

Schengen area: abolishing the free movement of people?

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Notre Europe and the European Policy Center (EPC) chaired a debate in Brussels on 20 September 2012 focusing on Yves Pascouau's Policy Paper¹ entitled "Schengen and Solidarity: the fragile balance between mutual trust and mistrust", co-published by the two think tanks. Following an introduction from EPC Executive Director Hans Martens, four speakers illustrated their respective visions of the Schengen area before fielding questions from the audience:

- **Carlos Coelho**, member of the European Parliament, member of the Committee on Civil Liberties, Justice and Home Affairs;
- **Stefano Manservigi**, director general of the DG Home Affairs with the European Commission;
- **Yves Pascouau**, senior political analyst with the EPC ;
- **António Vitorino**, president of Notre Europe and former European commissioner for justice and home affairs.

1. The way the Schengen area is governed requires a thorough overhaul: "all agreed"

1.1. Strengthening solidarity and mutual trust

Referring to his recent *Policy Paper*, **Yves Pascouau** confirmed the need for a strong degree of solidarity and of mutual trust in the Schengen area, even if those qualities have been sorely out to the test over the past year, especially in the wake of the common letter from the French and Italian authorities. Thus the possibility of sanctioning, or even of excluding, certain member states was raised more than once, as was the possibility of reintroducing internal border controls inside the Schengen area although, in accordance with the conclusions reached by the European Council in June 2011, this must remain a measure of last resort.

The emergence of mutual mistrust among member states has had a negative impact on the discussions relating to Bulgarian and Romanian membership of the Schengen area, to the Dublin regulation on asylum seekers, and even to representation agreements in the visa field².

According to **Carlos Coelho**, a decline in mutual trust and solidarity could have a negative impact on the area of free movement, which absolutely must be safeguarded. A recent Eurobarometer survey has revealed that 60% of Europe's citizens consider freedom of movement to be one of the primary achievements made in the construction of Europe.

Thus a greater effort needs to be made towards strengthening trust and convergence, but not at the cost of calling into question the Schengen agreements. The European Parliament does not question member states' sovereign right to guarantee their own internal security, but it does want to play a

¹ Yves Pascouau, "[Schengen and solidarity: the fragile balance between mutual trust and mistrust](#)", *Policy Paper n° 55, Notre Europe-EPC, July 2012.*

² On these three interlinked issues, see Yves Pascouau's Policy Paper, *op.cit.*

full role in defining the common ground rules governing freedom of movement with the Schengen area, which is of common European interest.

1.2. Creating a fully-fledged governance of the Schengen area

In the view of **Stefano Manservigi**, it has not been a matter of mutual mistrust only among member states but also among their citizens, because in their view the system is not capable of protecting them enough. In an attempt to remedy that situation, the European Commission published a strong proposal based on three main pillars in September 2011³.

On the one hand, the Commission considers it necessary to create a system of fully-fledged governance for the Schengen area, because right now no such thing exists and this leads to individual reactions on the part of the member states in the event of a problem arising. Organising debates in the Council on a twice-yearly basis would make it possible to analyse trends in the institutions and member states in order to establish a comprehensive governance of the area of free movement.

The Commission also counsels resorting to the Community method for governing the Schengen area and, in particular, for governing the way in which the evaluation mechanisms function (*see § 1.4*).

Lastly, it is necessary to adopt a simple political mechanism governing decisions to reintroduce internal borders; moreover, this must be a measure of last resort decided on by the Commission to help a member state and to prevent contagion and mistrust from spreading. Unilateral decisions are not effective because governance of the Schengen area is not a matter of domestic security but of the management of a common asset.

1.3. Focusing on the external border issue

António Vitorino warned that in a climate marked by the reawakening of nationalism, the debate on the Schengen area actually conceals an attempt to review the ground rules governing freedom of movement.

He pointed out that, while everyone agrees on the need for a reform of the Schengen area and on the problem of its governance, it took seven years for the directive on the free movement of persons⁴, which is currently being questioned by several member states, to see the light of day in 2004. Thus it is necessary to focus on the issue of external borders rather than on internal borders and domestic security, as the European Council in June 2011 and the JHA (Justice and Home Affairs) Council in June 2012 so wisely did. This, because while cross-border threats can rarely justify the reintroduction of border controls, there is a genuine link between border control and migrant flows.

A. Vitorino pointed out, in this connection, that the issue of migrant flow control does not concern only the borders between Greece and Turkey but also, and to the same degree, those airports located in countries which continue to argue in favour of a marked strengthening of border controls in the European debate despite that fact.

³ Communication from the Commission, *Schengen governance - Strengthening the area without internal border control*, [COM\(2011\) 561 final](#), 16.09.2012; Proposal for a regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, [COM\(2011\) 559 final](#), 16.09.2012; Proposal for a regulation to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, [COM\(2011\) 560 final](#), 16.09.2012.

⁴ Directive [2004/38/CE](#) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 29.04.2004.

1.4. Developing a mechanism for an evaluation mechanism more effective than peer pressure

The four participants in the debate dwelled on the need to develop a more effective evaluation mechanism, given that the "peer-to-peer review" method has proven to be ineffectual inasmuch as it encourages member states to adopt a softer approach with one another (**A. Vitorino**).

The new mechanism must be an independent institution permitting both an in-depth evaluation of needs and threats, and rapid action. Also, while it must be possible to temporarily reintroduce border controls if any shortcomings are discovered, this must be solely a measure of last resort in the event it proves impossible to address a serious threat by any other means. The mechanism must be based on on-the-spot border controls and on the technical expertise of the Frontex agency; and it could be managed by the European Commission, while at the same time assigning a role to member states in order to strengthen solidarity and trust, but not necessarily to the European Parliament (which does not seek such a role anyway) inasmuch as it is not an executive player (**C. Coelho**).

Besides, the Commission provides in its proposal for the creation of a fully-fledged system for monitoring the Schengen evaluation mechanism along the lines of the system already in place in the euro zone. This involves radically changing the current evaluation and supervision system based on "peer-to-peer review", in order to adopt preemptive measures if such a move proves necessary. Given that the Commission is the only institution which acts in the general interest, it would logically fall to it to analyse, to control and to act in this field (**S. Manservisi**).

2. A lively debate on the legal basis applicable to the governance of the Schengen area

2.1. The choice of codecision and the clash between the Council and European Parliament

S. Manservisi explained that the European Commission feels that it is important for the European Parliament, which represents the citizens, to be brought in on decisions relating to the Schengen area, hence the Commission's choice of a legal basis involving codecision in its proposal.

C. Coelho explained that the Council has changed the legal basis envisaged in the Commission's proposal (opting for Article 70 in the TFEU instead of the initial choice of Article 77 in the TFEU). He considers that Article 70 is not the appropriate legal basis because it refers to non-legislative acts and would be unable to prevent the adoption of a European evaluation mechanism. Moreover, the Council could modify such a mechanism at will and decide of its own accord to reintroduce internal borders, something the European Parliament would like to prevent. The leeway for each member state to decide individually on the right measures to adopt must be restricted as much as possible.

2.2. The bases for an inter-institutional compromise

The debate on the legal basis applicable to the governance of the Schengen area has elicited a very strong reaction from the European Parliament, which has decided to retaliate by suspending its cooperation with the Council in five areas relating to justice and home affairs (the reform of the Schengen agreements, the struggle against cyber-crime, the European investigation order, the registration of air transport passengers and the attendant part of the budget).

In that context, **C. Coelho** argued that it is up to the Council to make an effort to achieve a compromise because it is the entity responsible for modifying the Commission's proposal. The European Parliament is prepared to submit the matter to the EUCJ if the three legal services of the

Commission, the Council and the European Parliament, which still have not managed to arrange a meeting, fail to thrash out an agreement on the issue.

Y. Pascouau proposed clarifying the specific role of each of these three institutions. The Council must view the Schengen area as a common space in which it is necessary to develop the intergovernmental method and to prevent member states from cobbling negative coalitions together. The Commission must play a mediator's role in order to prevent the broad principles underlying the governance of the Schengen area from being undermined in the clash between the European Parliament and the Council. And lastly, the European Parliament must take on board an awareness of its major political and legislative responsibility in the spheres of asylum and of migrant flows, and it must avoid the temptation to overdramatize the debates.

3. Police cooperation, reciprocity, visas and migration

3.1. Police cooperation and freedom of movement

The abolition of the third pillar relating to police and judicial cooperation in the criminal field has prompted the adoption of a tool guaranteeing a certain degree of cooperation in the police sphere, hence the TFEU's new Article 70 based on the need for a specific evaluation mechanism. At the time, border issues had already been communitarised (the Schengen area was floated after the Amsterdam Treaty). Thus as **A. Vitorino** pointed out, it was decided not to replace the specific legal basis for the evaluation of Schengen but to set up a second one. This duplication was based on the argument that, at the time, the Commission could not single-handedly shoulder the burden of evaluating police cooperation, a consideration which justified greater involvement in this field on the member states' part.

C. Coelho reminded his interlocutors that the Schengen area is not just a space for the free movement of persons but also for the sharing of information among police forces. As **S. Manservisi** also highlighted, borders are not the best place for really "catching" criminals; the struggle against crime can and must be conducted first and foremost by improving police cooperation among member states.

3.2. Reciprocity, visa and migration policy

Right now the issue of reciprocity is becoming an extremely acute problem, in particular with Canada, which no longer wishes to process applications for asylum from Roma people who see themselves as the victims of "persecution" in Europe.

According to **S. Manservisi**, given that visa policy is a common policy, it is worthwhile conducting a common debate on the possibility of reintroducing visas in certain specific circumstances. And indeed the issue is currently the subject of negotiations between the Council and the Commission.

A. Vitorino argued that it is crucial to avoid confusing the way we deal with migration, which is a worldwide phenomenon, with people's right to freedom of movement, which is a specifically European right enshrined in the treaties.

4. Presentation of an opinion poll conducted on the spot

The debate ended with a presentation of the results of an opinion poll conducted among the audience both before and during the discussion. (It was made quite clear, however, that the audience did not represent a perfect cross-section of the population).

- 61% of respondents considered it necessary to change the regulations governing Schengen, as opposed to 27% who disagreed. Of those regulations, 72% were in favour of reforming the Schengen evaluation mechanism, 4% were in favour of reintroducing internal border controls, and 24% were in favour of both rules simultaneously.
- The decision to modify the legal basis (thus excluding the European Parliament) was rejected by 71% of respondents, while 19% were in favour and 10% held no specific views on the matter.
- Some 49% of respondents considered the European Parliament's reaction to be appropriate, while 34% considered it to be "inappropriate" and 17% held no specific view on the matter.
- And lastly, 61% of respondents considered that freedom of movement is in jeopardy, while 29% did not and 10% held no specific view on the matter.