

Theory and Practice of the Schengen Evaluation Mechanism¹

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The abolition of border controls executed at the internal borders of the European Union and the Schengen Area is one of the most significant acquis with regards to the freedom of movement. However, particular occasions or events allow to temporarily reintroduce border controls at the internal common border section of two Member States. This requires a properly trained and educated personnel, technology and infrastructure.

Keywords: border traffic, border traffic control, border control, security, internal border

The primary objective of establishing the Schengen Area was to grant free movement to persons, vehicles and consignments at the joint borders of the participating Member States, moreover, to gradually phase out border control, especially including border traffic control.

Simultaneously with the phasing out of border control at the internal borders of Schengen,⁵ great emphasis should be laid on border control at the external borders of Schengen⁶ which goes beyond national interests and the security of a particular country – which carries out controls in the external border section of the Schengen Area – as in this case, it is obliged to grant the security of the whole Schengen Area through the measures taken. These measures, however, solely justify such actions which are in accordance with the Community interests, and are based on the common procedures

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⁵ Schengen internal border: joint land borders of the Schengen Member States including borders crossing flowing or standing waters, airports of the Member States for the departure and arrival of internal flights, furthermore, sea-ports, sea-river or lake ports of the Member States where regular internal ferryboat is operating.

⁶ Schengen external border: land borders of the Schengen Member States including borders crossing flowing or standing waters, sea borders and airports, seaports, sea-river or lake ports, in case these are not Schengen internal borders.

and requirements. The execution of border controls in accordance with the common principles is primarily regulated in a binding way by Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

In order to make the practical execution and effectiveness of border controls measurable according to the common principles, it is indispensable to establish such an evaluation mechanism which is able to present a fair view of the relevant Member States' activities, and of the question whether it represents added value to the security of the Schengen Area. The 'raison d'être' of this Schengen evaluation mechanism has already been drafted simultaneously with the establishment of an area without internal borders – more precisely, without Schengen internal border control. This is the clear consequence of the fact that in case there is a Community regulation regarding what and how to carry out, this execution may only be ascertained through control. In this case, the aim of the control is not to identify execution shortcomings but to identify the difference(s) compared to the execution in accordance with the relevant standards, which results in these differences and how it is possible to cease them.

In order to implement the Community measures aiming at the establishment of the Area of Freedom, Security and Justice and to maintain the mutual trust, the Executive Committee made the decision in 1998 to set up the Standing Committee on the evaluation and implementation of Schengen (hereinafter: Standing Committee).⁷ The Standing Committee is a permanent body the members of which consist of one high-level representative per Member State party to the contract. Its task system has been dual but it is not possible to draw parallels, to make distinctions between them or to equate them with each other. Both tasks have been meant to serve the security of the Schengen Area:

- the first task through inspecting whether the new candidate country for accession to the Schengen Area has met all the requirements of the implementation of the Schengen acquis – including the measures granting the phasing out of border control at the Schengen internal border, namely, the evaluation of the realisation/application has been reported;
- the second task through inspecting whether a Member State already 'functioning' as a full member of the Schengen Area has correctly implemented the Schengen acquis, i.e. the evaluation of the execution has been reported.

Based on the separated task system, it may clearly be stated that the Execution Committee attached particular importance to (and recognised the necessity of) that in order to maintain the spirit of the Schengen acquis, both the monitoring of the candidate countries before the accession to the Schengen Area and the evaluation of

⁷ The Schengen acquis – Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com-ex [98] 26 def.). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41998D0026> (Downloaded: 10.05.2018.)

the Member States' activities are required besides the mutual trust and the community responsibility beyond the representation of national interests.

The fields subject to inspections in the course of the two tasks are specified by the relevant standard, however, it should be highlighted what the evaluation of the Schengen Members States has included; it has consisted of the examination of the following fields:

- external border control and surveillance;
- police cooperation on the border territory of those states to which the convention applies;
- Schengen Information System;
- requirements of the issue of Schengen visas;
- measures against foreigners illegally staying on the territory of the country;
- mutual assistance in criminal proceedings including extraditions, too.

In order to enhance the effectiveness, the comprehensive reform of the third pillar has become indispensable – which has been intended to grant the harmonisation of the questions of cooperation between the Member States regarding justice and home affairs but its practical realisation has been less effective – which was included in the Treaty of Amsterdam that was signed on 2 October 1997 and came into force on 1 May 1999. Within five years from the entry into force, the Treaty set the establishment of the 'Area of Freedom, Security and Justice' as a central objective which has direct influence on the everyday lives of the EU citizens.⁸ The Treaty of Amsterdam incorporated, among others, the *acquis* of the Schengen Conventions, too into the framework of the European Union. While the Treaty of Maastricht had managed justice and home affairs together, the Treaty of Amsterdam managed them partly in the first, partly in the third pillar.⁹

The Schengen *acquis* was integrated in the framework of the European Union without renegotiation, thus the Standing Committee and its 1998 mandate were incorporated without amendments, except that the Standing Committee became the Schengen Evaluation Working Group (SCH-EVAL) in the Council. The evaluation of the execution of the Schengen *acquis* fully remained the exclusive competence of the Member States due to its intergovernmental nature; the European Commission took part in the evaluation as an observer.¹⁰

It is important to note that on-site visits were conducted solely in the course of quinquennials. Due to the foreknown and predictable 'nature' of the visits, the performance of the particular Member States could be extremely fluctuating.¹¹ In case a Member State aligned the implementation of the Schengen *acquis* only with the date

⁸ Balla (2013)

⁹ The Maastricht and Amsterdam Treaties. Available: www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftu-Id=FTU_1.1.3.html (Downloaded: 12.05.2018.)

¹⁰ Szabó (2017)

¹¹ Kovács (2018); Kovács (2017)

of the planned Schengen evaluation mechanism, it meant that it was not able to grant the security of the whole Schengen Area on a continuous basis. In other words, it just wanted to own/enjoy the benefits of the membership but it considered the obligations to be fulfilled according to the provisions only every five year or not even then as the Evaluation Committee drafted 'solely' recommendations in order to eliminate the deficiencies. There could be significant differences with regards to the timely realisation of the recommendations aiming to eliminate the deficiencies depending on what criteria had to be met as its prerequisites which required Community or national sources. Such a claim may also be formulated why it is required to evaluate such a Member State which is 'functioning' as a full member of the Schengen Area as the condition for accession had been – and had been subject to inspections before becoming a member – the fulfilment of the implementation criteria of the Schengen acquis and their proper application.

In order to achieve the objectives set out in the already mentioned Treaty of Amsterdam, the European Council agreed on a five-year-long legislative programme for the period until 2004 during its meeting held on 15 and 16 October 1999 in Tampere which included the tasks to be fulfilled in a time-bound way.

“According to the Tampere Conclusions, the Area of Freedom, Security and Justice – going beyond the justice and home affairs policies – includes the following policy areas:

- *free movement of persons;*
- *visa;*
- *EU external borders;*
- *Schengen Area;*
- *immigration;*
- *asylum;*
- *judicial cooperation in civil matters;*
- *EU citizenship;*
- *fundamental rights;*
- *racism and xenophobia;*
- *police and customs cooperation;*
- *prevention of crime;*
- *fight against organised crime;*
- *external relations;*
- *EU enlargement in terms of cooperation in home affairs and justice.”*¹²

It was defined at the Tampere Summit for the first time in which fields the establishment of the Area of Freedom, Security and Justice requires measures.¹³ Based on the inspection of the intervention areas, the conclusion may clearly be drawn that the free movement within the Schengen Area can partly be granted through the control of external borders.

¹² Tóth (2004) 7.

¹³ Neither the Treaty of Maastricht, nor the Treaty of Amsterdam defined what shall actually be meant by the establishment of the Area of Freedom, Security and Justice.

In this context, the need for making the evaluation more efficient regarding the proper implementation of the Schengen acquis has gradually intensified. The formulated change/amendment was embodied by the Hague Programme¹⁴ which ‘incorporated’ the strengthening of the implementation of freedom, security and justice as the so-called second action plan. The Hague Programme defined the steps in order to achieve the objective for the period between 2004 and 2009, and with regards to the chosen topic, invited the European Commission “to submit, as soon as the abolition of control at internal borders has been completed, a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, and including unannounced inspections”.¹⁵

Those factors which negatively influence the efficiency of the inspection mechanism that was shaped, is functioning and carried out in five-year-long cycles, and the recommendations regarding efficiency improvement were summarised by the Member States and the European Commission in the followings:

- the methods of the inspection mechanism are not appropriate in order to achieve the objective which was set;
- the possibility, and as a consequence, the practice of on-site evaluations without prior announcement are lacking;
- the planning and execution of inspections neglect the prioritisation based on risk analysis;
- evaluations shall be conducted by highly qualified Member States experts who have practical experiences too;
- in case of on-site visits, only the required number of experts shall be involved;
- the follow-up of the recommendations aiming at the elimination of deficiencies recognised during the evaluations and the deadlines shall be managed in a consistent way.

In order to enhance the efficiency of the implementation practice and to carry out its reform, the European Commission presented a draft proposal for a Council Decision¹⁶ which included, among others, the followings as opportunities:

- the announced on-site inspections may be conducted in the frame of one-year and more-year-long programmes;
- the content elements of the inspection may include the Member States’ answers given to the previously received survey, the on-site visits or the combination of these two procedures;

¹⁴ The Hague Programme: Strengthening freedom, security and justice in the European Union (2005/C 53/01). Available: [http://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX:52005XG0303\(01\)](http://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX:52005XG0303(01)) (Downloaded: 03.05.2018.)

¹⁵ Ibid. 1.7.1.

¹⁶ Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, Brussels, 16.09.2011 COM(2011) 559 final 2010/0312 (COD). Available: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/news/intro/docs/20110916/1_en_act_part1_v6.pdf (Downloaded: 03.05.2018.)

- the evaluation will continue to be conducted by a commission consisting of national experts, with the addition that the members of the group carrying out the on-site evaluation had the chance to nominate a coordinator who had personalised and full responsibility for the drafting of the evaluation report;
- with regards to the manpower, it was necessary to employ at most 8 persons who were required to have capabilities, solid theoretical knowledge and practical experiences in the relevant field, moreover, they had to know the principles of the on-site inspections, the procedures and the technology of the implementation;
- the inspected Member State shall express its opinions on the report within two weeks following the sending of the final report, and it shall submit an action plan on the method of the elimination of deficiencies within six weeks;
- six months later, a separate report shall be drawn up on the execution of the action plan content which examines the elimination of deficiencies task-by-task, the state of the measures taken in order to make progress, moreover, the persistence of deficiencies.

It may be considered an important criterion that in each five-year-long period, inspection had to be carried out in all Member States at least once, and in addition to this, the already mentioned, unannounced on-site visits could also take place. In addition, in case there is a serious deficiency, the European Commission had to immediately inform the Council to take exceptional measures in order to grant the security of the Schengen Area. The possibility of such measures was perceived positively by the European Parliament in its Resolution issued on 7 July 2011.¹⁷

It may clearly be stated and observed in the wording of the resolution that changes are required on each level as the security of the Schengen Area is threatened by full Member States too, and this shall be managed with the help of efficient measures.

In the European Commission Communication issued on 16 September 2011,¹⁸ it is clearly formulated that the reintroduction of internal border control shall be a measure of last resort which could only be contemplated where all other possibilities have been exhausted by the particular Member State and all other measures have proved incapable of effectively mitigating the serious threat identified. Moreover, with regards to the elimination of persistent deficiencies in the field of border management at the EU external border sections, the Commission's opinion is also expressed regarding the question, based on which aspects and procedures the 'forced' temporary reintroduction

¹⁷ European Parliament resolution of 7 July 2011 on changes to Schengen. Available: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0336+0+DOC+XML+V0//HU (Downloaded: 03.05.2018.)

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Schengen governance – strengthening the area without internal border control, Brussels, 16.09.2011 COM(2011) 561. Available: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/news/intro/docs/20110916/1_en_act_part1_v8.pdf (Downloaded: 03.05.2018.)

of border control¹⁹ shall be carried out.²⁰ The nature of the sanction against the failing Member State is clearly visible. Besides the reintroduction of border control in order to grant security, there is also a ‘paradox’ which requires a solution, namely, that the Member State concerned is further obliged to grant the right of free movement to the entitled persons – in accordance with Directive 2004/38/EC on the right of citizens of the Union, the Treaties and the Charter of Fundamental Rights, and their family members to move and reside freely within the territory of the Member States.

It is neither the ‘forced way’ of the temporary reintroduction of border control, nor the consequence of the Schengen evaluation when a Member State makes a decision based on its own risk analysis to introduce this measure. The European Commission realised the number of unilateral reintroductions – which, according to some opinions, jeopardised the integration of the Schengen Area – and recommended a common mechanism regarding the reintroduction of border control, furthermore, of course, transferred its authorisation into its own competence. To that effect, it recommended to modify the provisions of the Schengen Borders Code related to the reintroduction of internal border control, moreover, re-submitted its proposal for a regulation with regards to the reform of the Schengen evaluations according to which the Commission shall take over the conduction of the Schengen evaluations. As the result of the long professional and political discussions and inter-institutional debates, Council Regulation (EU) No. 1053/2013²¹ was published on 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen. In 2015, Member States could already be visited in the framework of the ‘new Schengen evaluation mechanism’ along the new regulations.

What kind of changes were introduced by the new Regulation? Primarily, besides the earlier described five-year-long evaluation cycles, the system of unannounced on-site visits was defined in the Regulation in order to prevent fluctuating performances. Regarding its date and time, the Member State concerned may only be informed 24 hours before the evaluation visit. This eventuality does not allow the Member State

¹⁹ Temporary reintroduction of border controls: it is a measure in the area without internal border controls in the event that a serious threat to public policy or internal security has been established in a Member State. In this case, the Member State concerned may, as an exception, reintroduce border controls at the total length or parts of its internal borders for a limited period of no more than 30 days, or for the foreseeable period of the serious threat if its duration exceeds the period of 30 days. The scope and duration of the temporary reintroduction of internal border controls shall not exceed what is strictly necessary to respond to the serious threat.

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Schengen governance – strengthening the area without internal border control, Brussels, 16.09.2011 COM(2011) 561, 12. Available: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/news/intro/docs/20110916/1_en_act_part1_v8.pdf (Downloaded: 03.05.2018.)

²¹ Council Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen. Available: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R1053&from=HU> (Downloaded: 03.05.2018.)

being under control to make significant ‘changes’ in its activities, therefore, it shall perform the tasks constantly in a balanced way and on a high level.

In addition to the unannounced visits, the new evaluation method was the survey-based evaluation. Its objective is, in a reasonable way, – taking into account also the cost-effectiveness of the evaluation – in case of those Member States which are ‘not affected’ by illegal migration and due to their geographical location, to have a realistic picture of the implementation of the Schengen norms without on-site visits. Of course, if the answers given to the survey questions do not provide the experts with clear or sufficient information, it is possible to conduct an on-site visit.

Besides the expansion of the evaluation methods – announced, unannounced on-site visits and the application of surveys – the fields affected by the Schengen evaluation mechanism have now included returns and internal border evaluation. As a result, the number of fields to be evaluated has increased to seven.

The European Commission shall draft multiannual and annual evaluation programmes for the five-year-long period.²²

The multiannual evaluation programme for the five-year-long period does not define details regarding the evaluation fields of the Member States, the intention is, however, to have the particular Member State evaluated in all fields in the given year. The result of this system could be summarised in the following way: on-site visits shall become more transparent, the planning and organisation of programmes shall become more simple but it can be a ‘difficulty’ that Member States shall be ready to welcome the evaluating experts in all fields at the same time. Preparations cannot be done as the philosophy of this new system basically excludes this definition as Member States shall constantly be prepared and ready to report on the execution of a task and its continuous preparedness.

The European Commission drafts annual evaluation programmes, too²³ which are, of course, in correlation with the multiannual programmes for the five-year-long period. The annual evaluation programme defines the time and planned locations of the on-site visits in all evaluation fields concerning the particular Member State(s). The unannounced and survey-based evaluations are also included in the annual evaluation programme but while the Member States may be informed about the time of the announced and survey-based evaluations, regarding the unannounced evaluations, exclusively the European Commission may have information.

It should also be mentioned as a positive thing that risk analysis defined as a deficiency has been included in the new evaluation mechanism and has become a high priority.²⁴ The risk analysis conducted by Frontex provides, primarily, the evaluations to be executed in the field of external border management with a point of reference but the analyses support inspections in other evaluation fields, as well. The European Commission may ask for analyses from other EU organisations, agencies and offices besides

²² Ibid. Article 5.

²³ Ibid. Article 6.

²⁴ Ibid. Article 7.

Frontex which can also be used for the Schengen evaluation. From among the organisations which could be involved in the evaluations, the European Union Agency for Law Enforcement Cooperation (Europol) which inspects the Member States' activities along the cross-border crimes basically, and the European Union Agency for Fundamental Rights (FRA) have particular significance. The latter agency was established by the European Union to assist the Union's institutions and Member States through independent, fact-based support and expertise in the field of fundamental rights.

One of the essential guarantees of the quality, efficiency and objectivity of the on-site visits is the preparedness of the experts involved in the evaluation. These experts shall have appropriate qualifications. They shall have a well-founded theoretical knowledge in the fields concerned by the evaluation mechanism and practical experiences, moreover, the thorough knowledge of the evaluation principles, methods and techniques, and proper language skills are also indispensable. Frontex 'undertook' to serve these qualification needs – it is not aiming at teaching professional knowledge and improving language skills in the framework of the one-week-long training as these are basic requirements in case of experts but places great emphasis on the implementation of the Schengen evaluation system – as it has modernised the previous training focusing on experts involved in the Schengen evaluation, and has made it capable of meeting the requirements laid down by the Regulation. In the course of the Schengen evaluation to be conducted in the field of external border management, the experts typically work in five groups:²⁵

- The first group examines the topic of risk analysis. Usually the Frontex's delegate participates in this group who, despite his/her observer status, performs his/her tasks as a full member.
- The second group examines the training and HR-related issues. The members of this subgroup, which requires special preparedness, are usually delegated by the Member States and working for local or central institutions. They are able to inspect the mentioned topic on a strategic level thanks to their thorough knowledge and approach.
- The third group examines the procedural questions which include the whole border surveillance, border traffic and aliens policing. This group requires such experts who themselves are working in the mentioned fields. (The work of those experts who have solely theoretical knowledge and know the legislations could also be useful but it is not sufficient to assist the activity of this subgroup.)
- The fourth group examines the infrastructural requirements and the availability of technical tools. The work of this subgroup seems to be the simplest. In the framework of the new evaluation mechanism it has undergone significant changes. Earlier, this subgroup had focused on the existing technical tools only, almost making an inventory of the available technology. In contrast, in the

²⁵ Szabó (2017)

new evaluation mechanism, the mentioned inventory is not made any more but experts shall express their opinions regarding the available infrastructure and technical tools based on the migration threat, the available manpower and preparedness.

- The fifth group examines the border management system exclusively on a strategic level including the implementation of the integrated border management model, the existence of a multiannual national strategy, the development and implementation of annual national programmes, financial and self-evaluation plans. Taking into account the number of expert group members, usually leading experts take part in this subgroup where much of the work is carried out by the European Commission's delegate. Considering the function of this fifth subgroup, it can be stated that the Commission is given a strong weapon with the help of which – hiding behind the Member States' experts – it is able to substantially alter the outcome of a particular Member State's Schengen evaluation.

Tasks at the Internal Borders

Following the amendment of the Schengen Borders Code proposed also by the European Commission, in case of a serious threat to the security of the Schengen Area, and due to the serious deficiencies in the implementation of the Schengen external border control, the Member State concerned has the opportunity (in two cases) or is obliged to (in one case) to temporarily reintroduce border control at its internal borders. The duration of the reintroduction can significantly differ depending on the triggering circumstances.

In the lives of the Member States' citizens, one of the most visible and greatest *acquis* related to the establishment of the Schengen Area is the free travel in connection with the freedom of movement. Through the fact that border crossings have become easier at the Member States' internal borders, such new and positive prospects have now opened up which have actually hindered the development. Just consider that there are more opportunities with regards to holiday planning, school attendance of those children who live in border areas, or even for the adult, working population if it is easy to travel from one country to another for recreational, cultural, educational or work purposes.

The Member States have gradually benefited from these opportunities following the accession to the Schengen Execution Agreement, and later on, to the mandatory Schengen *acquis*. It has several benefits that, normally, one can cross the internal borders freely, without control and quickly.

Problems occur in the operation of the system if this ordinary, everyday, almost routine system is damaged and at particular border crossing points, one of the most important rights of EU citizens (and third country nationals moving freely in the Schengen Area) will also be damaged.

There is no doubt that there are such life situations, occasions which make the reintroduction of internal border control inevitable. An important political, sports or cultural event, the investigation of a serious crime committed can require the introduction of control at given border sections which, however, cannot lead to the maintenance of such a system for several years. This counters the basic principle according to which those physical obstacles shall be abolished at the internal borders which hinder the fast traffic flow. These days, the Schengen system has arrived to the point that the so-called removal of obstacles at the internal borders is separately object to inspections (is a separate mechanism), and Member States not executing this can face serious sanctions.

But besides the question of infrastructure, there is the execution of the inspection which, normally, clearly prohibits continuous police and border police presence, and the maintenance of a constant control. Already by the early 2000s, the practice has become accepted that police control cannot be carried out at the internal borders at the same time and for more than a couple of hours at a specific location, not to mention that this control cannot be total (universal), furthermore, control methods similar to the external borders control cannot be applied even if somebody is randomly controlled based on risk analysis. Member States shall consider the reintroduction of internal border control due to these facts, and it shall be no longer than necessary and shall be executed for a particular purpose.

The execution of such a (border) control is significantly facilitated if such a policing staff is deployed who are specifically trained and perform their duties with quick, precise and professional work, and appropriate assistance based on risk analysis, causing as little disruption and annoyance for the border crossing persons as possible.

Regulatory System of the Internal Border Controls to Be Reintroduced

The abolishment of internal border control was established by the Schengen Agreement of 1985, then the Schengen Execution Agreement which came into force in 1995 and 'squandered' the Schengen Agreement. The above mentioned two Agreements restricted the abolishment of border control in particular (listed in a very short paragraph) cases and allowed the reintroduction of border control. The Schengen Borders Code adopted in 2006²⁶ tried to regulate this question in a more detailed way in the form of a Regulation. However, the system of checks and balances described in it was overwritten by life within nearly ten years, and the Regulation was amended in 2013²⁷ based on which, due to the factors threatening the general functioning of the area with-

²⁶ 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). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006R0562&from=HU> (Downloaded: 11.05.2018.)

²⁷ Regulation (EU) No. 1051/2013 of the European Parliament and of the Council of 22 October 2013 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. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R1051&from=HU> (Downloaded: 11.05.2018.)

out internal border controls, the regulation of the reintroduction of border control was seriously reformed.

The previous, extremely short provisions were replaced by a more detailed regulation which included new elements as well, for example, it introduced the possibility of reintroduction as a special measure in case serious deficiencies related to external border control can be observed.²⁸

Briefly, this new procedure allowed that in case such serious deficiencies are observed by the Schengen evaluation inspection during the monitoring of external border control, which require EU intervention, then a multi-stage procedure will be introduced. One of its elements is, for example, the deployment of European border guard teams to a particular Member State to normalise the external border control through their support, or the submission of such plans by a Member State which are based on strategic analysis and prove that the concerned Member State is able to properly handle the situation, and make a positive shift in the field of strict external border control in a short time (more precisely, it is able to operate its border control system according to the required standards).

Implicitly, this amendment did not modify the general frames of the temporary reintroduction of internal border control. In case of a serious threat jeopardising the public order or internal security of a Member State, it could, as an exception, reintroduce border control for a limited period of no more than 30 days, or for the foreseeable period of the serious threat if its duration exceeds the period of 30 days. However, this duration shall not exceed what is strictly necessary to respond to the real (serious) threat.

In case of a different – in the aforementioned special case – reintroduction, it is an essential aspect that it is not initiated by the (or by one) Member State(s) but by the Commission which makes a proposal for one or more Member States to reintroduce border control at the internal border section or part of it in order to protect the security of the Schengen Area. This new regulation allows the reintroduction of border control in four cases for a period of maximum 6 months.

The causes of the reintroduction of border control can vary widely and it is sensible that the duration of the reintroduction shall conform to it.

Border control can be reintroduced for a short period of time, for only a couple of days in case of an economic or political summit, for a medium term in case of a prestigious sports event, and for a long period of time in case of an event really threatening public security, in case the date and time of the occurrence cannot be established exactly (for example, in order to detect a real terror threat).

²⁸ Balla (2018)

As an example of the reintroduction of border control for an extremely short time, the 10-day-long set of measures at the Hungarian–Slovenian border section due to the closure of the Hungarian–Croatian border section on 17 October 2015²⁹ could be mentioned. The cause of this was to prevent a possible reverse flow of those persons towards Hungary who were involved in mass migration, and managed to get to Slovenia through Croatia.

Until 9 March 2016, the comprehensive codification of the Schengen Borders Code took place as a result of which, its new, unified text was officially published.³⁰

Prior to the codification process, almost each Member State in Europe was affected by the migration crisis of 2015 which almost invalidated the previous regulation system, primarily, from particular Member States' unique point of view. Five Member States (Austria, Germany, Denmark, Norway and Sweden) reintroduced border control at a significant part of their internal borders specifying migration crisis and the attached terror threat as their reasons, furthermore, Article 29 of the Schengen Borders Code justifying this measure. This Article lays down the rules for specific procedures which could be applied in exceptional circumstances.

According to the relevant passages of the Recommendation adopted by the Council, the concerned five Member States were proposed to introduce proportional and temporary border control for a period of 6 months first, counterbalancing the security deficit caused by the situation at the external border section of Greece. The security inspection in Greece established deficiencies in the external border control, and these deficiencies allowed illegal migrant masses arriving to Greece to travel further to other Member States of the Schengen Area through what they threatened the Member States' public order and internal security.

In the previous period, the introduced system of special measures was extended by 6 months on a further four occasions on the Council's recommendation. Thereby, through the last opportunity introduced between 12 May 2017 and 11 October 2017, the period of maximum 2 years granted in Article 29 of the Schengen Borders Code was exhausted. However, the five Member States were not satisfied with this opportunity so they exploited the 'loophole' in the Regulations currently in force, and referring to Article 25 (circumventing the opportunity of a period of maximum 6 months provided in the general frameworks of the reintroduction of internal border control), maintain border control at their internal borders.

In order to find a solution regarding the above mentioned situation, the amendment of the Schengen Borders Code's regulations related to the reintroduction of internal border control was proposed on French and German initiative at the beginning of 2017,

²⁹ A Magyarország és a Szlovén Köztársaság közti belső határon a határellenőrzés ideiglenes visszaállításáról szóló 315/2015. (X. 30.) Korm. rendelet. Available: <https://net.jogtar.hu/jogszabaly?docid=A1500315.KOR×hift=ffffff4&xtreferer=00000001.TXT> (Downloaded: 04.05.2018.)

³⁰ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0399&from=HU> (Downloaded: 04.05.2018.)

the drafting of which is still in progress. The initial position is that in case of a threat concerning public and internal security, for example, committing terrorist crimes, it shall be allowed to reintroduce border control for an indefinite period, more precisely, until such a threat has ceased.

Slightly more than half a year following the initiative, the Commission started negotiations with regards to the amendments of the Regulation, however, they were limited and those Member States' interests and proposals were taken into account which did not wholly agree with the initiative. The Commission put together a so-called 'Schengen Package' consisting of 3 themes in September 2017. One of its pillars is to revise the regulations related to the reintroduction of internal border control, and if necessary, make amendments. The final aim of this complex 'legislative package' is clearly to return to the previous Schengen acquis, namely, to ensure freedom of movement and free movement of persons again.

The consultation among the Member States with regards to the amendment of the Schengen Borders Code itself is still ongoing, causing serious debates as the Member States' views are highly divergent. According to the opponents, deadlines should be maximised; it is not acceptable that a particular (or at the same time more) Member State(s) could maintain border control for an indefinite period of time. On the one hand, because a Member State could say for whatever reason that the occurrence or series of given events or actions justify the maintenance of border control, on the other hand, because the current main reason (the movement of terror suspect persons or particular concrete actions) has already been present in Europe (Red Army Faction, ETA, Red Brigades etc.), and their appearance could be new according to some people but actually, it is not a brand new phenomenon. In addition, Member States reintroduce border control at those border sections which are not concerned by these actions or their concern has solely been seen in particular activities. Implicitly, I mean that the perpetrators of the attacks committed from 2015 in France, Belgium or Germany were basically multi-generational local residents or the perpetrators of illegal activities could cross freely (for the umpteenth time) the internal borders of the Member States. Moreover, their free movement has not been restricted or controlled at all, however, the Schengen regulations have clearly allowed their screening so far in the framework of general police controls carried out along the internal borders.

The above mentioned – most important – regulatory framework reflects that a Member State shall be prepared for a possible reintroduction of border control even in a longer term perspective, thus the drafting of the requirements, which are necessary for the preparedness, shall properly be organised and implemented. This requires a purposeful, almost strategic way of thinking and preparedness from all Member States.

Beyond the European Union regulations, all Member States have the opportunity to regulate the reintroduction of internal border control on a bilateral level, as well. With regards to Hungary, this topic is specifically governed by the Agreement with the

Republic of Austria³¹ which regulates the activities concerning the Hungarian–Austrian connection. The two countries signed the Agreement on 19 June 2014, and it regulates the system of measures to be introduced in case of a possible reintroduction of border control.

In addition to the provisions of the EU (binding) law and the international, bilateral treaties (voluntarily concluded between states), also the international law regulates the rules of the temporary reintroduction of internal border control. In Hungary, this basically derives from the Act on the State Border.³² For the purpose of its execution, a separate Government Regulation³³ was issued.

According to the provisions of the Act, in case of a planned, foreseen reintroduction of internal border control, the related fact shall be published in a Government Regulation while such a reintroduction, which is carried out immediately, due to unforeseen reasons, takes place based on the Minister's decree who is responsible for border policing (in our case the Minister of the Interior).

The Act empowers the Government to regulate the rules of the temporary reintroduction of internal border control in a Regulation. The above mentioned Government Regulation is the result of this authorisation.

The relatively short legislation considers the opportunity of a reintroduction at the whole internal border section or only at particular border sections, moreover, the opportunity to be introduced in case of internal railway vehicles, aircraft or crafts separate points.

At the internal border, the European Union's expectation is the so-called accessibility, namely, to ensure the conditions of a smooth and quick traffic flow on the transit roads. For this purpose, speed limits shall be the least possible (adjusted to the environmental infrastructural network), furthermore, the road section shall be clear on a long distance, installations, constructions cannot block the road traffic.

When roadsides, former passport control booths and barriers will be demolished, and the roadway will have a straight level, then the traffic will be seamless and even transit from the territory of one country to another without speed limit could be realised. But the same applies to the awnings at the former border crossing points which, at high speed, prevent drivers from seeing long distance of the road safely.

³¹ Magyarország Kormánya és az Osztrák Szövetségi Kormány között a közös államhatáron lévő határátkelőhelyekről és határátlépési pontokról, valamint a közúti és vízi közlekedésben a határforgalom ellenőrzésében történő együttműködésről szóló megállapodás (Magyarországon kihirdetve a 2014. évi LVII. törvénnyel). Available: <https://net.jogtar.hu/jogszabaly?docid=A1400057.TV> (Downloaded: 24.05.2018.)

³² Az államhatárról szóló 2007. évi LXXXIX. törvény. Available: <https://net.jogtar.hu/jogszabaly?docid=a0700089.tv> (Downloaded: 17.05.2018.)

³³ A belső határon a határellenőrzés ideiglenes visszaállításának feltételeinek szabályairól szóló 333/2007. (XII. 13.) Korm. rendelet. Available: <https://net.jogtar.hu/jogszabaly?docid=a0700333.kor> (Downloaded: 22.05.2018.)

Monitoring at the Internal Border

One of the European Commission Recommendations from 2016 on the experiences of control carried out at the border between France and Germany provides a good example of how seriously accessibility is taken by the European Union. Although this is not related to the reintroduction of border control, it shows what differences are expected from the Member States by the European Union between the measures taken during a possible reintroduction of border control and police activities carried out at the internal border under normal conditions. The Council Regulation establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis³⁴ considers controls carried out at the internal borders fields to be evaluated (more precisely, to what extent the abolition of border control is enforced at the internal borders).

The European Commission is continuously monitoring the Member States' activities at the internal borders regarding which occasionally reports are issued, as well. The first comprehensive report from 2010 following the Schengen Borders Code's entry into force³⁵ addressed the system of police controls carried out at the internal borders, and drew a parallel between them and the police measures introduced during the reintroduction of border control at the internal borders.

During the reintroduction of border control, it was detected as a problem that the pieces of information listed as its cause were too general, and did not allow a full evaluation of the efficiency of the measures taken with regards to the threats to public policy and security. Due to this, the pieces of information shall be factual and relevant. The measures taken in the course of border controls shall be aligned with these; they shall be limited to such an extent which is necessary taking into account the Member States' public policy and security. The measures (controls) to be carried out shall always be taken proportionately to the time and location based on the risk analysis and available pieces of information. The main point is that the measures introduced during the control shall specifically be relevant based on the causes related to the reintroduction of border control.

In the meantime, border control has been reintroduced several times by particular Member States. The reasons for this have been very diverse with which the individual Member States have tried to align the actual execution of border surveillance. One of the most significant factors of this (besides granting security) is the proper resource management. But the reason for the actual reintroductions is really numerous and diverse: for example, the reintroduction of border control at the French–Spanish border

³⁴ Council Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen. Available: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R1053&from=HU> (Downloaded: 03.05.2018.)

³⁵ 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/2010/0554 final. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010DC0554&from=HU> (Downloaded: 03.05.2018.)

(at 14 border crossing points) on the occasion of the 50th anniversary of the ETA (Basque separatist organization) or at the Malta International Airport and Valletta Sea Passenger Terminal due to Pope Benedict XVI's visit, furthermore, at Estonia's land, sea and air borders in connection with the Estonian informal meeting of the NATO Foreign Ministers.

Due to this, it is the Member States' decision how seriously they take border surveillance (as the other component of border control) besides the reintroduction of border traffic control, namely, how necessary they consider the introduction of border surveillance and to what extent. Just think of that, for example, there are several hundred roads, paths, footpaths or dirt roads crossing the French–German border the constant surveillance of which would be an unrealistic expectation from the French Police as the manpower is not so high that it could grant constant border surveillance 24 hours a day.

At the same time, the introduction of border traffic control itself raises a number of questions which should be investigated in accordance with the Schengen Borders Code's articles related to external border control, such as the question of the refusal of entry. This question cannot be interpreted exclusively in the area of internal borders (without controls as it is such a measure which can solely be taken in accordance with the border traffic controls at the external border). The decision regarding the refusal of entry is the final decision of the border guard (now stick to this expression to give a better understanding) carrying out border traffic control in the course of the detailed analysis of an entry process. In addition, the mandatory form to be issued in the course of the refusal of entry, which form is specified in the Schengen Borders Code, is addressed to third country nationals; EU citizens cannot obtain such a form. The refusal of their entry can solely occur for compelling reasons in accordance with the EU Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.³⁶

It is important to note that through the reintroduction of border control, internal border does not become an external border, thus, particular regulations, provisions cannot be applied in such cases e.g. stamping on travel documents or the question of the carriers' responsibility.

³⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0038&from=HU> (Downloaded: 22.05.2018.)

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