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EUROPEAN POLICY ANALYSIS

Restoring the Borderless Schengen Area: Mission Impossible?

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Summary

The reintroduction of checks at the borders between Schengen countries in recent years has caused widespread concern. In response, the EU launched a strategy to 'save Schengen', by, among other things, rewriting the rules on internal border checks, agreeing major changes to EU asylum law and taking measures in the area of further police cooperation. Amendments to the Schengen Borders Code, along with many other proposals (including the asylum law changes), have now been agreed.

This briefing analyses the Border Code amendments in the broader context, assessing whether they are likely to 'save Schengen' and whether they raise human rights concerns in the process.

While it is hard to predict what impact these measures will have in practice, they do not amount to the sustainable restoration of a borderless Schengen zone, and there is a lack of clarity in the relationship between the revised Borders Code and the revised EU asylum laws. In light of this, the briefing ends with some recommendations on how to protect the principle of avoiding internal border controls, which is not only a legal issue but of great political and economic relevance to the EU as a whole. One of these recommendations is the use of benchmarks for when reintroduced internal border controls should be lifted again.

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1. Introduction

The Schengen system is intended to abolish internal border checks between Member States. This abolition applies alongside harmonised checks on external borders with non-EU countries, a common visa policy for non-EU visitors, and a Schengen Information System listing non-EU persons to be denied entry and objects and persons to be stopped or tracked.

This system dates back to 1990, when the initial rules on the abolition of internal border checks and the common provisions on external border checks were set out in the Schengen Convention, later supplemented by a Common Manual implementing it. Since 2006, these rules have been set out in an EU Regulation called the Schengen Borders Code,[1] which was replaced by a new version in 2016 which has in turn been amended several times. [2]

However, in recent years, Schengen States have frequently and extensively resorted to checks at internal borders, and for long periods, largely because of concerns about migration control but also justified on grounds of counter-terrorism and the COVID-19 pandemic. In light of this development, it is increasingly contended that the Schengen system – designed precisely to avoid such border checks – is in crisis.

In response, the EU Commission has embarked on a plan to 'save Schengen', by returning to the original notion of abolishing internal border controls, while addressing Member States' concerns about doing so.[3] The plan includes amendments to the Schengen Borders Code, recently agreed in principle, alongside a broader package of changes to EU justice and home affairs law, such as the migration and asylum pact, agreed at the end of 2023 but not yet officially adopted.

Will this plan, and the broader package of changes to asylum law as part of the migration pact, restore a borderless Schengen area – and if so, how? This paper will answer that question by examining in turn the current state of checks at internal borders, the current legal framework, and the recent agreement to reform the Borders Code, followed by an assessment of the options and likely outcomes. It will also discuss the impact of these new measures on the right to seek asylum.

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2. Current Border Controls

It is sometimes thought that the Schengen rules abolish all checks on internal borders absolutely. However, limited checks are legally possible, as described in section 3 below. The issue is that Member States' practice arguably goes beyond what the law provides for, and in any case that internal border checks are far more frequent than they were initially.

In practice, the information available on the reimposition of internal border controls is sporadic. According to the Commission's report on the issue in 2010,[4] twelve Member States had reintroduced border controls, on twenty-two occasions (from the application of the Code in 2006, until the date of the report).[5] The 2016 'Back to Schengen' communication stated that, since the start of the 'refugee crisis', internal border checks had been reintroduced by eight countries: Belgium, Denmark, Germany, Hungary, Austria, Slovenia, Sweden and Norway.[6] France had maintained controls which it had introduced prior to the crisis.

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1 Reg 562/2006 ([2006] OJ L 105/1).
2 Reg 2016/399 ([2016] OJ L 77/1).
3 Communication on a 'strategy for a fully functioning and resilient Schengen area' (COM(2021) 27, 2 June 2021). See also the earlier communication on 'preserving and strengthening Schengen' (COM(2017) 570, 27 Sep 2017), 'Back to Schengen – a roadmap' (COM(2016) 120, 4 Mar 2016).
4 COM(2010) 554, 13 Oct 2010.
5 For more detail, see Annex I to the report. The 2010 report refers to the rules as they stood before the 2013 amendment (see s 3 below).
6 'Back to Schengen – a roadmap' (COM(2016) 120, 4 Mar 2016). For the details, see the Annex to the communication.

Subsequently, the EU used the Schengen Borders Code provisions allowing for the coordinated reintroduction of internal border controls by the five States most affected by deficiencies of external border control – Austria, Germany, Denmark, Sweden and Norway.[7]

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More recently, the first annual 2022 'State of Schengen' report noted that since September 2015, border checks at the internal borders had been reintroduced more than 280 times, justified on grounds of the 'refugee crisis', counter-terrorism and the covid pandemic.[8] According to the 2023 'State of Schengen' report, Member States reintroduced or extended internal border controls 28 times, 19 of which were extensions of border controls in place since 2015.[9] In particular, Austria, Denmark, France, Germany, Norway, and Sweden had in early 2023 extended or reintroduced internal border controls for six months, and in some cases these internal border controls had already, by the time of the report, been reduced or dropped (for instance, the Danish border controls with Sweden). The 2024 'State of Schengen' report noted developments as regards these controls over the following year: further internal border controls were imposed at other borders, by Austria, Germany, Poland, Italy, Slovakia, Slovenia, and Czechia, although some of these controls were dropped in early 2024.[10]

Although the discussion over the reintroduction of internal border checks often focusses on the migration control and free movement of persons aspects, it should not be forgotten that the initial Schengen agreement was a project of transport ministries, and that there are significant estimated economic costs to the partial – and even more so, the full – application of internal border checks.[11]

3. Internal Border Checks and Controls: the legal framework

The Schengen rules distinguish between border 'checks', i.e. where some persons are stopped, and systematic border 'controls', in which a greater number, or all, are stopped. This section examines the rules and the caselaw which determine when such checks and controls are legally permitted.

3.1 When Internal Border Checks are Allowed

It is worth noting that while Member States are obliged to remove road-traffic obstacles at the internal borders, including any unjustified special speed limits, they must nonetheless be 'prepared to provide for facilities' to reintroduce internal border checks if necessary.[12] And, as noted already, the Schengen rules have always allowed for the limited reintroduction of internal border checks as an exception to the rule of the general abolition of such checks. Initially this was on the basis of Article 2 of the Schengen Convention (2000),[13] which was amended and replaced by

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7 See the discussion of Art 29 of the Code, in s 3 below.
8 COM(2022) 301, 24 May 2022.
9 COM(2023) 274, 16 May 2023.
10 COM(2024) 173, 16 April 2024 (see also Annex 3). See also the staff working document on the controls imposed at the time of the 2023 report (SWD(2023)388, 23 Nov 2023).
11 See the estimates in the communications on 'Back to Schengen – a roadmap' (COM(2016) 120, 4 Mar 2016), the 'preserving and strengthening Schengen' (COM(2017) 570, 27 Sep 2017), and the 'strategy for a fully functioning and resilient Schengen area' (COM(2021) 27, 2 June 2021).
12 Art 24. This clause took over the gist of Schengen Executive Committee Decision 94(17) ([2000] OJ L 239/168), which was repealed by the Code.
13 [2000] OJ L 239/1. There were also three relevant Decisions adopted by the Schengen Executive Committee, which concerned obstacles to traffic flows (SCH/Com-ex (94) 1 rev 2, [2000] OJ L 239/157), bringing the Convention into force (SCH/Com-ex (94) 1 rev 29, [2000] OJ L 239/130), and procedures for reintroducing border checks (SCH/Com-ex (95) 20 rev 2, [2000] OJ L 239/133).

the initial version of the Schengen Borders Code, adopted in 2006.[14] The rules were amended again in 2013 following the Arab spring,[15] in order to allow for longer periods of internal border checks due to concerns about migration flows, and this section outlines the legal framework, including its interpretation in CJEU case law,[16] as it stands since then (in the version of the Borders Code codified in 2016).[17] The recent agreement to amend the rules is discussed in section 4 below.

The starting point of the Code's rules on the abolition of internal border checks is the basic premise that 'internal borders can be crossed at any point without any checks on persons being carried out'.[18] But some types of checks are still allowed, according to Article 23 of the Code:

- in the exercise of police powers, if this does not 'have an effect equivalent to border checks';
- security checks at ports and airports (if such checks also apply to movement within a Member State);
- the possibility to impose an obligation to hold or carry documents;
- and Member States' exercise of their option to require travellers to register, set out elsewhere in the Schengen Convention.[19]

The 'police powers' exception sets out four cases 'in particular' where the exercise of police powers shall not be considered equivalent to border checks:[20] the checks do not have border control as an objective; they are based on general police information and experience and aim 'in particular' at combating 'cross-border crime'; they are devised and executed differently from systematic checks at the external borders; and they 'are carried out on the basis of spot-checks', i.e. random checks on individuals.

'The "police powers" exception sets out four cases "in particular" where the exercise of police powers shall not be considered equivalent to border checks [...]'

What this means in practice has been the subject of numerous cases brought at the Court of Justice of the EU. According to the CJEU judgment in *Melki and Abdeli*,[21] a French police check within a border zone (i.e. an area near the border), which had resulted in the apprehension of two unlawfully present Algerian citizens, was not carried out *at* the border, so was not prohibited by the Schengen Borders Code. The objective of the checks concerned was not border control (which would have been prohibited under the Code), but rather to check the national obligation to hold or carry papers or documents (which was permitted by the Code, as seen above). Moreover, the national rules did not breach the rules in the Schengen Borders Code merely because those rules only applied to border zones. However, those national rules contained 'neither further details nor limitations on the power thus conferred – in particular in relation to the intensity and frequency of the controls which may be carried out', for the purpose of preventing those checks from infringing

[14] Reg 562/2006 ([2006] OJ L 105/1), which also replaced two of the Schengen Executive Committee Decisions. Art 38 of the 2006 Code required the Commission to report on the application of the internal borders rules: see COM(2010) 554, 13 Oct 2010. Parts of this section update and adapt S Peers, EU Justice and Home Affairs Law, 5th ed (OUP, 2023), chapter 3, s 3:5. See also the Commission recommendation on internal border controls: [2017] OJ L 259/25.
[15] Reg 1051/2013 ([2013] OJ L 295/1).
[16] Cases: C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667; C-278/12 PPU *Adil*, ECLI:EU:C:2012:508; C-9/16 *A*, ECLI:EU:C:2017:483; C-412/17 and C-474/17 *Touring Tours*, ECLI:EU:C:2018:1005; C-444/17 *Arib*, ECLI:EU:C:2020:220; C-554/19 *FU*, ECLI:EU:C:2020:439; C-368/20 and C-369/20 *NW*, ECLI:EU:C:2022:298; C-143/22 *ADDE*, ECLI:EU:C:2023:689; and C-128/22 *NORDIC INFO*, ECLI:EU:C:2023:951.
[17] Reg 2016/399 ([2016] OJ L 77/1), Arts 22-35.
[18] Art 22 of the Code.
[19] Art 22 of the Convention.
[20] Art 23(a) of the Code.
[21] Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667.

the rules of the Code. A national rule which gave the police the power to carry out identity checks specifically in border regions, where those powers did 'not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order', had to 'provide the necessary framework for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power'. That would ensure that the exercise of that power in practice did not have an effect equivalent to border checks, and therefore breach the Code.

In the subsequent *Adil* judgment,[22] the Court of Justice ruled on the compatibility with the Schengen Borders Code of a Dutch law which resulted in the apprehension of a purported Afghan national, following police checks on a bus in the border zone. Again, the checks in question were not carried out at the internal border as such, and so were not prohibited by the basic rule in the Code. Rather, the checks were carried out on the territory, so fell within the scope of the list of possible exceptions to the rule. And, as in *Melki and Abdeli*, the checks carried out in this case did not have border control as an objective, since they did not aim to regulate the authorization of *entry*. Rather the checks sought 'to establish the identity, nationality and/or residence status of the person stopped in order, principally, to combat illegal *residence*',[23] even though there were special rules in national law as regards carrying out such checks in border zones as compared to the rest of the territory.

The absence of a reference to combating unauthorized residence in the Code was irrelevant, since the list of rules specifying when the exercise of police powers is not equivalent to border checks was not exhaustive ('in particular'). Moreover, both the Treaty and the Code still provided for Member States to retain powers 'with regard to the maintenance of law and order and the safeguarding of internal security'.[24]

Also, the national rules were found not to breach Article 23 of the Code just because they were limited in scope to border areas. The crucial question was whether there was a legal framework in place to ensure that the exercise of those controls in practice did not have an effect equivalent to border checks. Nor was it problematic that the national law did not require 'reasonable suspicion of illegal residence, in contrast to the identity checks for that purpose carried out in the remainder of the national territory.' It was sufficient that such checks were being carried out on the basis of 'general police information and experience', as referred to in the Code.

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Having said that, the Court insisted that the greater the possibility of an 'equivalent effect' to internal border controls (evidenced by the objective of the checks in a border zone, the territorial scope of these checks and from the creation of a distinction between those checks and the checks carried out in the rest of national territory), 'the greater the need for strict detailed rules and limitations laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations, in order not to imperil the attainment of the objective of the abolition of internal border controls'. Applying that principle to the Dutch law: the objective of the checks was distinct from border controls; the checks were based on 'general police information and experience regarding illegal residence after the crossing of a border'; the checks were clearly distinct from systematic checks at the external borders, since they were carried out only for a limited period and not on all vehicles; and they were carried out on the basis of spot-checks, since vehicles were stopped based on sampling or profiling.

[22] Case C-278/12 PPU *Adil*, ECLI:EU:C:2012:508.
[23] Emphasis added.
[24] Art 72 TFEU .

Applying this case law, the CJEU has ruled that German rules on checks away from the border provided for an insufficient framework to ensure that the checks did not have an effect equivalent to border checks, although on the other hand German rules on checks on trains had a sufficient such framework.[25] German checks on coach transport were systematic and closely connected to crossing borders, so were in breach of the rules.[26] The Commission has also adopted a recommendation on policing at internal borders which reflects the principles in the case law, updated in late 2023 to take account of further developments.[27]

Finally, in *NORDIC INFO*,[28] the CJEU accepted that checks on public health grounds during the COVID-19 pandemic might not constitute measures equivalent to border checks, because they might be covered by the 'police powers' exception, recalling that the list of grounds to exercise such police powers was non-exhaustive ('in particular'), and that therefore they were not limited to public security concerns. Also, the measures did not have border control as an objective, but rather the public health objective of ensuring screening or quarantine – even though the Court accepted that the *purpose* of the controls was to determine who was authorized to enter Belgian territory. Information about public health risks was sufficient to satisfy the requirement that the police have information on security risks. Member States must have discretion on the 'spot checks' requirement, in cases of pandemics.

In summary, the case law provides that police checks can be applied uniformly throughout national territory (in which case the Code is unlikely to be breached), or that specific rules can apply to police checks at internal border zones. In the latter case, to avoid a breach of the Schengen Borders Code, the specific rules must be accompanied by detailed safeguards, in particular to ensure that any checks are selective and targeted. The checks can focus specifically on irregular residence, which in practice will often entail detecting those who have crossed an internal border without authorization, given that such checks will take place in the border zone under specific rules. So the requirement that such checks must be selective and targeted is the only feature that distinguishes them in practice from checks at internal borders. As for checks in the case of a pandemic, they appear to be in a league of their own: the CJEU interpreted several aspects of the 'police powers' clause very liberally in order to suggest that they did not constitute border checks.

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3.2 When Internal Border Controls Are Allowed

As for the possible reintroduction of internal border controls by a Member State,[29] rather than sporadic checks, the basic rule is that a Member State can 'exceptionally' reintroduce border controls for up to 30 days, or for a longer period if the duration of the relevant event is foreseeable, in the 'event of a serious threat to public policy or to internal security'; but the 'scope and duration' of the reintroduced checks 'shall not exceed what is strictly necessary to respond to the reintroduced checks'.[30] This must be a 'last resort', however.[31] The reintroduction of controls may be continued for further renewable periods of up to 30 days, 'taking into account any new elements'.[32] But the maximum time to reintroduce border controls is six months, or two years in 'exceptional circumstances' (see discussion below).[33]

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[25] Case C-9/16 *A*, ECLI:EU:C:2017:483. See also Case C-554/19 *FU*, ECLI:EU:C:2020:439.
[26] Joined Cases C-412/17 and C-474/17 *Touring Tours*, ECLI:EU:C:2018:1005.
[27] [2017] OJ L 122/79 and [2024] OJ L 17 Jan.
[28] Case C-128/22 *NORDIC INFO*, ECLI:EU:C:2023:951.
[29] Arts 25–35.
[30] Art 25(1).
[31] Art 25(2).
[32] Art 25(3).
[33] Art 25(4).

Furthermore, before they reintroduce or extend internal border controls, Member States are required to 'assess the extent to which' this will 'adequately remedy the threat to public policy or external security', as well as the 'proportionality' of that threat. The Member State must 'in particular' take into account the 'likely impact of any threats to its public policy or internal security', including terrorism and organized crime, alongside the 'likely impact' on the free movement of persons.[34]

According to the CJEU,[35] interpreting these provisions strictly as a derogation from the general rule of abolition of border controls, the six-month time limit on the reintroduction of internal border controls that applies where there are no extraordinary circumstances could only be triggered again where there was a serious new threat. On the other hand, the Court was less strict as regards pandemics, where it considered that although public health risks as such could not justify internal border checks, it was possible nevertheless that a health threat could constitute a serious threat to public policy or public security.[36]

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There are more specific rules, depending on whether the reintroduction of border checks is foreseeable, urgent, or constitutes 'exceptional circumstances':

- First of all, where the reintroduction of controls is foreseeable, Member States must inform the Commission and other Member States four weeks beforehand of plans to reintroduce controls, and provide information 'as soon as available' on the reasons for and the scope of the reintroduction of controls, the authorized crossing points, the date and duration of the introduction, and (if relevant) the measures to be taken by other Member States.[37] The Commission or another Member State may issue an opinion on the planned reintroduction, and there shall be consultation on the planned controls between the Member States and the Commission in order to discuss the proportionality of the controls and possibly also 'mutual cooperation between the Member States'.

- Secondly, if 'immediate action' is required, Member States may reintroduce controls without prior notification, if they send the relevant information to the Commission and other Member States later.[38] Border controls in this context can only be introduced for ten days, renewable for periods of twenty days up to a total of three months.

- Thirdly, Member States may re-introduce border controls in 'exceptional circumstances when the overall functioning' of the Schengen system is 'put at risk' by 'serious persistent deficiencies' regarding external border control, which were revealed by Schengen evaluations, if this constitutes 'a serious threat to public policy or internal security'.[39] This must follow a Schengen evaluation report which reveals that there are 'serious deficiencies in the carrying out of external border control' by a Member State, Commission recommendations of specific measures to that Member State, a Schengen evaluation finding that a Member State is 'seriously neglecting its obligations', and then a Commission finding that the problem is still continuing after three months'.[40]

In this last scenario, the border controls can last for up to six months and can be renewed 'no more than' three times for the same period, 'if the exceptional circumstances persist'. The re-introduction (or prolongation) is based on

[34] Art 26.
[35] Joined Cases C-368/20 and C-369/20 *NW*, ECLI:EU:C:2022:298.
[36] Case C-128/22 *NORDIC INFO*, ECLI:EU:C:2023:951.
[37] Art 27.
[38] Art 28.
[39] Art 29.
[40] Art 21.

a recommendation of the Council, based on a proposal from the Commission, that one or more Member States reintroduce internal border controls. Member States can request the Commission to table such a proposal and must inform the Commission if they did not follow the Council's recommendation. Then the Commission must present a report assessing that Member State's decision. In urgent cases where there was less than ten days' notice of the exceptional circumstances, the Commission can adopt the recommendation to reintroduce border controls by means of an implementing act.

> 'This assessment must be based on information from the Commission and the Member State(s) concerned, and take into account the availability of support at EU level, the impact of the "serious deficiencies", and the impact on the free movement of people in the Schengen area. '

Before making its recommendation, the Council has to assess whether this would 'adequately remedy the threat to public policy or internal security within the area without internal border controls', and also 'assess the proportionality of the measure in relation to that threat'.[41] This assessment must be based on information from the Commission and the Member State(s) concerned, and take into account the availability of support at EU level, the impact of the 'serious deficiencies', and the impact on the free movement of people in the Schengen area. In practice, as noted above, these provisions were used to adopt a series of four recommendations to reintroduce border control in response to the situation in Greece.[42] They are not currently being applied.

There are ancillary rules on: informing and reporting to the European Parliament as regards decisions on reintroduced controls; clarifying that the external borders rules will apply when internal border checks are reintroduced; requiring a report when internal border controls are lifted, outlining the operation of the internal checks and their effectiveness; requiring information to the public about reintroduced controls unless there are overriding security reasons to the contrary; and rules on the confidentiality of information submitted by a Member State at its request.[43]

The issue of applying the external borders rules at the internal borders when Member States reintroduce checks at the latter has been addressed by the CJEU. In the Court's view, the reimposition of internal border controls only triggers the external borders rules in the *Code*, not other legislation, i.e., the external borders exceptions from the scope of the *Returns Directive* do not become applicable.[44] In a more recent case, the Court has added that while the rules on refusal of entry at the external borders set out in the Code apply in principle to internal borders when checks on the latter are reintroduced, the Returns Directive still nevertheless applies when the internal border crossing point is on the territory.[45]

4. Proposed Amendments

4.1 Amendments to the Borders Code

A 2017 proposal to amend the Schengen Borders Code rules on internal borders failed because the European Parliament and the Council could not agree on the details of extending checks on internal borders.[46] But the persistent belief that the Schengen rules need to be changed in order to save the Schengen system prompted a fresh attempt to

[41] Art 30(1).
[42] [2016] OJ L 151/8; [2016] OJ L 306/13; [2017] OJ L 36/59; and [2017] OJ L 122/73. See the Commission's recommendation on the termination of the last Art 29 recommendation: [2017] OJ L 259/25.
[43] Arts 31–5.
[44] Art 32 of the Code: Case C-444/17 *Arib*, ECLI:EU:C:2020:220.
[45] Case C-143/22 *ADDE*, ECLI:EU:C:2023:689, referring to Art 14 of the Code. See also the Commission's interpretation in its 2010 report on internal border checks.
[46] COM(2017) 571, 27 Sep 2017.

change the rules, in the form of a proposal at the end of 2021.[47] As noted already, in light of the perceived need to 'save Schengen' (even though the later proposal gave *more* leeway to Member States to reintroduce controls), the European Parliament and the Council recently agreed on this proposal, and they are likely to adopt it formally before the European Parliament elections in June 2024.[48]

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The agreed 2024 amendments address a number of issues besides internal border controls, although some of those other issues are related to the broader challenges facing the Schengen system, for example changes to the Borders Code as regards border surveillance;[49] and response to future public health crises.[50] This section examines the proposed changes relating to four key topics: the instrumentalization of migrants; the definition of border checks; fast-track returns to other Member States, and the reintroduction of border controls.

Cases of instrumentalisation

The 'Instrumentalisation' of migrants is defined (by cross-reference to a recently agreed asylum law)[51] as 'where a third country or a hostile non-state actor encourages or facilitates the movement of third country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security'.

The preamble clarifies the definition further, stating that '[s]ituations in which non-state actors are involved in organised crime, in particular smuggling, should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State'. Furthermore, '[h]umanitarian assistance should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State'.[52]

Where the instrumentalisation of migrants occurs, the Commission had proposed to allow Member States to close border posts and limit their opening hours. The Council wanted to go further – allowing Member States to take unspecified 'necessary measures' – while conversely, the European Parliament wanted to drop new provisions on instrumentalisation in the Code entirely.

The agreed text largely adopts the Council's position, stating that 'in particular' Member States can temporarily close border crossing points or limit their opening hours in instrumentalisation cases. However, any limitations must be 'proportionate', and must take 'full account of the rights of' those with free movement rights, non-EU citizens with a legal right to reside, and non-EU citizens 'seeking international protection'. The revised code will also have a new rule, subject to the same guarantees, that 'Member States may, where a large number of migrants attempt to cross the external border in an unauthorised manner, *en*

[47] COM(2021) 891, 14 Dec 2021.
[48] For the agreed text, see Council doc 6568/24, 15 Feb 2024. For a comparison of the negotiation positions of the European Parliament, Council and Commission, see Council doc 14288/23, 19 Oct 2023.
[49] Agreed revised Art 13 of the Code, which will add more references to prevention and detection along with a new reference to situational awareness, insert a cross-reference to human rights protection, elaborate on methods of surveillance, and specify further what Commission implementing measures could address. See also the amended definition of 'border surveillance' in Art 2(12), and recitals 15 and 16 in the preamble.
[50] Agreed new Art 21a, which takes account of the 'soft law' on external border controls which was adopted in the context of the COVID-19 pandemic. These will be minimum standards, with Member States allowed to adopt more restrictive measures. See also the new definitions in Art 2(27a) to (29), and recitals 5 to 7b in the preamble.
[51] Art 1(4)(b) of the regulation on asylum crises (Council doc 8587/24, 18 April 2024).
[52] Recitals 15 and 16 in the preamble.

masse and using force, take the necessary measures to preserve security, law and order'.[53]

Defining internal border checks

As for internal border checks, the agreed amendments will first of all revise what will *not* be considered equivalent to such checks.[54] More precisely, the rules will now also refer to the exercise of 'other public powers' alongside police powers as not being equivalent to border checks. Also, the current criterion relating to 'general information and experience' will in future refer not only to police information but also to public health information in the context of the spread of infections, and it will now expressly extend to checks which aim to 'contain the spread of an infectious disease' (these three changes matching the *NORDIC INFO* judgment, which was delivered in the meantime since the amendments were proposed).

> 'As for internal border checks, the agreed amendments will first of all revise what will *not* be considered equivalent to such checks.'

This provision will also expressly extend to measures to 'reduce illegal migration', reflecting the *Adil* judgment. The criterion that the checks must be 'devised and executed in a manner clearly distinct from systematic checks on persons at the external borders' will now also explicitly include checks 'conducted at transport hubs or directly on board of passenger transport services and when they are based on risk assessment'.[55] The prospect of 'security checks' will now extend not just to ports and airports, but to the broader notion of 'transport hubs', and to checks by carriers. There will be a new reference to the obligation of hotel managers to ensure that travellers fill out registration forms. Finally, the rule on removal of barriers to traffic flow will include a new exception, for monitoring and surveillance technology.[56]

Providing for fast-track returns

A new clause will provide for the fast-track transfer to another Member State of non-EU citizens 'apprehended in border areas',[57] where the non-EU citizen was 'apprehended during checks involving the competent authorities of both Member States within the framework of bilateral cooperation', which may include 'joint police patrols'; and 'there are clear indications that [they have] arrived directly from another Member State', as further explained, if it is 'established that the third-country national has no right to stay on the territory of the Member State in which he or she has arrived'.

However, this process cannot be applied to people with international protection, or to applicants for asylum; according to the preamble, the Dublin rules 'should apply' to asylum seekers. Furthermore, if the transferring State believes that the person concerned is a minor, the two States involved must ensure the best interests of the child, in accordance with their national laws. The preamble also states that the procedure 'should not' apply to other groups of non-EU citizens with legal status, but those exceptions are not set out in the main text.

Where the new fast-track transfer rules will apply, as a derogation from the usual obligation in the EU Returns Directive (the law which sets out general rules on irregular migration) to issue a return decision,[58] the Member State which stopped the person may transfer them immediately to the Member State from which they arrived 'in accordance with' a process set out in a new Annex XII to the Code. This Annex will require

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[53] New sub-para to be added to Art 5(3) of the Code, and new Art 5(4) of the Code.
[54] Agreed revised Art 23. See also recitals 17 to 24 in the preamble.
[55] Agreed new Art 2(30) will define 'transport hubs' as 'airports, sea or river ports, train or bus stations, as well as freight terminals'. The 'spot-checks' requirement will be dropped, perhaps because it repeats the rule that checks cannot be systematic at the external border.
[56] Agreed amendment to Art 24 of the Code.
[57] Agreed new Art 23a. See also recitals 25 to 27c in the preamble.
[58] Art 6(1), Directive 2008/115, [2008] OJ L 348/98. The Commission had also proposed to amend this Directive, but the final agreement does not include such amendments, perhaps because the derogation from Art 6(1) of the Directive is sufficient. The amendments are also 'without prejudice' to existing bilateral fast-track return arrangements between Member States, preserved already in Art 6(3) of the Directive. There is also a recent Commission recommendation on mutual recognition of return decisions: [2023] OJ L 86/58.

the authorities to give reasons for the transfer by means of a standard form handed to the person concerned.

There will be a right to appeal the transfer, but it will not have suspensive effect, and in the meantime the person concerned will be transferred within 24 hours. If the 24-hour deadline is missed, the Returns Directive (requiring a return decision) shall apply. Where a Member State triggers this transfer process, the receiving Member State must 'take all measures necessary to receive' the person concerned, in accordance' with the same Annex. After the transfer, the Returns Directive rules will apply in the receiving Member State.

Finally, Member States will be required to 'define practical modalities under their bilateral cooperation frameworks, including with a view to, as a rule, avoiding the use of' the fast-track return process, 'in particular on the sections of the internal borders where controls have been reintroduced or prolonged'.

The reintroduction of internal border checks and controls

There will be a series of amendments to the existing rules on reimposing internal border checks in the Borders Code. First of all, there will be a non-exhaustive list ('in particular') of what might be considered a serious threat to public policy or public security,[59] including: 'terrorist incidents or threats and including those posed by serious organised crime'; 'large scale public health emergencies'; 'an exceptional situation characterised by sudden large scale unauthorised movements of third-country nationals between the Member States, putting a substantial strain on the overall resources and capacities of well-prepared competent authorities and which is likely to put at risk the overall functioning of the area without internal border control' (if this is evidenced); and 'large scale or high profile international events'. The public health emergency provision will in effect match the *NORDIC INFO* judgment issued in the meantime.

The rules on reintroducing border controls in cases requiring 'immediate action' will be amended, referring instead to 'unforeseeable' events, and allowing border controls to be reintroduced for a one-month period with extensions up to three months, instead of the current ten days with extensions up to two months. In 'foreseeable' cases, national decisions to reintroduce internal border checks could, under the agreed text, be renewed and apply for a maximum period of two years, rather than six months at present – although in a 'major exceptional situation', a Member State could in future also apply two further extensions of six months each.[60] However, when Member States reintroduce or prolong internal border controls, they will have to consider whether the new or changed rules agreed in the 2024 amendments (fast-track returns, checks on the territory, or public health restrictions), or police cooperation, would instead address their concerns.[61] The procedural obligations for Member States reintroducing internal border controls, and the consultation process in that context, will also be amended,[62] as will the obligations to report after the reintroduction of those controls.[63]

> 'Furthermore, there will be a new process for authorisations of reintroduction of internal border controls where the "same large-scale health emergency affects several Member States, putting at risk the overall functioning of the area without internal border controls".'

Furthermore, there will be a new process for authorisations of reintroduction of internal border controls where the 'same large-scale health emergency affects several Member States, putting at risk the overall functioning of the area without internal border controls'.[64] This would be

[59] Agreed revised Art 25. On reintroduction of controls generally, see also recitals 27d to 45 in the preamble.
[60] Agreed new Art 25a; compare to current Arts 25(3) and (4), 27 and 28.
[61] Agreed revised Art 26.
[62] Agreed revised Art 27 and new Art 27a.
[63] Agreed revised Art 33.
[64] Agreed revised Art 28.

indefinitely renewable for six month periods if the emergency criteria were still met, although unlike other reintroductions of internal border controls, it could only be based (or extended) on a Council authorisation on a proposal from the Commission. The current procedure for reintroducing border controls in multiple Member States where a Member State has shown 'serious deficiencies' in controlling external borders will remain without amendment.[65]

4.2 The Broader 'Saving Schengen' Strategy

The 2021 proposal to amend the Schengen Borders Code placed it in the context of a broader strategy to 'save Schengen', referring to the Migration and Asylum Pact in general, a parallel proposal on 'instrumentalisation' in the context of asylum, proposed changes on police cooperation, and changes to the Schengen evaluation mechanism (which assesses Member States' implementation of the Schengen rules and proposes changes to their practices), along with regular reporting on the 'State of Schengen' (which provides an overview of the functioning of the Schengen system as a whole). The logic of this broader strategy was to address a number of concerns that Member States had about migration control, police cooperation, and Schengen governance and which contributed to their decisions to reimpose of internal border checks.

Of these measures, an agreement was reached in December 2023 on the proposed 'asylum package'. The proposal on instrumentalisation as regards asylum was not agreed,[66] although as noted above the issue will be addressed in a regulation on crisis and force majeure situations, which is one of the measures that were agreed.[67] Furthermore, the newly agreed regulation on the screening of migrants, another part of the asylum package, will supplement (although not directly amend) the borders Code as regards external border checks on this group of people.[68]

> 'The 2021 proposal to amend the Schengen Borders Code placed it in the context of a broader strategy to "save Schengen" [...].'

The police cooperation measures tabled in December 2021 have all been agreed or adopted: the replacement of the Framework Decision on ad hoc exchanges of information;[69] the update of the Prüm rules on exchange of information between national databases,[70] and the Council recommendation on police cooperation.[71] The Schengen evaluation mechanism was amended in 2022,[72] and the 'State of Schengen' reports – part of an elaborate 'Schengen cycle' of governance which comprises meetings of ministers of Schengen countries, a 'barometer' on the application of Schengen, and a scoreboard on Member States' implementation of Schengen evaluation recommendations – have been produced annually since that year.[73]

As the Commission's 2021 communication recognised, the broader context of 'saving Schengen' by addressing Member States' broader security and migration control concerns also includes the development of databases, particularly the latest version of the Schengen Information System,[74] applicable since March 2023, and the earlier amendments to the Borders Code which entail additional checks in databases at the external

[65] Current Arts 21 and 29.
[66] COM(2021) 890, 14 Dec 2021. The proposed emergency asylum measure on the issue has not been agreed either: COM(2021) 752, 1 Dec 2021.
[67] Council doc 8587/24, 18 April 2024.
[68] Council doc 8589/24, 18 April 2024.
[69] Directive 2023/977, [2023] L 134/1, which Member States must implement by 12 Dec 2024 (Art 21).
[70] Reg 2024/982, [2024] OJ 5 April.
[71] Recommendation 2022/915, [2022] OJ L 158/23.
[72] Reg 2022/922, [2022] L 160/1.
[73] COM(2022) 301, 24 May 2022 ; COM(2023) 274, 16 May 2023; and COM(2024) 173, 16 April 2024.
[74] Regs 2018/1860 and 1861, [2018] OJ L 312/1 and 14.

borders.[75] Other new or expanded databases are not yet operational,[76] and EU law has been amended to provide for the digitalisation of the visa application process (also not yet operational in practice).[77] The communication also refers to widening Europol powers,[78] amending the law on collection and exchange of advance passenger information,[79] the digitalisation of judicial cooperation,[80] law enforcement provisions of the proposed Artificial Intelligence Act,[81] and the regular expansion of the scope and powers of Frontex, including recent status agreements with Balkan countries.[82] It would also be relevant to take into account the proposal to amend the Returns Directive generally,[83] the power to sanction countries which do not agree to readmission to more stringent visa measures (and the proposal to link trade preferences with readmission),[84] and the recent proposal to link visa waivers to other countries' alignment with EU visa policy – to make it harder for would-be asylum-seekers to reach the EU's external borders.[85]

5. Assessment and conclusions

What will be the impact of these agreed amendments to the Borders Code? This section analyses which provisions are new, the broader context in which they will apply, and their potential impact in practice. In particular, they will impact upon 'instrumentalisation' of migration from non-EU countries, and the reintroduction of border controls within the Schengen area.

In part the changes will entrench the status quo, because they either take account of the case law issued beforehand (*Adil*, on checks on the territory) or match judgments issued while the proposed amendments were under discussion (*NORDIC INFO*, on public health). So the revised text on the police powers exception to the ban on internal border controls, and the public health justification for reintroducing internal border controls, will in effect not be new. And the power to adopt binding rules as regards health controls at the external borders in case of pandemics reflects the soft law adopted during the previous pandemic.

> '[…] some of the agreed amendments are genuinely new.'

On the other hand, some of the agreed amendments are genuinely new. The most important of the new provisions concern fast-track returns of irregular migrants (although not asylum-seekers) between Member States, longer renewals of national internal border control, potentially indefinite border controls on public health grounds (if authorised by the Council), and the instrumentalisation of migration. It is notable that the agreed amendments will in effect circumvent CJEU case law as regards the application of the Returns Directive when border controls are reintroduced (*Arib* and *ADDE*), which as it stands prevents the instant return of non-EU citizens to other Member States.

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[75] Reg 2017/458, [2017] OJ L 74/1.
[76] Namely the entry-exit system (Reg 2017/2226, [2017] OJ L 327/20); the Electronic Travel Information and Authorisation System (Reg 2018/1240, [2018] OJ L 236/1), the revised Visa Information System (Reg 2021/1134, [2021] OJ L 248/11), and Eurodac (agreed text in Council doc 8576/24, 18 April 2024; not yet formally adopted).
[77] Reg 2023/2667, [2023] OJ 7 Dec. The 2021 communication also refers to digitalisation of travel documents, but the Commission has not tabled a proposal on that yet.
[78] Subsequently adopted: Reg 2022/991, [2022] OJ L 169/1.
[79] Subsequently agreed between the European Parliament and the Council (Council docs 7400/24 and 7401/24, 14 Mar 2024), and likely to be adopted also in spring 2024.
[80] Subsequently adopted: Reg 2023/2844 and Directive 2023/2843, OJ [2023] 27 Dec.
[81] Agreed text approved by the European Parliament in March 2024 (Council doc 7536/24, 18 Mar 2024); not yet formally adopted by the Council.
[82] Most recently Reg 2019/1896, [2019] OJ L 295/1.
[83] COM(2018) 634, 12 Sep 2018. At present this proposal is stalled because the European Parliament has not yet adopted a negotiation position – although as we have seen, the agreed amendments to the Borders Code will derogate from a provision of the Directive, to provide for fast-track returns between Member States.
[84] Respectively Art 25a of the visa Code, as inserted by Reg 2019/1155, [2019] OJ L 188/25, and the proposal to amend the Generalised System of Preferences law (COM(2021) 579, 22 Sep 2021).
[85] COM(2023) 642, 18 Oct 2023. The Council has agreed a position on this law (Council doc 7687/24, 13 Mar 2024), but the European Parliament has not yet done so.

Could the new provisions on instrumentalisation circumvent the case law requiring the application of asylum law in such cases?[86] At first sight, the prospect of closing border posts might evade the obligation to consider asylum applications, by making them impossible to lodge. However, applications might still be lodged by those entering illegally, and in any event the prospect of closing border posts will be explicitly subject to a requirement to take full account of the rights of asylum-seekers. Member States' power to take 'necessary measures' to respond to entry by force will also be subject to this requirement. Also, the *entire Borders Code* is 'without prejudice' to the rights of refugees and asylum-seekers. It requires Member States to act in 'full compliance' with the EU Charter, the Refugee Convention, and 'obligations related to access to international protection […] in particular […] *non-refoulement*' in both cases.[87] Therefore there is no plausible argument that the new provisions will legalise illegal 'push-backs' by Member States.

'Therefore there is no plausible argument that the new provisions will legalise illegal "push-backs" by Member States.'

How soon might the agreed changes contribute to 'saving Schengen' in practice? The amendments will apply twenty days after their publication in the Official Journal, which will follow their formal approval by the European Parliament and then formal adoption by the Council, planned for spring 2024. So Member States will likely be subject to the new rules – and therefore able to apply the provisions on fast-track returns, for instance – by this summer.

In addition, many changes to the broader framework of the Schengen crisis are either certain and already in force (Frontex, some aspects of police cooperation, Europol new powers, revised Schengen Information System, further use of databases, Schengen evaluation system revision, Schengen governance reform, visa/readmission links), adopted and due to become operational or applied in the near future (other new or extended databases, changes to the laws on exchange of police data, digitalisation of visas and judicial cooperation), or agreed in principle (the asylum package, the Artificial Intelligence Act, advance passenger information). Only a few of the measures concerned are stalled (Returns Directive, readmission/trade preference links, instrumentalisation – although the asylum package addresses the latter issue through a different measure), or still under negotiation (visa waiver amendments).

The changes to the rules, for instance allowing for longer periods of legally authorised reintroduction of border controls, raise the question of how limited these controls will be in practice. There are no specific benchmarks available for the abolition of reintroduced border controls, and even if there were it is likely that such abolition – like the extension of the Schengen zone itself – would be determined by political rather than legal factors; it might be more difficult politically to abolish internal border checks the longer they have been applied. While there are legal constraints on the maximum time limit of the reintroduction of those controls, as recently emphasised by the CJEU, it might be wondered – in light, for instance, of frequent allegations of illegal push-backs at the external borders – whether Member States are sufficiently concerned to observe the rule of law in this field.

Nevertheless, it might be useful to attempt to introduce such benchmarks, at least politically, if the intent is to give an impetus to the aim of ending internal border checks across the Schengen area. The development and implementation of such benchmarks, which can include an assessment of the negative impact of reintroduced or prolonged

[86] Case C-72/22 PPU *MA*, ECLI:EU:C:2022:505, which provided that Member States cannot derogate unilaterally from asylum law in such cases as EU law currently stands. The Court of Justice was not asked to rule on instrumentalisation in the context of the Borders Code, as distinct from asylum law. More recently the Court has confirmed that pushbacks at the external borders are a breach of EU asylum law: Case C216/22 ECLI:EU:C:2024:122.

[87] Arts 3 and 4 of the Borders Code. See the ECtHR judgment of 23 July 2020 in *MK v Poland*, which refers to the requirements in the Schengen Borders Code relating to asylum (para 181).

controls, could be integrated into the revised Schengen cycle of governance, and/or the reviews of the prolongation of reintroduced internal border controls. In this context, it may be necessary to consider not only the formal dates of application of the revised EU law – which will be certain, once those measures are formally adopted – but also the impact of those measures in practice, which is harder to predict or evaluate. Possibly the benchmarks could be, at least in part, tailored specifically to individual Member States and certain shared borders.

'So the extent of pressure from other Member States, EU bodies, public opinion and the private sector affected by border delays may be as much, or more, important than the legal constraints.'

In any event, the impact of the agreed amendments to the Code is an extension (or rather, *legally authorised* extension) of the time period during which Member States can reintroduce internal border control, even though indefinite extensions will only be legally possible in the case of pandemics. This will reduce the legal pressure to end the border controls, even if it will not eliminate it. But this will leave us with the political and economic arguments to end the application of those controls in practice. So the extent of pressure from other Member States, EU bodies, public opinion and the private sector affected by border delays may be as much, or more, important than the legal constraints.

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As this paper shows, the agreed amendments to the Schengen Borders Code, as part of a broader package of new laws and policies intended to 'save Schengen', attempt to do so by including new (or confirmed) rules on instrumentalisation, on the definition of border checks, on fast track returns, and the reintroduction of border controls. The attempts to 'save Schengen' have thus reached a crossroads, with the amendments to the Borders Code agreed, with the enhanced role of Frontex and the latest version of the Schengen Information System applicable in practice, and with changes to asylum law, police cooperation, and the new or extended use of other databases agreed and likely to apply in the near future. It is hard to predict exactly what impact these measures will have in practice, especially as some of them are either not yet applicable or not yet adopted – and most of the new asylum laws will not apply for two years. Nevertheless, it is clear that they do not automatically amount to the sustainable restoration of a borderless Schengen zone.

In light of this, it may be a good idea to agree indicative benchmarks for when internal border controls currently applied could be ended, once the agreed amendments to the Borders Code are formally adopted. The absence of any firm dates or benchmarks to do so does raise questions about the degree of commitment to the principle of avoiding internal border controls, which is not only a legal issue but of great political and economic relevance to the EU as a whole. Unfortunately, the Commission recently missed an opportunity to address this in its proposal for a Council recommendation on the Schengen cycle in 2024–5.[88]

Finally, in the context of agreed amendments regarding the authorisation of measures in cases of the instrumentalisation of migration, it is important to clarify that the new provisions do not justify illegal pushbacks to unsafe countries without considering asylum applications. It may likewise be necessary to clarify how the asylum exception to the new provisions on fast-track returns will work: will there be an effective possibility to apply for asylum, given that the process is intended to apply within 24 hours at the latest? The application of both of these provisions – and the broader question of the relationship between the revised Borders Code and the revised EU asylum laws, in particular the Dublin rules, the screening Regulation, and border procedures provided for in the new asylum procedures Regulation – could usefully be clarified by guidelines from the Commission, taking account of the case law of the CJEU and the European Court of Human Rights.

[88] COM(2024) 174, 16 April 2024.