Challenges to the Schengen Area of Free Movement of Persons:
Covid-19, Terrorism and Refugees

The Centre for Migration Law: 25 Years
17 December 2021

Jean Monnet Professor ad personam Elspeth Guild emeritus Radboud University

What is the real challenge to EU border control?

o Border violence and deniability:

- The Aegean – Greece/ Turkey sea and land border; the Frontex Interpreter (https://www.nytimes.com/2021/12/01/world/europe/greece-migrants-interpreter-expelled.html)

- The Mediterranean – Italy/Libya sea border: the prosecution of Former Minister Salvini;

- The Franco-British sea border: police violence against migrants in Calais, Dunkerque etc paid for by the UK (now with Frontex assistance: 28 November 2021 Council Decision);

- Belarus/Poland/Lithuania land border - the so-called instrumentalization;

- The outcomes: torture, inhuman and degrading treatment and death.

Fundamental Rights and EU Border Control

- UN Special Rapporteur for the Rights of Migrants Report (A/HRC/47/30 2021): "62. The Special Rapporteur reiterates his concerns that some pushbacks have also involved the use of force, in violation of international norms and standards, such as beatings, electric shocks, forced river crossings, the stripping off of clothes, in some cases in adverse weather conditions, forced stress positions, gender-insensitive body searches and spray-painting the heads of migrants with crosses –treatment that appeared to be designed to subject migrants to torture and other cruel, inhuman or degrading treatment."

- The problem: deniability – little or nor consequences as national authorities lacking independence placed in charge of investigation (not independent authorities and national prosecutors);

The EU rules: the Schengen Borders Code and the Border Surveillance Regulation

- SBC: First adopted in 2006, revised in 2016; numerous proposed revisions;

- Principle; no intra-Member State border controls and common external border controls; procedural remedies on refusal of entry;

- BSR: surveillance to detection irregular migration by sea, no procedural remedies for individuals;

- Principle: no recognition of or rights for individuals.

The Commission's New Proposal: COM(2021) 891 final

o Identifying the problems:
- Obstacles to the intra-Schengen control free area:
- Exceptional border controls – refugees, terrorism, and Covid;
- Covid measures – external borders;
- Instrumentalisation of human beings by state actors;
- Intra-Schengen movement of 'unwanted' persons.

The Commission's answers (1)

o Member States' re-introduction of intra-Schengen border controls:

- A real change to the time limits – 6 months – 2 years?
- Necessity and proportionality – a real test?
- A real threat of infringement proceedings?
- A real hardening of the justification requirements or 'making reintroduction of intra Schengen border controls less expensive'?
- A solution to the Member States' abuse of the current rules where a notification extending intra-Schengen controls on a new ground extends a previous exceptional notification?

The Commission's answers (2)

o Police powers and intra-Schengen border controls:

- Increased use of police checks inside the border and cross-border police cooperation;
- Use of 'not typically police-related public powers' as alternative border control checks;
- Problem – must not be an equivalent to border control;
- Problem – racial/ethnic profiling in policing (FRA Report June 2020 https://fra.europa.eu/en/news/2020/stop-racist-harassment-and-ethnic-profiling-Europe) (COM references to illegality of racial profiling only related to SBC not to proposed national policing alternative).

The Commission's answer (3)

- Instrumentalisation of human beings - defining it:

[A state] instigates irregular migratory flows to the Union by actively encouraging or facilitating the arrival of third country nationals to the external borders of the Member States, where such actions indicate an intention to destabilise the Union as a whole or a Member State and where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security...

- Response:

mobilise all tools from its toolbox of diplomatic, financial and operational measures to support the Member States confronted with instrumentalisation. Diplomatic efforts by the Union or the Member State concerned, should be given priority as the means of addressing the phenomenon of instrumentalisation. This may be supplemented, where appropriate, by the imposition of restrictive measures by the Union...

The Commission's answers (4)

- Intra-Schengen state 'secondary movements:
- Push the problem down to the Member States by promoting bilateral agreements on police pushback at intra-Schengen state borders;
- Amend Article 6(2) Return Directive to lift the standstill;
- The chasm between Schengen states and EU states (Schengen 26, some EU but four not) and EU states (27 but five not Schengen, of which 4 particulate in the Return Directive)

The Commission's answers (5)

o Simplification of pushbacks (intra-Schengen and bilateral agreements) and expulsion (extra Schengen) rules;

o What does simplification mean?

- Abolish procedural notification requirements for individuals to know what is happening to them (Article 14(1) SBC);
- Abolish appeal rights for individuals in defiance of the Charter (and Article 14(3) SBC);
- Unleash arbitrary decision-making on 'unwanted' migrants under the guise of permitting use of 'discretion' instead.

The Commission's answers (6)

o Monitoring and Surveillance Technologies in border areas:

- A real solution to instrumentalization?
- Risk assessment for internal security – what does this mean?
- Evidence of border guard violence against migrants?
- Privacy and data protection?

Addressing the real problems?

- Protection of fundamental rights of all people at EU internal and external borders;

- Effective and independent monitoring of Member States' border control activities;

- Enhancing fundamental rights compliance by all authorities;

- Avoiding the 'technological fix' trap.