are not considered as a disguised reintroduction of internal borders. The possibility to invoke a "safeguard clause", which enables countries to reintroduce temporarily fixed controls on their national borders, for instance in the event of sporting or political events, with here again the objective to protect internal security and public order in the member state concerned. And lastly, the shared management of external borders, which are *ipso facto* "our" borders: this is a matter of shared responsibilities according to rules established at the EU level, because anyone crossing these external borders can travel freely to and within the other member states on the sole condition that they comply with European visa and resource rules.

As I was able to state when I was in charge of managing the "area of freedom, security and justice" at the European Commission, the area's proper functioning presupposes the existence of a high degree of mutual trust among member states. The ideal situation is for each member state to be certain that all of the others have both the will and the ability to effectively implement the rules forged in common for managing the area.

Such mutual trust is especially necessary in the monitoring of our common external borders, which is something of an "asymmetrical" affair because some countries' land and sea borders are more exposed to major migrant influxes than others on account either of their geography (Greece, for instance) or, sometimes, of their history (for instance, Malta in the wake of the Arab uprisings or the European countries with a colonialist past). This "asymmetry", which is clearly visible in the sphere of applications for political asylum, is partly to blame for the tension that we have seen in the past few semesters, but also for the issue over solidarity among neighbouring countries which, in theory at least, are just as closely concerned by the matter.

The primary merit of the Policy Paper drafted by Yves Pascouau lies in its reminding us that there do already exist several European solidarity mechanisms among the Schengen area's member states designed to cater for this lack of symmetry. As he stresses, asylum, immigration and border control policies and their implementation "are governed by the principle of solidarity and fair sharing of responsibilities, including its financial implications, between Member States". It is in that perspective that it is more important than ever for us to work in the short and medium term.

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The other merit of Yves Pascouau's Policy Paper lies in his correctly identifying the sources of the tension that has flared up among European countries in the past few semesters, in a context marked by the economic crisis, the migrant influxes spawned by the fall of the dictatorial regimes on the southern rim of the Mediterranean and by the recurrent problems on the Greek-Turkish border. As he stresses, these episodes may well be only one of the numerous facets in a more widespread phenomenon affecting the area of free movement and gradually undermining mutual trust.

At the heart of his analysis lie the issues in the "Schengen governance" package currently under negotiation, which we need to address in the light of what is absolutely crucial, namely safeguarding the free movement of people. In that connection it is important to move within the framework established by the conclusions of the European Council meeting in June 2011.

Facilitating the reintroduction of national border controls by member states while also extending the time frame within which those border controls can be reintroduced is an option that need not be ruled out, but only on condition that this reintroduction is only available as a measure of last resort, after a step-by-step procedure whose first step would involve a strengthening of pro-active European solidarity in favour of exposed or defaulting states.

It is equally crucial that public order and security issues remain the only reasons that can be claimed for re-establishing national border controls, and that no other reasons can be invoked, such as massive migrant influxes, which would lend themselves to all kinds of random interpretations. I would add, moreover, that it is important for the Commission to continue to be the main player when it comes to defining the measures to be adopted in "exceptional circumstances".

Yves Pascouau also explains in a clear, cogent and comprehensive manner how the European dynamic triggered by the migration issue is coming up against problems similar to those that can be detected in the context of Schengen cooperation. The development of mutual mistrust among member states has *de facto* had a negative impact on Romanian and Bulgarian membership of the Schengen area, on representation agreements among member states over visa issuing procedures, and on the "Dublin" system relating to share out of responsibilities among member states as regards the distribution and treatment of asylum seekers' demands.

In this connection, we may welcome proposals aiming to set up a new "common European asylum system", which is already two years late on account of differences among the member states... It is indeed crucial for member states' positions to move towards convergence in this area, because as long as the number of applications for asylum and, above all, the acceptance rate for those applications, are so different from one country to the next, we are going to be seeing very strong tension in connection with the monitoring of the Schengen Area's external borders.

Despite the existence of signals betraying a far from negligible level of mutual mistrust, Yves Pascouau concludes by highlighting the fact that there are also several good reasons for hoping that the integrity of the area of free movement will be maintained thanks to the positions held by the European institutions, the interaction among which will decide on any improvements that may need to be made to it.

In identifying both the main issues in the debate on solidarity in the Schengen area and the guidelines to be pursued if we are to come out of it on top, Yves Pascouau's Policy Paper also gives us good reason to hope that this major step in the construction of Europe will be safeguarded for the benefit of the millions of European citizens who enjoy a freedom of movement at once so unprecedented and so precious on a daily basis.

António Vitorino, President of Notre Europe

Introduction

With the fall of the Egyptian and Tunisian dictatorships in spring 2011 came new aspirations in terms of democracy and freedom throughout the whole Arab region. The hopes of the peoples have not, however, received the welcome they deserve from the European Union and from its Member States. Indeed, and with the exception of a communication from the EU's High Representative, Catherine Ashton, acknowledging the events and the prospects they offered[1], reaction at European level was instead characterised by security concerns.

More specifically, faced with the arrival of several thousands of Tunisians on the Italian shores of Lampedusa - a reflection of newly-acquired freedom - the response from Member States and from the European Union was to raise the external border of the Schengen Area as a defence against them. As Cecilia Malmström, European Commissioner in charge of migratory issues would later put it, the response was inadequate[2].

The events at Lampedusa not only revealed a 'protective reflex' but also highlighted the need for solidarity. Firstly, in relation to third countries that had to manage the internal revolutions and the movement of people affecting the region. In this case, EU support was strong and decisive insofar as it allowed Tunisia and Egypt to manage the situation and to assure the protection of several hundred thousand people fleeing Libya[3]. Secondly, in relation to Member States facing the sudden arrival of a large number of prospective immigrants. The Italian authorities were fast to call on the EU and its partners for support, but to no real avail. The European Commission reminded Italy that it simply needed to use the already available funds and that additional aid could be made available as necessary[4]. As for the Member States, they did not consider that the arrival of approximately 15,000 Tunisians on the Italian coasts was so insurmountable that it required the application of specific procedures.

Feeling ignored, the Italian authorities therefore made the decision to issue residence permits along with travel permits to the 'Tunisians' that had arrived in Lampedusa so that they could travel within the Schengen area and go to France in particular. This decision, whose legality in relation to the Schengen rules is questionable, sparked off a reaction from French authorities who temporarily intensified patrols on the internal borders of the Schengen area.

Although this episode may seem anecdotal insofar as it only concerned a limited number of persons[5], it sparked off a chain of reactions that called into question the principle of solidarity between Member States. In reality, this episode could simply be just one of the many facets of a phenomenon affecting the area of free movement and taking the shape of the steady erosion of mutual trust. This phenomenon does not just lead to weaker solidarity, it could threaten the maintenance and the existence of the area of free movement.

The objective of this Policy Paper is to highlight this development. Firstly, it addresses the issue of solidarity in the context of the migration policy and it recalls the fact that mutual trust constitutes a structural element of the Schengen area (Part 1). Secondly, it underscores the fact that the proposals adopted within the framework of 'Schengen Governance' in response to the Arab Spring carry the seeds of mutual mistrust that threatens the area of free movement (Part 2). It also emphasises that other fields of the Schengen acquis are showing signs of contamination (Part 3). Lastly, and despite existing signs of a sometimes large dose of mutual mistrust, the Policy Paper points out that there are also reasons to hope that the area of free movement will be kept in its current state (Part 4).

1. Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', COM(2011) 200 final of 8.3.2011.
2. During an event entitled 'One Passport, one People?' organised by FutureLab Europe in collaboration with the European Policy Centre, Cecilia Malmström indicated: 'It's easy to feel depressed about today's EU', citing as reasons the euro crisis, unemployment, lack of trust in our leaders and politicians, rising xenophobia and populism, protectionism, calls to close our borders and our inadequate response to the 'Arab Spring'.
3. See Y. Pascouau, 'Arab Spring and Migration: Will the New Global Approach to Migration and Mobility Respond to the Challenges?' in S. Biscop, R. Balfour & M. Emerson, *An Arab Springboard for EU Foreign Policy?*, Academia Press, 2012.
4. See 'Immigration flows - Tunisia situation', Cecilia Malmström, EP Plenary Session, Strasbourg, 15 February 2011, SPEECH/11/106.
5. According to Agence Europe, approximately 60,000 people arrived in Lampedusa and Sicily after the start of the 'Arab Spring'. The article indicates that the number of people arriving on Italian coasts has dropped significantly insofar as 709 people were intercepted during the first quarter of 2012. Agence Europe No. 10612, Friday 11 May 2012.

Part 1 - Solidarity and mutual trust in the context of the EU migration policy

Solidarity is a founding and functional element of the European Union. Founding, because it appears obvious that a Union of States cannot exist without solidarity between its partners. Functional, insofar as this principle of solidarity, which the Member States guarantee to respect[6], concerns all EU actions, both internal and external[7]. Solidarity and mutual trust are the founding and structural elements of the migration policy (1.1) the expression of which can be found in many tangible achievements (1.2).

1.1. Founding and structural elements of the migration policy

Although the principle of solidarity provides the foundations and structures for the internal and external dimension of EU action, migration policy benefits from 'preferential treatment' with regards to this principle. Two provisions of the Treaty on the Functioning of the European Union (TFEU) explicitly refer to this.

Article 67, which defines the objectives of migration policy, indicates that it is based on solidarity[8]. Article 80 specifies that the policies of asylum, immigration as well as border controls and their implementation are 'governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States'.

These two provisions are the reflection of a dual reality. Article 80 is a reminder that in an area of free movement, all Member States are not 'equal' when faced with migration phenomena. Indeed, some carry out more decisive action in the field of external border control whereas others have to manage an ever greater number of requests, especially for international protection. Also, Article 80 makes it possible to organise financial or operational solidarity when it becomes necessary.

While recalling the fact that solidarity is the cornerstone of migration policy, Article 67 echoes the very origins of cooperation in the field of migration, and in so doing recalls the conditions for its maintenance. The objective of establishing an area of free movement with no internal border controls implies adopting common rules in the field of external border management, and of immigration and asylum policy. This objective however, can only be achieved if two factors are present; solidarity, i.e. the ability to adopt common rules and to apply them correctly, and mutual trust, i.e. the certainty that the partner will apply the rules effectively. In the context of migration policy, mutual trust precedes and accompanies joint action.

It is precisely mutual trust that is the basis of Schengen cooperation. For example, France and Germany considered that external border controls carried out by each partner were sufficient and similar enough to accept the removal of controls at the shared 'internal' borders between the two States. Thus, there was no reason for France to doubt the controls carried out by the German authorities and, consequently, a person accepted to move around Germany was also lawfully able to do so in France, and *vice versa*.

It was on this basis that common action was possible. The two partners first of all signed the Saarbrücken Agreement before entering into Schengen cooperation with the Benelux countries through the Schengen Agreement in 1985 and the Convention implementing the agreement in 1990. Mutual trust also had to be strengthened by adopting accompanying measures and policies in the field of visas, asylum, return procedures, criminal judicial cooperation or computerised systems such as the Schengen Information System (SIS).

A reading of the 1990 Convention Implementing the Schengen Agreement, whose content would be included in the Schengen Borders Code adopted by the European Parliament and the Council[9], bears witness to an

6. Especially on the grounds of the principle of loyal cooperation laid down in Article 4(3) TEU.
7. In this respect, Article 21 TEU indicates that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world : democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law'.
8. Article 67, 'It [the European Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.
9. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Official Journal of the European Union, L 105, 13.4.2006.

extremely high level of mutual trust between the partners. In this way, the reintroduction of internal border controls can only take place 'where there is a serious threat to public policy or internal security'. In other terms, it is not envisaged that a partner can show signs of failure in controlling external borders justifying the reintroduction of controls at the common internal border. Only when serious events happen, such as the shooting on the Norwegian island of Utoya during the summer of 2011, or the organisation of political or sporting events such as football championships or a meeting of the G20, can the temporary reintroduction of internal border controls in the Schengen area be justified.

In short, Schengen cooperation lays down the principle that would later be included in the field of migration policy according to which, the action of a Member State is not just restricted to this State but applies to all partners involved in this cooperation. The obligation to control entry to the territory and the decision to accept the entry and the stay of a person has consequences on the other partners due to the principle of freedom of movement and the absence of internal border controls. In substance, Article 67 TFEU recalls that the common policy on asylum, immigration and external border control is based on solidarity in that the action of one State applies to all the partners.

Furthermore, the system can only function if mutual trust is preserved and maintained to a high degree[10]. This involves two types of solidarity, which are respect for the obligation of loyal cooperation in applying the common rules and the implementation of operational and financial support mechanisms.

1.2. Solidarity mechanisms in the field of migration policy

The inequality of the Member States faced with migratory phenomena creates an 'asymmetry' as Yves Bertoncini puts it[11]. Several solidarity mechanisms have therefore been adopted in order to remedy this situation.

Financial support is the first expression of this tangible solidarity between Member States. Four European funds were thus created in order to provide financial support to States, in proportion to their exposure to migration flows. These funds are the European External Borders Fund, the European Refugee Fund, the European Integration Fund and the European Return Fund.

Solidarity is also expressed through the operational implementation of the policy and more precisely in the area of external border management. The European Agency for the Management of Operational Cooperation at the External Borders (better known as Frontex) coordinates external border control operations and can, as part of its missions, provide operational assistance to Member States facing strong migratory pressure. This assistance has for example led to the coordination and the funding of joint sea patrol operations ('Operation Hermes' off the Italian coast in 2011). The agency can also send Rapid Border Intervention Teams also known as 'RABIT'. These teams constitute a rapid intervention reserve, made up of national border guards. They are deployed by Frontex at the request of a Member State confronted with a mass influx of third-country nationals trying to make irregular entry into the territory. Members of the RABIT teams are authorised, under the responsibility of the Member State hosting the intervention, to exercise all necessary competences in order to carry out surveillance of the external borders. In other terms, the national agents seconded to the territory of another Member State are authorised to exercise elements of border control that are normally carried out uniquely by national agents. These European teams successfully went into action in November 2010 when Greece requested assistance in order to better control the migratory flows at its common border with Turkey.

The field of asylum is also concerned by solidarity mechanisms. This is the case, for example, for what is called the Temporary Protection Directive. Adopted in 2001, this directive introduces special protection in the case of a mass influx of displaced persons and strikes a balance between the efforts made by Member States in managing these emergency situations. Within the meaning of the directive, temporary protection must be understood as an exceptional scheme providing immediate and temporary protection in the case of

10. On the issue of mutual trust see also H. Battjes, E. Brouwer, P. de Morree and J. Ouwerkerk, 'The Principle of Mutual Trust in European Asylum, Migration and Criminal Law', Meijers Committee, FORUM Institute for Multicultural affairs, Utrecht, 2011.
11. Y. Bertoncini, 'Migrants, 'Schengen area' and European solidarity', *Tribune - Notre Europe's Viewpoint*, June 2011.

a real or imminent mass influx of displaced persons from third countries and who cannot return to their country of origin in safe and durable conditions because of the situation prevailing in the country.

All these solidarity mechanisms have been adopted over the past ten years, as part of the progressive Europeanisation of the management of migratory flows. They make it possible to restore a sort of balance between Member States and consequently to strengthen mutual trust.

However, the observation of current events at European and national level shows some signs that may create the conditions for erosion of the principle of mutual trust.

Part 2 - The Schengen Area threatened by mutual mistrust

The events in Lampedusa that followed the Arab Spring have crystallised attention and highlighted certain weaknesses in mutual trust between the Member States (2.1). That being said, these weaknesses are deep-rooted as they do not only concern relations between two or more Member States, but more fundamentally Schengen cooperation (2.2).

2.1. The 'Arab Spring' as a revealing factor

From March 2011, the arrival of several thousand Tunisian nationals on the Italian shores of Lampedusa sparked off a chain of reactions that were excessive in every respect. Although the verbal blunders such as that of evoking the risk of a 'human tsunami' should be regarded as 'petty politics', national actions and European responses, however, created the conditions to call the Schengen system and its philosophy into question.

First of all, Italian and then French decisions adopted in reaction to the arrival of migrants in Europe raised serious issues of compatibility with EU law. Whether it concerned the Italian authorities' issuance of residence permits accompanied by a travel permit[12] to persons whose situation comes under the humanitarian clause[13], or France's reaction leading to increased controls in the Franco-Italian border area and to the blockage of a train coming from Italy[14], the legality of national measures is questionable[15].

This episode would be just a distant memory today, if it had not been exploited by the Italian and French presidents. During a press conference organised on 26 April 2011, Silvio Berlusconi and Nicolas Sarkozy circumvented the issue of their responsibility and shifted the debate onto European level. More precisely, they announced that they were sending a joint letter addressed to both the European Council President Herman Van Rompuy and to the European Commission President José Manuel Barroso, requesting the development of a 'strengthened governance of the Schengen area'. This should include changes to the Schengen evaluation mechanism and to the conditions allowing the reintroduction of internal border controls.

Although there was no real emergency really justifying it, apart from debates on deficiencies in controls and the Greek-Turkish border, the response from the President of the European Commission was given... just three days later. In a single paragraph, the letter validates both options. Although it is true, as Mr Barroso indicates,

12. See also, B. Nascimbene and A. Di Pascale, 'The 'Arab Spring' and the Extraordinary Influx of People who Arrived in Italy from North Africa', *European Journal of Migration and Law*, 2011, pp. 341-360. The European Commission recently adopted guidelines on the coherent implementation of the Schengen acquis. In the paragraph on the issuance of residence permits and travel documents to third country nationals, it indicates as an echo to the situation encountered in Italy, 'If a Member State decides to issue residence permits and has the choice amongst different types of residence permits in accordance with its national legislation, it should opt for issuing residence permits or provisional residence permits that are not equivalent to a short stay visa if the migrants do not meet the conditions for travelling within the Schengen area', Communication from the Commission to the European Parliament and the Council, 'Biannual report on the functioning of the Schengen Area (1 November 2011 - 30 April 2012)', COM(2012)230 final, 16.5.2012.
13. In this respect, see Y. Pascouau, 'Schengen area under pressure: controversial responses and worrying signs', *EPC Commentary*, 3 May 2011.
14. See for example, S. Carrera, E. Guild, M. Merlino and J. Parkin, 'A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair', *CEPS*, April 2011.
15. The statement made by Commissioner C. Malmström on behalf of the European Commission, indicating that only the spirit of the Schengen acquis in this particular case had not been totally respected by France and Italy, is not to our mind, irrefutable evidence of the legality of national measures, see 'Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis', MEMO/11/538, 25 July 2011.

that the issue of evaluation was under review, it cannot be assumed that the President of the European Commission intended to reintroduce borders as an element to strengthen 'Schengen governance'. Quite the contrary, a report from the European Commission dated October 2010 deemed the existing legal framework sufficient and instead highlighted the Commission's concerns about the reintroduction or the existence of checks observed at certain internal borders[16].

By giving a rapid and positive response to the requests of the two Member States, Mr Barroso drove the issue of 'Schengen governance' to the top of the political agenda and forcedly set the 'Community machine' in motion. Between May and September 2011, 'Schengen governance' was the subject of Commission communications (May), conclusions by the Justice and Home Affairs Council and then by the European Council (June), a European Parliament resolution (July) and legislative proposals by the Commission (September).

Nevertheless, by launching the process to revise existing rules with a view to enlarging criteria to reintroduce internal border controls, the Commission has paved the way for the weakening of mutual trust and solidarity in parallel. In other terms, this validates the assumption that a partner can fail in its mission of external border control and endanger the public policy of its neighbours. If this happens, and in accordance with the arrangements to be defined, the solution lies in the reintroduction of internal border controls. If mutual trust is eroded, solidarity is disregarded as the ultimate solution available for 'virtuous' States consists in retreating behind their borders.

Behind the discourse calling for changes to Schengen precisely to save cooperation, lies hidden another reality, that of foundations cracking and progressively revealing growing signs of mutual mistrust.

2.2. The Schengen Governance Package as an extension

The Schengen Governance Package is based on a communication and two legislative proposals. The first proposal concerns enlarging criteria allowing the reintroduction of internal border controls (2.2.1). The second aims to change the Schengen evaluation mechanism which ensures the application of Schengen rules by Member States (2.2.2).

2.2.1. The reintroduction of internal border controls

Once the prospect of changing the rules was acquired, the issue of how to reintroduce internal border controls still remained. This mainly concerned questioning the new criteria allowing the reintroduction of controls and the relevant procedure. The options discussed are not neutral when examined from the viewpoint of mutual trust and solidarity.

Which criteria?

The Franco-Italian letters and that of the President of the Commission mentioned the possibility of reintroducing internal border controls in the case of exceptional difficulties in the management of external borders. There was wide margin for interpretation and three uncertainties remained.

The first concerned the intense difficulties encountered by the Member States in their obligation to control external borders. The Commission proposed a solution based on persistent serious deficiencies concerning external border control[17]. The compromise accepted by the Council is more limiting. In fact, these persistent serious deficiencies must jeopardise, in exceptional circumstances, the overall functioning of the area without internal border control[18]. The Council therefore added a criterion.

16. Report from the Commission to the European Parliament and the Council on the application of title III (Internal Borders) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), COM(2010) 554 final, 13.10.2010.
17 See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011) 560 final of 16.9.2011.
18. The version of Article 26 of the Schengen Borders Code accepted at the Justice and Home Affairs Council of 7 and 8 June 2012 reads as follows: 'In exceptional circumstances where the overall functioning of the area without internal border controls is put at risk as a result of persistent serious deficiencies related to external border control (…) and insofar as these circumstances constitute a serious threat to public policy or internal security within the area without internal border controls or parts thereof, border control at internal borders may be reintroduced (…)', Doc. 6161/4/12, 4 June 2012.

The second issue amounted to determining whether the deficiencies encountered at external border level were enough to lead to the reintroduction of controls or whether they should be linked to a threat to public policy. The issue of maintaining a link with public policy is essential. It allows to assess the willingness to preserve the principles leading to the establishment of Schengen cooperation, but above all, it raises a substantial legal issue. Under the Treaties, exceptions to the principle of freedom of movement - set out four times - can only be based on protection of public policy. In other terms, separating the reintroduction of internal border controls from public policy raises serious legal difficulties.

Whereas several documents presented by the Member States do not always mention the link with public policy[19], the Commission's proposal as well as the Council's working documents do maintain it. In this way, the reintroduction of internal border controls must meet three requirements, i.e. be the result of a persistent and serious deficiency, jeopardise the overall functioning of the area without internal border controls and be a serious threat to public policy and internal security.

Lastly, one more point deserving to be defined is that of the exceptional nature of reintroducing controls. The European Council of June 2011 was extremely clear on this issue, indicating that the reintroduction of controls should be a last resort and on an exceptional basis. The compromise accepted by the Council in June 2012 transposes this approach. The reintroduction of border controls can only take place as a last resort and when all other support measures have not allowed the resolution of the serious threat to public policy[20].

In short, the reintroduction of internal border controls is regulated, given that it can only take place in exceptional circumstances threatening the overall functioning of the area without internal border controls due to persistent serious deficiencies related to external border control. These circumstances must, in addition, constitute a serious threat to public policy or internal security within the area without border control. Lastly, controls can only be reintroduced as a last resort when prior measures have not been effective.

The Justice and Home Affairs Council of June 2012 puts an end to the attempts made by certain Member States to separate the reintroduction of internal border controls from the notion of public policy, as was the case in the Franco-German letter of April 2012. In this letter, the Home Affairs Ministers of both States wished to be able to re-establish internal border controls in the case of 'failure by a Member State to fulfil its obligations under Schengen'.

Which procedure?

Another difficulty concerned determining the depositary of the decision-making powers. In other terms, who decides to reintroduce internal border controls? This question puts the European Commission and the Member States in opposition.

The former proposed a significant extension of its decision-making powers. In particular, it provided that the reintroduction of internal border controls would require a request from the Member States followed by the Commission's decision to accept or reject, taken in application of the comitology procedure[21]. In the same way, the Commission proposed to expand its role as regards the decision to extend border controls in emergency situations[22].

19. See for example the document sent by the Austrian, Belgian, French, German, The Netherlands, Swedish and the UK delegations entitled 'Common responses to current challenges by Member States most affected by secondary mixed migration flows', Doc. 7431/12, 9 March 2012.
20. The version of Article 26 (2) of the Schengen Borders Code accepted at the Justice and Home Affairs Council of 7 and 8 June 2012 reads as follows 'The Council may, as a last resort and as a measure to protect the common interests within the area without internal border controls, where all other measures, in particular those referred to in Article 19A(1), are incapable of effectively mitigating the serious threat identified, recommend for one or more specific Member States to decide to reintroduce border control at all or specific parts of its internal borders', Doc. 6161/4/12, 4 June 2012
21. Article 24 of the Commission's proposal.
22. Article 25 of the Commission's proposal.

The Member States opposed this proposal and largely understated the action of the Commission, whose role remained unchanged[23]. Although this option can be explained by a 'stringent' reading of the Treaty, it raises some issues.

Concerning the 'stringent' explanation, it is based on a legal requirement and a logical approach. Once it has been agreed that the criterion for reintroducing internal border controls remains linked to the threat to public policy, this falls within the exclusive competence of the Member States. This stems from Article 72 of the TFEU, which indicates that the measures adopted within the framework of implementing the area of freedom, security and justice, and therefore in the field of migration policy 'shall not affect the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

The logic then boils down to considering who, from the European Commission or from the Member States, is best suited to determine whether or not public policy is threatened? To put it crudely, is a civil servant from the European Commission working in Brussels really in the best position to assess the threat to Portuguese public policy? It would seem not. And as established case law of the Court of Justice recalls, 'nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty'[24].

The position of the Member States nevertheless raises two types of consideration. The first concerns the rigorous interpretation of the issue of enforcement powers. These are normally held by the Commission and it is only on an exceptional basis that the Council retains them. Granted, the issue concerns the public policy of Member States, but it is intrinsically linked to the freedom of movement of persons. In this context, a balance must be struck between the players so that the European Commission, without being the decision-making authority, can at least be given the power to make recommendations. There is a strong likelihood that the European Parliament will use its position as co-legislator in this case to negotiate the recognition of greater powers for the European Commission.

The second consideration is based on putting the issue of free movement of persons into perspective. Can one or should one be satisfied with this exclusivity in the decision to reintroduce internal border controls once the issue is raised as part of the implementation of a 'European' or 'common' area of freedom of movement? In other terms, it is 'national public policy' that defines the conditions for the temporary fragmentation of the European area of free movement. In reality, this raises the question of knowing whether the development of a common policy of free movement and of immigration does not in the medium term call for the definition of 'European public policy'. In this way, it would no longer be the threat to national public policy but rather the threat to European public policy that would justify the reintroduction of internal border controls. It is certain that it is a sensitive issue, particularly for Member States. Having said this, it deserves to be discussed in order to define the outline and the system of a 'European public policy' applicable in the field of freedom of movement and of the migration policy[25].

Which lessons?

It is difficult to say whether the Arab Spring constituted a reflex or a 'pretext'[26] to change the Schengen acquis. In any event, it led to the questioning of mutual trust between the Member States, and consequently, of the freedom of movement in the Schengen area.

23. See, in particular, the conclusions adopted by the Justice and Home Affairs Council of March 2012, 'Council conclusions regarding guidelines for the strengthening of political governance in the Schengen cooperation', 3151st Justice and Home Affairs Council meeting, Brussels, 8 March 2012. See also, Doc. 6161/4/12, 4 June 2012.
24. ECJ, 4 December 1974, 'Yvonne Van Duyn', aff. 41-74, Rec. 1974.
25. On this issue see, in particular, E. Néraudau, *Ordre public et droit des étrangers en Europe. La notion d'ordre public à l'aune de la construction européenne*, Bruylant, Bruxelles, 2006.
26. H. Brady, 'Saving Schengen. How to protect passport-free travel Europe', Centre for European Reform, 20 January 2012, p.33.

In the current state of negotiations, the main fears[27] on enlarging the possibility of reintroducing border controls have been allayed. On the one hand, the reintroduction of internal border controls in exceptional circumstances remains linked to the threat to public policy. On the other hand, the reintroduction of border controls can only happen as a last resort and after implementation of support measures, such as the deployment of European Border Guard Teams. In this context, support or solidarity measures precede sanction measures, i.e. the reintroduction of border controls.

The temptation to undermine the Schengen acquis by enlarging the possibility of reintroducing internal border controls has been contained. The result obtained following intense negotiations both at European Council level and at Council of Ministers level nevertheless remains fragile. Indeed, the approach that seeks to sanction States with deficiencies in their external border controls by reintroducing internal border controls or by excluding them from the Schengen area, has received certain steady support among certain players.

Charles Clarke, former British Home Secretary in charge of immigration under Tony Blair - whose country, it must be recalled, is not part of Schengen cooperation - mentioned the possibility of excluding Greece from the Schengen area if it did not fulfil its obligations under Schengen rules[28]. The French president-candidate Nicolas Sarkozy affirmed during a speech given on 11 March 2012, 'We should be able to punish, suspend or exclude from Schengen a failed State just as we can sanction a eurozone country which does not fulfil its obligations'[29].

Although the idea of excluding a State from the Schengen area might seem attractive, especially at a time of elections and creeping xenophobia, it is difficult to implement. Such a prospect would require a revision of the Treaty. In the same way, the parallel made with sanctions applicable in the eurozone is not a pleasant one as here again revision of the Treaty is necessary. Even though the provisions of the Treaty relating to the eurozone provides for a system of specific sanctions against States not complying with the rules, this is not the case for Schengen cooperation. Here, the only sanction applicable falls within the scope of the ordinary rules of procedure, i.e. a finding by the Court of Justice of failure of a Member State to fulfil its obligations under the Treaty. Although it is still legally possible to revise the Treaties, it is however, much more difficult politically as it requires the unanimous agreement of the Member States.

Having said this, the 'outbidding' that politicians are engaging in should not be overlooked. On the one hand, it endorses the idea that a punitive approach towards a failing Member State or States could be a desirable solution. On the other hand, it is likely to receive a positive response from other delegations, just as the April 2012 Franco-German letter highlights, or from senior EU officials. Consequently, there is no guarantee that the punitive approach based on sanctions and exclusion will not supersede in the short, medium or long term the requirement for solidarity. History shows that ideas once brushed aside can be born again from their ashes.

2.2.2. Strengthening of the Schengen evaluation mechanism

The problem applicable to the strengthening of the Schengen evaluation mechanism is of a different nature. Here, the issue stems from the difficulty in adopting a text whose implementation would have very significant effects on mutual trust between Member States.

27. See also a Discussion Paper entitled 'The Future of the Schengen Area', distributed under the Polish presidency before the Informal Justice and Home Affairs Council, Sopot, July 2011, where the title of the sub-sections evoked wavering trust ('Why is trust in Schengen at risk?'), and the rebuilding of confidence ('Strengthening confidence in Schengen'). See also the commentaries published by the European Policy Centre, Y. Pascouau and S. McLoughlin, 'Migratory flows from North Africa: challenges for the EU', *EPC Commentary*, March 2011; Y. Pascouau, 'Schengen area under pressure: controversial responses and worrying signs', *EPC Commentary*, May 2011; Y. Pascouau, 'Schengen area under pressure # 2: The Commission recalls the EU nature of the Schengen system', *EPC Commentary*, May 2011; Y. Pascouau, 'Internal border controls in the Schengen area: much ado about nothing?', *EPC Commentary*, June 2011.
28. 'But the EU should conduct a special review that confronts the issue of whether the Greek authorities can fulfil their responsibilities under the Schengen agreement. If such a review finds that Greece does not satisfy the criteria now being applied to would-be Schengen entrants Bulgaria and Romania, considerations should be given to expelling Greece from the free-passport zone until it is in a position to carry out its responsibilities properly.' in C. Clarke, 'The EU and Migration: A call for action', *Essays, Centre for European Reform*, 2011, p. 27.
29. Speech given by Nicolas Sarkozy, national public meeting, Villepinte (Seine-Saint-Denis), Sunday 11 March 2012.

The need to strengthen the Schengen evaluation mechanism

Within the framework of Schengen cooperation, the Executive Committee, composed of ministers in charge from each State party, created 'a Standing Committee on the Evaluation and Implementation of Schengen'[30] in September 1998. The mission of this Committee, composed of Member State representatives, was firstly to ensure that all the necessary conditions for the implementation of the Convention in a candidate State were present and secondly to ensure the correct application of the Schengen acquis by the States already applying the Convention. In this latter scenario, one of the tasks of the Committee, within the framework of visiting committees, was to evaluate external border control and surveillance.

This evaluation mechanism seemed satisfactory, particularly as it preserved the intergovernmental and sovereign nature of Schengen cooperation. On the one hand, the evaluations were carried out by peers. The European Commission participated in the work with observer status, and the European Parliament was excluded. On the other hand, visits to Member States were carried out 'in an order and at intervals' to be laid down by the Executive Committee. In other terms, on-site visits were planned.

Following the entry into force of the Amsterdam Treaty, and the integration of the Schengen acquis into the EU, the tasks carried out by the Standing Committee were transferred to a Council working group, i.e. they retained an intergovernmental nature.

From 2009, the European Commission presented a proposal[31] with two main objectives. The first was to follow the movement of the communitarisation of migration policies and to entrust the tasks formerly carried out by the Standing Committee and then the Council working group to the European Commission. The second was to strengthen evaluation methods in particular by providing for the possibility of paying unexpected visits to the external borders[32].

Although the text presented in March 2009 underwent several changes of a political or technical nature[33], the currently pending proposal pursues the same objectives. But negotiation of the proposal is complicated by a series of problems.

Political and legal problems

Two main problems affect negotiation of the text. The first problem concerns the legal basis. The issue is technical and can be summarised as follows. The European Commission's proposal is based on a provision of the Treaty that provides for the participation of the European Parliament under the co-decision procedure. Given the content and the subject of the proposal, the legal basis chosen is debatable. In fact, there exists a provision of the Treaty, introduced by the Lisbon Treaty, that specifically concerns evaluations[34]. However, the Commission has not based its proposal on this legal basis, in particular because it results in exclusion of the European Parliament from the procedure, which leads to a political problem.

Faced with this legal problem, two avenues were open: status quo, i.e. maintenance of the current legal basis with the European Parliament as co-legislator, or modification of the legal basis and exclusion of the European Parliament from the procedure. After several months of negotiations, the Justice and Home Affairs Council of

30. Decision of the Executive Committee, 16 September 1998, setting up a Standing Committee on the Evaluation and Implementation of Schengen.
31. Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis, COM(2009)102 final of 4.3.2009.
32. See, in particular, Y. Pascouau, *La politique migratoire de l'Union européenne. De Schengen à Lisbonne*, Fondation Varenne, LGDJ, 2011.
33. See, in particular, Y. Pascouau, 'The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock', *European Policy Centre, Policy Brief*, 2012.
34. See, to that effect, Y. Pascouau, 'The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock', *European Policy Centre, Policy Brief*, 2012. For a contrary opinion, S. Carrera, 'An assessment of the Commission's 2011 Schengen Governance Package. Preventing abuse by EU member states of freedom of movement?', *Centre for European Policy Studies, Paper n° 47*, 2012.

June 2012 decided to act in accordance with the opinion of its legal service and to change, with the unanimity of its members, the legal basis on which the proposal is founded[35].

This decision immediately caused an uproar among the political groups of the European Parliament. Evoking 'a step backwards' in relations between the Parliament and the Council, a 'breach of the Treaties' or even a 'declaration of war', several political groups highlighted their intention to refer this matter to the Court of Justice. In real terms, this means that once the new evaluation mechanism is adopted by the Council, the European Parliament will ask for it to be cancelled before the Court of Justice of the European Union.

The decision made by the Council to consult the European Parliament to ensure that its position will be taken into account in the broadest possible manner, will probably not suffice to calm passions. It will then be up to the Court of Justice to decide on the issue and to determine whether or not the legal basis now chosen by the Council is the right one.

This 'issue of changing the legal basis' deserves to be examined with some hindsight, for on closer examination, the responsibility of the situation belongs with both the European Commission and the Member States. The Commission, firstly, because the choice of legal basis was questionable. Refusing to alienate the European Parliament, the European executive did not wish to present a modified proposal based on a different legal basis, even though discussions and national pressures to that end were strong. In this situation, it was the Council's responsibility to do this. But the process within the Council was long and difficult. On the one hand, the Polish Presidency of the second half of 2011 did not decide on the matter, mainly due to the lack of consensus between the Member States. Consequently, the dossier was handed over to the Danish Presidency. This slowdown in procedure allowed the Rapporteur of the European Parliament to fully deal with the dossier given that without modification of the legal basis, the EP remained co-legislator. On the other hand, it appeared to be extremely complicated to obtain unanimity in order to change the legal basis. Portugal and Luxembourg had been opposed to this for quite a while. Once these countries had rallied to the cause, Romania showed its opposition to the change, just a few days before the June Council. In substance, up until the day before the JHA Council, the issue of unanimity remained pending.

These difficulties were a boon for the European Parliament. As time passed, it became more and more difficult to withdraw the matter from it. Although one might legally challenge the attitude of the European Parliament, which knew the legal problem perfectly and had done so for a long time[36], it however took full advantage of the political opportunity in order to obtain powers that the Treaty had not explicitly entrusted to it. The Parliamentary Assembly is therefore today in its role when it vilifies the Council's decision to change the legal basis with the result that it is excluded from the procedure. It remains to be seen, now, how far the reprisals of the European Parliament can go. In a best-case scenario, the Parliament could limit its refusal to cooperation in the Schengen issue, i.e. it could refuse to adopt the changes to the Schengen Borders Code in relation to reintroducing internal border controls. In a worst-case scenario, the Parliament could call into question its relationship with the Council by refusing to negotiate the Schengen issue but also other fields under the co-decision procedure. Visibly, the Parliament chose the second option. On 14 June it decided to suspend its cooperation with the Council on five dossiers[37] until a satisfactory solution is found concerning Schengen governance.

Whatever happens in this 'issue', the European Parliament must nevertheless keep in mind several elements governing its action. On the one hand, the issue of the legal basis is key in a Union built on respect for the

35. Legally, modification of the legal basis of a Commission proposal is possible with a qualified majority in the Council if the Commission accepts it, or if not, with unanimity in the Council. In the present case, the Commission did not deem it necessary to modify its proposal, thus refusing to alienate the European Parliament, which obliges the Council to obtain the unanimity of its members in order to modify the legal basis featuring in the Commission's proposal.
36. The European Parliament mentions this in the Resolution adopted on 7 July 2011. On this occasion, it stressed that 'any attempt to move away from Article 77 TFEU as the proper legal basis for all measures in this field will be considered to be a deviation from the EU Treaties, and reserves the right to use all available legal remedies if necessary': 'European Parliament Resolution of 7 July 2011 on changes to Schengen', P7_TA(2011)0336.
37. The five dossiers concern: amendment of the Schengen Borders Code; combating attacks against information systems; the European Investigation Order; budget 2013 relating to internal security and EU passenger name records.

rule of law. This in fact defines the scope of an act, its adoption procedure and the competence of the different institutions. If the institutions have a different interpretation of the choice of the legal basis, it is up to the Court of Justice, as a last resort, to resolve the issue. Increased politicisation of the debate would simply call into question this balance that guarantees the rule of law. On the other hand, the temptation to call cooperation with the Council into question finds limitations in the EU system as there is a principle of mutual sincere cooperation that applies to all these institutions[38]. In other words, suspension of cooperation with the Council could not endure without violating the principle of mutual sincere cooperation.

This episode is certainly a blow to mutual trust between the Council and the European Parliament. It is not certain however, that Schengen cooperation has received a similar blow. A small exercise in forecasting would even prove the contrary.

On the one hand, the European Parliament is reversing its decision to suspend cooperation with the Council but still intends to mark its disapproval by blocking changes to the Schengen Borders Code. The conditions for reintroducing internal border controls have not been enlarged and the current situation remains. The outcome is positive insofar as the request for a useless change has not been followed up. Firstly, the current conditions for reintroducing internal border controls are sufficient. Secondly, no follow up has been given to the request formulated by two officials who today no longer hold political office.

On the other hand, today, the Council cannot legitimately retreat on the 'Schengen Evaluation' issue. It must therefore within a short time frame, amend, and improve the mechanism. In doing so, this will lead to stronger mutual trust. The latter can only be consolidated with the implementation of an integrated (with major involvement of the European Commission) and strengthened (including unexpected visits) evaluation system of external border controls.

Ultimately, the 'issue of the legal basis' could have a positive outcome in strengthening mutual trust in the management and functioning of the Schengen area.

The theory of radioactivity

Although Schengen cooperation is based on mutual trust, it would be naïve to consider that this cooperation is, in the same way as cooperation in the field of internal security, exempt from a certain degree of mutual mistrust between Member States. The same applies to this field as it does to radioactivity. The latter exists in a natural state but it is only when its intensity increases abnormally that it becomes dangerous.

Thus, the abnormal or artificial increase in mutual mistrust in the field of Schengen cooperation undermines freedom of movement. On the one hand, the temptation to reintroduce internal border controls is stronger and the opinions/avenues to achieve this are more pressing. On the other hand, the will to accept the strengthening of mutual trust through greater integration is less pronounced. Both phenomena do not help to solidify the framework of free movement of persons - quite the opposite in fact.

Current events and the sensitive nature of issues affecting Schengen make it a 'high-priority' field of analysis. Also, the question is raised of whether other fields of migration policy are following the same trends.

Part 3 - Signs of contamination in other fields of the Schengen acquis

Migration policy is a field that is characterised by strong activity both at European and national level. In certain fields, this momentum, both legislative and operational, goes hand in hand with a phenomenon identical to that encountered in the framework of Schengen cooperation. Thus, several signs raise fears of mutual mistrust developing between the Member States in several fields linked to the area of free movement.

38. Article 13(2) TEU indicates that 'Each institution shall act within the limits of the powers conferred upon it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.

These fields touch upon Romania and Bulgaria's accession to the Schengen area (3.1), to the 'Dublin' system relative to the distribution of asylum seekers (3.2) and to representation agreements between Member States in the field of issuance of visas (3.3).

3.1. The delayed accession of Romania and Bulgaria to the Schengen area

The first sign of mistrust that is blighting Schengen cooperation concerns the refusal to accept the entry of Bulgaria and Romania into the Schengen area. Although both candidate States fully meet the conditions for accession to the area of free movement[39], several delegations are opposed to this, in particular on the grounds of corruption problems observed in these Member States.

This opposition raises two issues. The first falls under the link made between accession to the Schengen area and corruption. The latter has never been a criterion to be taken into account to determine whether a State meets the conditions required to join the Schengen area. By using the issue of corruption, States have therefore shifted debate from the technical arena (evaluation of conditions required to eliminate internal border controls with Romania and Bulgaria) to the political arena. This shift is the source of the second issue. As long as a delegation uses the argument of corruption to oppose the entry of Romania and Bulgaria into the Schengen area, their accession remains impossible, as the accession decision must be unanimously taken by Council members.

This situation therefore raises the issue of the reasons causing the political blockage. It would seem difficult, a priori, to invoke the fear of misapplication of Schengen rules insofar as the Commission and the European Parliament both recognise that Romania and Bulgaria meet the technical conditions for accession. It is therefore not on these States that the blame for mistrust should be laid. A quick glance at the Schengen map, however, provides us with an explanation. When Bulgaria enters the area of free movement, there will be territorial continuity in the Schengen area with Greece. Now, the difficulties encountered by this Member State in managing migration flows, especially at its border with Turkey, is a source of concern for several Member States[40].

Thus, the possibility of Romania and Bulgaria's accession to the Schengen area is in fact delayed because of the mistrust of certain States regarding Greece. Although Greece benefits from a support plan, it is not sufficient to allow it to restore effective controls and mutual trust. Consequently, Romanian and Bulgarian citizens are still deprived of the fundamental freedom to move in an area with no internal border controls. This situation should evolve in any case, as the European Council of 1-2 March 2012 requested that a decision concerning Romania and Bulgaria's accession to the Schengen area be adopted in September 2012.

3.2. The 'Dublin System' and the suspension clause

The European Union adopted a set of rules with a view to establishing a Common European Asylum System (CEAS). Featuring amongst these rules is the 'Dublin' regulation. This text establishes the rules applicable to determine the Member State responsible for an asylum application[41]. The Regulation lays down the principle that only one Member State is responsible for examining an asylum application. The objective is to avoid asylum seekers being sent from one country to another but also to avoid abuse of the system in the case where a single person makes several asylum applications. Although determination of the State responsible is carried out on the basis of prioritised criteria, the implementation of these rules, in practice, makes the State in which the asylum seeker has entered the common territory bear the responsibility.

39. See, in particular, the report by the European deputy Carlos Coelho in which the following is indicated: 'At this moment, both Romania and Bulgaria have proved that they are sufficiently prepared to apply all the provisions of the Schengen acquis in a satisfactory manner', 'Report on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania', A7-0185/2011, 4 May 2011.
40. See 'Note from the Belgian, the French, the German, The Netherlands, the Austrian, the Swedish and the UK delegations on Common responses to current challenges by Member States most affected by secondary mixed migration flows', Doc. 7431/12, 9 March 2012.
41. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union, L 50 of 25.2.2003.

For example, a person enters through Poland and lodges an application for asylum in France. When the application is lodged, the French authorities will try to determine which State is responsible for the asylum application. In most cases, it is the State through which the asylum seeker entered that is responsible, in this case, Poland. This system serves to attribute the responsibility of examining the asylum application to the States situated along the periphery of the area of free movement.

However, this system of distributing asylum seekers has shown its limits, particularly for peripheral States which, in addition to receiving a large number of asylum seekers, have an 'asylum system' with major deficiencies. This is precisely the case of Greece, whose asylum system does not allow it to receive asylum seekers or to process the applications in compliance with EU law and the European Convention on Human Rights, as demonstrated by the European Court of Human Rights in the M.S.S. case[42], and by the Court of Justice of the European Union, in the N.S. case[43].

Faced with these difficulties, which can lead to violation of EU law and of human rights, the European Commission had proposed to establish a mechanism allowing the suspension of the transfer of asylum seekers towards these Member States. More precisely, the Commission proposed that 'when a Member State is faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants for international protection in accordance with this Regulation could add to that burden, that Member State may request that such transfers be suspended'.

The Commission's proposal was not accepted by the Member States. Certain delegations highlighted, in particular, that implementation of the suspension clause would result in encouraging asylum seekers and migrants to enter Europe through the State in difficulty. In this way, these persons would be assured that they could lodge an asylum application in a Member State other than that through which they entered, as the Dublin mechanism would be suspended.

Instead of a suspension mechanism, the Member States proposed the introduction of an early warning system. It provides that when a problem in the functioning of the asylum system of a State jeopardises the application of the Dublin Regulation, corrective mechanisms must be put in place. The main objective of this mechanism is to avoid risks of dysfunction rather than to deal with the consequences. In any event, this mechanism does not provide for suspension of the Dublin mechanism[44].

At first sight, the refusal to establish a suspension mechanism between the Member States could be considered as the expression of a lack of solidarity between partners. This assertion must however be qualified insofar as there is now the suspension obligation resulting from the case law of the European Court of Human Rights and of the Court of Justice[45]. The two courts now compel Member States not to transfer asylum seekers when they risk inhuman or degrading treatment in the country of transfer. Once the obligation established by case law is formulated, it could appear unnecessary to try to include it in secondary legislation.

Although the issue of suspension of Dublin transfers is now resolved, this is not the case for the issue relative to relocation mechanisms. These would aim to redistribute beneficiaries of international protection among the Member States. For example, when a Member State has a large number of refugees on its territory, these refugees could be 'relocated' on the territory of another Member State as a token of solidarity and to free up the protection systems of Member States receiving large numbers of refugees or beneficiaries of subsidiary protection. Here again, however, the Member States refuse to be constrained by such a mechanism. There is a relocation mechanism concerning Malta, but this mechanism only functions on a voluntary basis.

42. ECHR, 21 January 2011, 'M.S.S. v Belgium and Greece'.
43. ECJ, 21 December 2011, 'N.S. v Secretary of State of the Home Department', C-411/10.
44. See S. Peers, 'The revised 'Dublin' rules on responsibility for asylum seekers: the Council's failure to fix a broken system', Statewatch Analysis, April 2012.
45. On the M.S.S. case, see, in particular, F. Maiani and E. Néraudau, 'L'arrêt M.S.S./Grèce et Belgique de la Cour EDH du 21 janvier 2011 - De la détermination de l'Etat responsable selon Dublin à la responsabilité des Etats membres en matière de protection des droits fondamentaux', *Revue du droit des étrangers*, 2011.

Solidarity among Member States does not seem to be a priority in asylum policy. The suspension mechanism for the transfers of asylum seekers only exists under the constraint of European jurisdictions and relocation still remains a remote project. The low level of solidarity in the field of asylum fuels the development of the 'every man for himself' rule, and consequently mutual mistrust.

3.3. Suspension of visa representation agreements

The field of visa policy is the source of interesting forms of cooperation between Member States as they do not have consular services in every country in the world. When a third-country national wishes to obtain a visa for a Member State that does not have a consular service in the applicant's country of origin, s/he must in practice go to the nearest neighbouring third country in which the Member State has established a consular service. In order to avoid these sometimes long and costly procedures, the Member States have signed bilateral agreements through which a Member State with a consular service in a third country accepts on behalf of another Member State to process the visa application and issue the visa once the application has been accepted.

France, which has the most extensive consular network in the world[46], has signed several agreements of this type with its European partners. At the end of 2011, France announced that from 1 January 2012 it would terminate a representation agreement signed with Denmark. The end of the cooperation is based on France's impossibility, under Danish legislation, to refuse to issue a visa. In other terms, the French authorities are only authorised to issue visas and cannot be a substitute for the Danish authorities and refuse to issue a visa even if the Danish authorities would have accepted. In a press release dated 4 April 2012, the Danish Foreign Minister mentioned that the representation agreements with France, but also with Germany and Austria, remain suspended or terminated[47].

While this situation creates major problems for third-country nationals who require a visa in order to go to Denmark, it also shows a lack of mutual trust between the European partners. In fact, the reason for the breakdown lies in the impossibility for a delivering State to refuse the issuance of a visa, when the destination State has accepted. The will to preserve a veto power demonstrates that a Member State may have no confidence in the decision made by another. It could be a further sign of mistrust between Member States.

These examples reveal how mutual trust has been undermined to give way to mutual mistrust. Although these signs are reasons to fear a weakening in the freedom of movement, are they irremediable? Nothing could be less certain insofar as there are reasons to hope that the free movement of persons will not be repeatedly infringed but can instead be preserved and guaranteed by the EU institutions.

Part 4 - Reasons not to lose hope: the institutions taking responsibility

The area of free movement has been put under pressure in recent months, sometimes in an extremely violent way and without joint consultation as the last letter from the French and German Home Ministers has shown. For all this, should we fear that the principle of free movement is being threatened?

The more pessimistic among us will recall that for several years now, freedom of movement, particularly that of European citizens, has been repeatedly attacked by Member States. While the Metock case, judged by the Court of Justice in 2008, allowed certain Member States, in this case Ireland and Denmark, to express their willingness to call into question the acquis in the area of freedom of movement[48], several other Member States

46. Y. Tavernier, 'Les services des visas, parents pauvres des Affaires étrangères', French National Assembly, information report No 1803, 1999.
47. http://um.dk/en/news/newsdisplaypage/?newsID=5BC5B233-62F3-4223-8917-CF75026293B2
48. The Metock case concerned the right of residence for family members of EU citizens. The Court of Justice, opting for an extensive interpretation, indicated that the right of residence for family members of a citizen of the European Union must be guaranteed, whether or not the person had previously resided lawfully in another Member State, and whether or not the person entered that Member State before or after the union. The lack of criteria concerning lawful residence was a main source of discontent among Member States. ECJ, 25 July 2008, 'Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform', case C-127/08.

followed in their footsteps for different reasons. This was the case in 2010 when France criticised the freedom of movement benefiting Roma people. In 2011, the Netherlands raised the possibility of sending Polish workers who were unemployed back to their country. Recently, in May 2012, the British Secretary of State indicated that the United Kingdom was examining the possibility of limiting freedom of movement for European workers, especially Greeks, in the case of a collapse of the eurozone. These elements, when aligned, show that a 'negative coalition' of the Member States could press for changes to the rules relating to freedom of movement of EU citizens. Recent proposals to change Schengen rules could therefore become part of a general movement of mistrust, which, if we need reminding, moves forward in fits and starts and is more often than not dictated by national electoral agendas.

The more optimistic among us will, on the contrary, highlight the fact that freedom of movement, as a major achievement of European integration, is not threatened. While this assertion corresponds to reality, in our view, it is nevertheless important to emphasise that preserving freedom of movement implies that each institutional player contributes. Furthermore, analysis of the role of players in the 'Schengen governance' framework shows that balances should be preserved.

4.1. The Council: enemy of freedom of movement?

At first sight, the Council, through the Member States, seems to be the institution that is most inclined to infringe on freedom of movement. The joint letter sent by Claude Guéant and Hans-Peter Friedrich is an eloquent example of the attempt made by certain delegations to weaken Schengen cooperation and mutual trust by forcing their national political agenda on their European partners[49].

That being the case, this type of manoeuvre, which consists in asking other delegations to approve a political approach and to transform it into a legal instrument can only come to fruition if it receives approval of a qualified majority in the Council. As it happens, the reactions shown during the Justice and Home Affairs Council of April 2012, during discussions relating to the Franco-German proposal demonstrate that the Member States are extremely divided on enlargement of the criteria to reintroduce internal border controls. Therefore, several Member States cautiously welcomed the letter from the French and German Home Affairs Ministers. Certain delegations, headed by Sweden, expressed their attachment to freedom of movement and their refusal to go any further in legislative changes. The position of certain delegations could be summed up in this way: 'Schengen is not the problem but the solution'.

In addition, the result of the French presidential elections on 6 May 2012, entrusting the role of President of the French Republic to François Hollande, will have a decisive impact on the issue of 'Schengen governance'. While France spent several months seeking to enlarge as far as possible the reasons for reintroducing border controls, the new President of the French Republic will most certainly join the fold of Member States concerned about preserving the principle of freedom of movement. From the role of hot-headed discussion leader, France will probably now slip into the garb of responsible peacemaker. That, in any case, is the tone of the press conference given by the new Home Affairs Minister Manuel Valls, at the end of the Justice and Home Affairs Council of 7 June 2012, during which he made clear in particular his desire to 'renew a climate of confidence and appeasement'.

In this context of protecting freedom of movement and of modifying the European political landscape, the adoption of a decision relating to the accession of Romania and Bulgaria into the Schengen area in September 2012 is a realistic prospect.

49. While the French presidential campaign led the president-candidate Nicolas Sarkozy to toughen his discourse on the theme of border reinforcement, there was nothing to indicate that a German minister could co-sign this type of letter with a French minister. On the contrary, Germany has shown a careful and responsible approach in this field. Furthermore, Guido Westerwelle, the Minister for Foreign Affairs, declared he was greatly in favour of freedom of movement. Should we see in this the isolated act on the part of the Minister for Home Affairs?

4.2. The Commission: the delicate exercise of 'damage control'

While the Commission seemed surprisingly receptive to the Franco-Italian requests following events in Lampedusa, it is not certain that it will welcome new proposals with the same fervour, such as those presented by Messrs Guéant and Friedrich. First of all, the great reluctance shown by several Member States during the Justice and Home Affairs Council of April 2012 is sufficient to justify this restraint. Moreover, it is imperative that the Commission remain focused on the ongoing negotiations. In this respect, it plays a role of 'go-between' for the Council and the European Parliament in order to guarantee that the text is adopted. Furthermore, it must ensure that the content of the proposal does not constitute a disproportionate interference to the principle of freedom of movement.

The Commission is also under pressure to achieve results. Firstly, the interruption of negotiation would be a failure for it. It is in fact in the Commission's interest to reach an agreement on the text it has presented. Failing this, it would prove that the proposal was unnecessary or that it did not convince the legislator of the importance of adopting it. Secondly, the Commission is obliged to monitor the negotiation process to limit interference to freedom of movement as much as possible. In fact, and whatever happens, the Commission will remain the institution that formally accepted to propose a change to Schengen rules. Furthermore, and so as not to appear as the 'initiator of the dismantling' of Schengen, it must be guarantor of the mechanism. This involves, on the one hand, preserving the link between reintroducing controls and a serious threat to public policy, and, on the other, recalling that any interference to freedom of movement must be as limited as possible.

4.3. The European Parliament: guarantor of freedom of movement?

In this exercise, the Commission should be able to hope for strong support from the European Parliament. In fact, the parliamentary institution clearly affirmed in July 2011, that 'on no account, can the influx of migrants and asylum seekers at external borders *per se* be considered an additional ground for the reintroduction of border controls'[50]. It also indicated that any proposal by the Commission should aim at specifying the implementation of existing provisions.

It seems obvious that the European Parliament will bring all its weight to bear in order to avoid any excessive interference of the principle of freedom of movement and that its role in negotiations will be vital. A contrary outcome would be the negative sign of the European Parliament's ability to guarantee civil liberties in an area of freedom of movement that is unequalled at international level.

Changes to the legal basis determined by the Justice and Home Affairs Council of June 2012 in the 'Schengen Evaluation Mechanism', nevertheless muddy the waters on the outcome of the Schengen Governance Package, as indicated earlier. Although it seems clear that certain parliamentary groups will strongly push for the European Parliament to introduce an action for annulment against the future evaluation mechanism, the Parliament's position in relation to changes to the Schengen Borders Code - which could waver between total blockage and feeble or full collaboration with the Council - remains much more blurred and deserves to be closely monitored.

4.4. The Court of Justice: keeper of the temple

Since the beginning of European integration, the Court of Justice has worked incessantly to preserve the balance of the Treaties and to guarantee the full implementation of the four freedoms of movement. While little demand has been placed on it in the field of migration policy, which is highly regrettable, the Court has nevertheless sketched the main thrusts of case law which, firstly, restricts the attempts to limit the rights conferred by the European Union, and secondly, champions solidarity and mutual trust as the cornerstones of freedom of movement.

50. 'European Parliament Resolution of 7 July 2011 on changes to Schengen', P7_TA(2011)0336.

Case law of the European Court of Justice has always considered freedom of movement as a principle and limits to this freedom as exceptions that must be interpreted in a restrictive manner. Nothing suggests that the Court of Justice should follow a different path regarding migration policy and the issue of reintroducing internal border controls within the EU.

On this last point, the Court also pointed out in the Melki and Abdelli case[51] that although the national authorities are still empowered to carry out identity checks in the border area between two Schengen States, the exercise of these checks would not be considered as equivalent to those carried out systematically at the borders.

The Court took a similar stance in the Chakroun case[52] concerning the justification of personal resources as part of exercising the right to family reunification. It recalls that the authorisation of family reunification is the general rule and that the Member States' right to enforce the 'sufficient resources' requirement 'must be interpreted strictly'.

Lastly, in relation to mutual trust, the Court of Justice highlighted, in a case concerning the removal of asylum seekers to Greece[53], that it is the basis for achieving the area of freedom, of security and of justice and more particularly the Common European Asylum System. In the same case, the Court recalled the importance of Article 80 TFEU which sets forth that the implementation of migration policy is governed by the principle of solidarity and fair sharing of responsibility between the Member States.

In this way the Court is successively sketching a working framework applicable to migration policy. It indicates, first of all, that the leeway preserved by the Member States in the implementation of EU law shall not have the effect of disproportionately infringing the exercise of the rights conferred on individuals. It also indicates that this policy is based on mutual trust and governed by the principle of solidarity.

Conclusion

There are many reasons to hope that the freedom of movement of persons will not be weakened due to certain circumstances. The role and the responsibility of each institution helps to limit the 'infringements' that could affect freedom of movement. In other words, the Schengen area will not explode any time soon under the impact of increasing introduction of internal border controls. And that is good news.

However, it would be irresponsible not to consider the signs of mutual mistrust surrounding Schengen and the migration policy for what they really are. Firstly, if they are to be considered as a response to the 'radioactivity' in the field of freedom of circulation, it is necessary to measure their intensity. Moreover, it is not because the Member States challenge the European Commission's intervention that mutual mistrust has reached a high level throughout the entire political field. Very often it is an institutional issue that drives reservation. For example, the ministers willingly accept to cooperate with each other but refuse to allow the Commission to look after cooperation, as in this case it is considered as an outside player. By contrast, when the intensity of mutual mistrust threatens the functioning of a policy, as is the case in the field of asylum, it is necessary to pay attention to it and to take the necessary measures to contain it, especially by showing solidarity.

Secondly, signs of mutual mistrust must be put in context along with their possible effects. While it seems today that the progressive 'dismantling' of the Schengen area is requested by a very small group of Member States, it is the underlying logic that should be given consideration as it appears to be particularly worrying. This logic is reversing over fifty years of European integration devoted to the constant quest for greater freedom of movement. For the first time in 'the history of the Community', the European Union, driven by the founding States, could choose the path towards curbing freedom. This groundswell, which is reflected in recent events, is disturbing enough for it not to be taken at face value. Freedom of movement is an invaluable good and it is our common duty to preserve it.

51. ECJ, 22 June 2010, 'Aziz Melki and Sélim Abdeli', cases C-188/10 and C-189/10.
52. ECJ, 4 March 2010, 'Rhimou Chakroun', case C-578/08.
53. ECJ, 21 December 2011, 'N.S. V Secretary of State for the Home Department', case C-411/10.

Executive Summary

Solidarity and mutual trust are the cornerstone of the Schengen area of free movement of persons and they ensure that it is upheld. They are the cornerstone because this area is based on a high level of mutual trust between partners, particularly concerning controls carried out at the entry into the common territory. They uphold it, because solidarity mechanisms, both financial and operational, offset the burden that weighs mainly on the States situated along the periphery of the area.

However, just as with many policies linked to internal security, mutual trust and solidarity are often confronted with mutual mistrust. The balance between mutual trust and mistrust could thus be compared to radioactivity. The latter exists 'in a natural state' and it is only when its intensity increases excessively that it becomes dangerous. In this way, there is a 'normal' degree of mutual mistrust in the area of free movement but its 'abnormal' or 'artificial' increase could damage the development and the maintenance of freedom of movement.

The advent of the 'Arab Spring' and the subsequent arrival of several thousands of Tunisian nationals on the shores of the Italian island of Lampedusa, was followed by several measures that resulted in a sudden increase in mutual mistrust. The request formulated by France and Italy aimed at changing the Schengen rules in order to enlarge criteria to reintroduce internal border controls and the acceptance to give substance to this, are the main symbolic elements.

This Policy Paper reviews in detail the various stages that followed this episode, but also analyses other fields linked to freedom of movement, in order to determine whether solidarity and mutual trust are giving way to growing mutual mistrust that would jeopardise the free movement of persons in the Schengen area.

Although this Paper illustrates the fact that signs of mutual mistrust are indeed tangible, their impact seems to remain limited as yet. The Policy Paper emphasises, however, that maintenance of freedom of movement is not yet a given, and that its preservation requires that the European institutions - Council, Commission, European Parliament and Court of Justice - act in their official capacity in order to ensure its protection. To that effect, the Policy Paper reminds us that 'Freedom of movement is an invaluable good and it is our common duty to preserve it'.

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