Belgium - Non-paper Schengen

1. Introduction

The Schengen area is one of the most successful, tangible achievements of the European integration process. Its well-functioning grants hundreds of millions of European citizens and third-country nationals a right to stay, to move freely in an area without border controls and constitutes a prerequisite for the good functioning of the Internal Market.

In recent years, Schengen has been confronted with a number of challenges of different nature, putting its functioning at risk. It is unmistakably clear that an area without border controls can only be safeguarded when the Schengen acquis in all its aspects[1] and the Dublin acquis are adapted to such challenges, properly applied and enforced in accordance with fundamental rights and international obligations. Deficiencies in one of those policies affect the mutual trust that is needed among the Member States and could eventually lead to the reintroduction of the controls at the internal borders, putting the whole Schengen project at stake.

Belgium, as one of the Union's founding fathers, with its open economy and its central geography, has always been one of the greatest advocates of Schengen. We therefore welcome the initiative by the European Commission to update the Schengen Strategy and to involve all relevant stakeholders in this exercise. Based on the fruitful discussions of the second Ministerial Schengen Forum, Belgium wishes to share its views and thoughts on how to make Schengen more resilient and fit to face the challenges of the 21st century. This non-paper focuses on the three pillars to make Schengen more robust, on the governance of Schengen and on the rules for introducing internal border controls.

2. Towards a more robust Schengen

a) Reinforcing the external borders

A necessary condition to preserve an area without internal borders, is to know who enters and who leaves this area. The Schengen Borders Code stipulates very clearly that there should be a systematic check of all passengers entering the EU, whether they are third-country nationals or EU-citizens. It is not acceptable that 20% of the persons crossing the external border is not checked, or not checked correctly[2]. There lies a heavy responsibility on all Members States, as we all have external land, air or sea borders. Many initiatives, such as the Smart Borders project, the reinforcement of the mandate of the European Border and Coast Guard Agency or the recent proposal on the pre-entry screening of third-country nationals are useful instruments to support us in managing the external borders.

It is of utmost importance that the Smart Borders project and the interoperability of the IT-systems succeed in due time. Its implementation should therefore be closely monitored so as

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[1] A common policy on external borders and on internal border controls, visa, return and readmission, cross-border police cooperation, judicial cooperation and data protection.

[2] A Frontex report showed that in 2018, 22% of all passengers (this represents 122 million passengers) who were crossing the external borders, have not been checked against the SIS.

to detect delays and implementation problems at the earliest stage. Member States should be supported financially through EU funding. As a final compromise has been reached on the new financial instruments in the field of Justice and Home Affairs, those regulations should be implemented as a matter of priority.

The efforts to improve procedures at the external borders need an equally strong policy in the fight against criminal networks involved in migrant smuggling. This should be done by improving analysis and risk-based monitoring within the member states, by police cooperation and support for this EMPACT priority on the fight against criminal networks. The protection of the victims must also be reinforced in all its aspects.

Every support is also needed for the successful implementation of the mandate of the European Border and Coast Guard Agency, a mandate that must be exercised in full compliance with the fundamental rights of the migrants and international obligations with strong accountability and monitoring mechanisms. The establishment of the Standing Corps will contribute to a border surveillance that ensures a uniform high quality at all external borders, while at the same time local conditions are taken into account. The vulnerability assessments improve our knowledge as to where border controls should be enhanced.

However, all those initiatives and tools are only meaningful if they are implemented on the ground and applied vigorously by those responsible for the controls at the external borders. More attention should therefore be paid to monitoring and evaluation, which would enable rapid decision making for adjustments when necessary. The Strategy on Integrated Border Management should be a useful tool in this regard.

b) Compensatory measures

Police cooperation
We welcome the intention of the Commission to put forward a code on police cooperation. The codification and update of the existing legal framework will strengthen the way in which the police cooperation is organized. However, in this strive for harmonization, the local dimension of cross border police cooperation should not be forgotten. We should keep in mind that, especially in border regions, cross border police cooperation basically emerges from local or bilateral needs. It is important that Member States continue to keep the competence to develop specific partnerships with their neighboring countries.

Visa and return policy
The publication of the Commission communication on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, accompanied by an overview on the level of cooperation of third countries on readmission, should help to make the return policy more effective. In all aspects of the return policy, the EU must take into account as a guiding principle the respect of Human rights and international obligations. Belgium is looking forward to future discussions in this regard, as well as to the evaluation of the measures taken.

Migration and asylum policy
There is an undeniable link between the well-functioning of Schengen and the European migration and asylum policy. As mentioned in the Pact on Migration and Asylum, « *Schengen*

has been put under strain by difficulties in responding to changing situations at the Union's border, by gaps and loopholes, and by diverging national asylum, reception and return systems. These elements increase unauthorised movements, both of asylum seekers and of migrants who should be returned. » It is therefore of utmost importance to make progress in the CEAS files, and to conclude as soon as possible the recast of the Eurodac Regulation and the Regulation on the Asylum Agency, as well as to make progress on further initiatives related to legal migration.

The screening proposal should also contribute to making the external borders more resilient and therefore safeguarding the Schengen area, without any prejudice to the right to seek asylum and to the respect of fundamental rights.

c) Schengen Evaluation mechanism

The Schengen Evaluation mechanism needs a thorough reform. Although we value the existing mechanism, there is room for improvement. Not only there should be ways to shorten procedures, but the evaluation reports should also take better into account the specific situation of each Member State. An important element of innovation should be that, in addition to technical recommendations, the evaluations can also feed political discussions at Ministerial level.

3. Schengen Governance

Safeguarding the well-functioning of Schengen deserves periodic political discussions at Ministerial level, preferably in the framework of the JHA-Council. As mentioned above, more political considerations resulting from Schengen evaluations, but also various other evaluations and reports from the JHA Agencies, such as the Frontex vulnerability reports which provide a good picture of the application of the 'acquis', could provide the necessary input for these debates. When necessary, the Council should be able to take appropriate decisions to protect or to further adjust the functioning of Schengen.

4. Rules on internal border controls

Member States should retain the possibility to temporarily introduce controls at their internal borders to preserve the integrity of their territory against threats. As mentioned in Art. 4.2 of the Treaty on the European Union, *« [The Union] shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. »* Reintroducing internal border controls is one of the instruments that Member States have at their disposal when confronted to threats related to the public order, internal security or public health. However, those internal border controls should only be introduced as a matter of last resort according to the rules established in the Schengen Borders Code.

Over the past years, we have witnessed numerous notifications of the temporary reintroduction of controls at the internal border of Member States for various reasons. However, when assessing the situation on the ground, the internal border controls are implemented in various ways and do not always correspond to the legal definition of border

control: a systematic control of all persons crossing the border[3]. Often, the internal border controls are implemented as targeted, non-systematic checks. From a legal perspective, they cannot be replaced by targeted police checks, as their purpose remains border control. By default, Member States fall back on the internal border control rules, as there is no other legal basis provided for the type of action they perform at the internal borders.

We see therefore an opportunity to refine the concept of internal border controls and to depart from the current black-or-white situation. We should set a clear definition of what internal border control consists of and how it can be applied in practice. We believe there is space for different intermediate forms of controls at the internal borders, starting from the use of modern technologies for border surveillance, over targeted checks at the internal border to systematic checks of all persons crossing the border. A legal basis should be created at European level to underpin those types of controls that already exist in practice. Whilst introducing controls at the internal borders should remain a matter of last resort, providing different forms for the implementation could help mitigating the negative effects of such decision. In this light, we should also assess whether the current notification procedures should be amended.

Which type of internal border control is chosen will also depend on the urgency to act against the threat and the overall decision-making process. Member States should be able to introduce rapidly systematic checks at the internal borders when an acute threat occurs and an immediate response is needed. Article 28 of the Schengen Borders Code corresponds to this need and does not require further amendments. However, less intrusive forms of border control should also be possible, whether to deal with specific situations or to replace systematic checks after a certain time, if the threat remains. A discussion at European level is needed to evaluate the justification if systematic checks are maintained.

Finally, we encourage a reflection on the impact of serious deficiencies in the implementation of the asylum acquis on the well-functioning of Schengen.

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[3] This means controls on entry and exit, which consists of verifying their identity, their nationality, the authenticity of travel documents and whether the persons pose a threat to public policy, internal security, public health or international relations of any of the Member States and where applicable, whether the persons fulfill the entry conditions. The relevant databases should be consulted in this regard.