

Schengen Still Standing: Internal Borders, Integration, and COVID-19

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Abstract

In early 2020, widespread reintroductions of internal border controls were taken by member states across the Schengen Area in response to the COVID-19 pandemic. This had perilous consequences for the European economy, which was nearly ground to a halt by these restrictions. This paper investigates the impacts this crisis has had on integration with regards to Schengen. It argues that this crisis has driven member states to deepen integration, as the economic benefits of Schengen are too important to abandon. This paper also highlights how *ad hoc* improvisation was essential to ensuring that the Schengen Area was able to get back on its feet during this crisis. These crisis-proven improvised measures have since been adopted into ongoing reforms to Schengen governance, which seeks to build an agreement better equipped to handle future challenges.

Introduction

“L'Europe se fera dans les crises et elle sera la somme des solutions apportées à ces crises” –

Jean Monnet, *Mémoires*, 1976

From the perspective of an outsider, the EU can appear to be an impenetrable behemoth, with countless bureaucrats, politicians, states, and institutions all intertwined in a byzantine structure of countless regulations. In the face of a crisis that defies the expectations set out in these rules, this system is put to the test. COVID-19 has provided a prime opportunity for us to examine this in detail, and it has shown that perhaps the EU is not quite as inflexible as it may appear on the surface.

The main research objective of this paper is to examine the widespread reintroductions of internal border controls in the Schengen Area implemented in reaction to the COVID-19 pandemic. As the first wave of COVID-19 raged across Europe in early 2020, it brought with it widespread reintroductions of internal border controls across the Schengen area. The flow of goods, services and people across Europe slowed to a halt, bringing forth economic distress. How has this crisis impacted integration with regards to Schengen? This paper argues that widespread reintroductions of internal border controls across the Schengen Area led to swift and pragmatic improvisation to combat the severe economic impacts, which in turn is acting as the impetus for greater integration in this policy area.

To answer the above question, we will examine both short-term and long-term decision making with regards to Schengen's internal borders. This paper will be specifically focused on examining the area without internal borders from March through June 2020, along with the ongoing reforms to Schengen governance. Covering a period from the initial pandemic-related reintroductions of

border controls to their subsequent relaxation in the leadup to Summer 2020, this time frame provides a compelling view of the EU and its member states operating in crisis mode. By also examining the most recent developments in Schengen governance, this paper hopes to determine how these high-pressure decisions transitioned into long-term planning. While other measures such as streamlining regulatory steps for the development of COVID-19 vaccines undoubtedly had a secondary impact on internal border controls measures, this paper will only address issues related directly to internal border controls.

As a secondary question, this paper also asks: What role did the European Commission play during this crisis? Having this examination of the supranational side in addition to the intergovernmental will provide us a more complete view of the impacts COVID-19 had on integration in this area, as the dichotomy between member states and supranational institutions is an important factor in EU policy making. Regarding this question, this paper argues that the European Commission acted as policy entrepreneurs, attempting to steer intergovernmental power to achieve their goals through facilitation, coordination, and guidance. Ultimately, their actions helped create the foundations for reforms to Schengen by proving the worth of numerous *ad hoc* tools and measures.

In the proceeding section, we will begin with a look at the theories and resources behind this paper. A brief overview of Schengen, its importance to the EU, and the primary institutional actors involved will then be given. Following this, we will briefly examine a relevant historical case in order to gain an understanding of the impacts of previous crises on European integration. We will then proceed to give an overview of the state of Schengen just prior to the COVID-19 before we begin our investigation into the pandemic proper.

The first topic to be examined will be the immediate aftermath of widespread border closures. Here we will consider the reasons why these border closures occurred, as well as examine the triage

work done by the EU in order to minimize the negative outcomes of these decisions. The next priority will be an examination of the gradual re-opening across Europe in the buildup to the Summer of 2020, where we will be able to delve more closely into the national motivations driving this reopening. This will then be followed by an examination of the role the European Commission played during this time and the motivations driving their choices. We will then examine the topic of subsequent long-term proposals and changes to Schengen governance, and whether these indicate a willingness for member states to deepen integration in this area. Following all of this, this paper will conclude.

Theory and Resources

This topic will be approached from a liberal intergovernmentalist (LI) perspective. The core of liberal intergovernmentalism sees the development of policy within the European Union broken down into three steps: states developing national preferences, states engaging in intergovernmental bargaining, and states empowering institutions to ensure interstate commitment to agreements.¹ In a policy area where the majority of the power remains in the hands of the member states such as this one, liberal intergovernmentalism's focus on domestic interests and state actors provides a useful lens to interpret the shift in national attitudes during the initial crisis and in the development of longer-term policy. LI focuses attributes great value to domestic economic interests in terms of their ability to shape national preferences and focuses less on the role of geopolitics.² This perspective helps this paper develop important insights on the responses of the EU and its member

¹ Moravcsik, Andrew. "Preferences, Power and Institutions in 21st Century Europe." *Journal of Common Market Studies* 56, no. 7 (2018): 1649

² Kleine, Mareike, and Mark Pollack. "Liberal Intergovernmentalism and Its Critics." *Journal of Common Market Studies* 56, no. 7 (2018): 1493, 1496

states to the internal border control measures and the driving factors behind them. Liberal intergovernmentalism's views do not preclude it from being complemented by other theories, instead it can be seen as serving as an important role as a baseline theory on European integration.³ Even Moravcsik, who introduced the concept of liberal intergovernmentalism, noted that the theory cannot hope to explain every last detail, and that factors which are distinctly outside of LI (such as supranational entrepreneurship) can play an important role in providing credible answers in certain cases.⁴ This factor will play an important role in this paper, as it also relies heavily upon the 'failing forward' explanation of European integration developed by Jones, Kelemen, and Meunier.⁵ Built upon a fusion of liberal intergovernmentalism and neofunctionalism, they argue that European integration occurs over time through a process of the Union failing forward. Incomplete policy created through lowest common denominator solutions leads to crisis. In response, member states deepen integration through piecemeal reforms, which eventually leads to further crisis and a continuation of the cycle. While this approach was originally applied against the Euro crisis, in this paper it provides a useful frame to examine the crisis-driven solutions during the pandemic and allows us to extrapolate on the currently ongoing reforms to Schengen.

This paper primarily examines documents and legislation produced by the European Union. In order to develop a first-hand understanding of key issues and the reasoning behind proposed solutions, this paper also relies on statements provided by EU public officials and on discussions during recorded meetings of Committees in the European Parliament.

³ Moravcsik, 1649, 1665

⁴ Moravcsik, 1650

⁵ Jones, Erik, R. Daniel Kelemen, and Sophie Meunier. "Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration." *Comparative Political Studies* 49, no. 7 (2016): 1010-1034

Background

The Schengen Area is emblematic of 21st century Europe. In the Schengen Area, participating states have voluntarily erased the shared borders between them, destroying the physical boundaries between the myriad cultures and communities that call Europe home. In this sense, it can be said to truly embody the motto of the European Union, *in varietate concordia*.

The Schengen Area is currently comprised of 26 European countries. These include 22 EU member states (Austria, Belgium, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, and Sweden) and 4 non-EU Countries referred to as Schengen Associated States (Iceland, Liechtenstein, Norway, and Switzerland).

The original Schengen Agreement was signed in 1985 between five European countries (Belgium, France, Germany, the Netherlands, and Luxembourg), with the aim to gradually abolish checks at their common borders.⁶ A convention implementing the Schengen Agreement was signed in 1990, but it was not until 1995 that it came into effect and the implementation of Schengen began.⁷ Schengen became part of the EU framework under the Treaty of Amsterdam in 1997, and Schengen was absorbed into the *acquis communautaire*.⁸ Schengen rules are therefore binding upon all EU Member states, and EU candidate countries must accept them by the time of their accession

⁶ Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders

⁷ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders

⁸ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts

to the EU. This means that Bulgaria, Croatia, Cyprus, and Romania are all obliged to obey Schengen rules and integrate into the area without internal borders. However, practical implementation of this is a long, multi-step procedure that all are in the process of working towards. Post-Brexit, Ireland is the only EU member state which is not obligated to participate in the area without internal borders, having received an opt-out on the specific rules governing border controls with other Schengen countries following the Treaty of Amsterdam.

Schengen is more than simply the area without internal borders. There are numerous other aspects including the Schengen Information System and Visa Information System. For the purposes of this paper we will not be exploring these in more detail as we will be focused primarily on internal borders. Currently the rules that govern the reintroduction of internal border controls can be found in the Schengen Borders Code (SBC).⁹

Regarding Schengen governance, the four primary institutions of the European Union all have a role to play, to differing degrees. The European Commission is the primary executive body of the European Union. With its political independence, some of its many roles are to monitor policy implementation and manage ongoing programmes. The European Commission plays a stewardship role in the Schengen Area and keeps watch to ensure that member states meet their commitments.

The European Council is comprised of the heads of state and government in the EU's member states. It sets key priorities and helps define the overall political direction of the Union as a whole. National Ministers from EU member states make up the Council of the European Union. Although it is a single entity, it meets in various configurations, with national ministers responsible for

⁹ 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)

specific policy areas meeting with their counterparts from other member states. The Council of the EU and the European Council were both designed to lean more towards representing the interests of individuals member states, in contrast to the Commission which was meant to represent the ‘European’ interest.¹⁰ For Schengen, the Council of the EU and the European Council can be seen as providing important forums in which member state actors can discuss and take collective decisions.

Finally, as the sole directly elected institution in the European Union, the European Parliament is meant to represent the concerns of citizens. Parliament is mostly hands-off when it comes to the day-to-day operation of the area without internal borders. As we will see, this meant that their influence during the first wave of COVID-19 was limited, as unilateral national measures and supranational soft law where the main sources of action during the pandemic.¹¹

Schengen itself is of major economic importance to the European Union. The area without internal borders facilitates the flow of goods, services, and people, three of the four freedoms that form the backbone of the EU’s Single Market. Each year, the total trade between two complementary Schengen States increases by about 0.09 percent.¹² As an example, this creates of hundreds of millions of dollars of additional trade between France and Germany alone each year.¹³ Much of Schengen’s economic benefits directly correlate to the physical nature of borders and the creation of a frictionless border crossing experience. The greater the number of internal borders a good or

¹⁰ Cini, Michelle, and Nieves Pérez-Solórzano Borragán. *European Union Politics*. Oxford University Press, 2019: 170

¹¹ Wolff, Sarah, Ariadna Ripoll Servent, and Agathe Piquet. “Framing Immobility: Schengen Governance in Times of Pandemics.” *Journal of European Integration* 42, no. 8 (2020): 1127

¹² Davis, Dane, and Thomas Gift. “The Positive Effects of the Schengen Agreement on European Trade.” *World Economy* 37, no. 11 (2014): 1549

¹³ Davis and Gift, 1549-1550

service crosses in the Schengen Area, the greater the impact Schengen has overall on fostering such trade.¹⁴

The Schengen area is the largest free travel area in the entire world.¹⁵ Over 420 million people live in the Schengen area, and each day three and a half million people cross its internal borders.¹⁶ About 1.7 million people reside in one Schengen state and work in another.¹⁷ The absence of internal borders provided by Schengen is especially important in the EU's border regions, where about 30% of the entire population of the EU live, and 30% of the GDP of the entire European Union is produced.¹⁸ Here, Schengen has brought about much tighter cross-border economic integration.¹⁹

As noted earlier, there are several non-EU Schengen Associated States. Though each has their own agreement with the EU, they do not have the same ability to influence EU-decision making that EU member states do. In essence, these Associated States voluntarily became rule-takers in order to reap the benefits that Schengen brings. Overall, the economic benefits of Schengen to the countries of Europe is vitally important, and this fact played an important role in the COVID-19 crisis.

¹⁴Felbermayr, Gabriel, Jasmin Gröschl, and Thomas Steinwachs. "The Trade Effects of Border Controls: Evidence from the European Schengen Agreement." *Journal of Common Market Studies* 56, no. 2 (2018): 343, 349

¹⁵ European Commission. Communication from the Commission to the European Parliament and the Council A strategy towards a fully functioning and resilient Schengen area. 02 June, 2021: 1

¹⁶ European Commission, Directorate-General for Migration and Home Affairs. Adapting Schengen to evolving challenges. 14 December, 2021

¹⁷ European Commission, Directorate-General for Migration and Home Affairs, *Adapting Schengen to evolving challenges*

¹⁸ European Commission, *A strategy towards a fully functioning and resilient Schengen area*, 2

¹⁹ Felbermayr *et al*, 336.

Historical Parallels – The Euro Crisis

The EU is no stranger to crises, and to taking a reactive approach towards them. Van Middelaar argues that the traditional political structures of the EU are not well-suited to dealing with crisis, which requires decision-making as opposed to the application of norms. Therefore, past crises have led the European Union to improvise solutions beyond these norms.²⁰ These solutions have shown to sometimes require action that sidesteps existing rules. But rather than seeing this approach as a failing or a danger to the EU's rules-based structure, this willingness to adapt should be seen as one of the EU's strengths.

Arguably the most prominent example can be found in the Euro Crisis. As Greece stood on the edge of bankruptcy in early 2010, member states came to realize that this would have severe repercussions for the Eurozone and the Union as a whole.²¹ At this point, the EU was faced with a problem, as it did not have the tools to effectively mitigate the emergency.²² The Maastricht Treaty set out the framework under which the Eurozone operated, and it prevented bailouts, monetization of fiscal debt, and debt restructuring.²³ But member states did not simply throw up their hands and resign themselves to the consequences, instead a solution outside the confines of the EU treaties was developed. Pragmatism won out and all three of the above prohibited measures were utilized in order to save the Euro.²⁴ This was most certainly not the end of the story for the Euro Crisis, as the trials and tribulations would continue for years to come. But these circumstances and responses proved the EU's capacity and willingness for crisis-based decision-making that goes beyond

²⁰ van Middelaar, Luuk. *Alarums & Excursions: Improvising Politics on the European Stage*. Agenda Publishing, 2019: 4, 22

²¹ van Middelaar, 4, 27

²² van Middelaar, 4

²³ Bénassy-Quéré, Agnès. "Recovering from Maastricht." *European Journal of Economics and Economic Policies* 17, no. 2 (2020): 133

²⁴ Bénassy-Quéré, 134

existing legal frameworks. The established procedures were unable to provide the timely solution required, thus improvisation was essential. As noted by German Chancellor Angela Merkel in 2010, “if the euro fails, Europe fails.”²⁵ A solution was needed, and the EU did not shy away from taking decisive action. Utilizing the “full range of means available”, the heads of state and government along with EU institutions were able to stabilize the situation and prevent the crisis from evolving into an even greater threat to the Union.²⁶

The Euro Crisis was a pivotal moment in the history of the EU that saw both member state and supranational actors stepping up to play a role in saving the Union. Rather than abandon the governance system that failed during this crisis, member states instead brought about deeper economic and monetary integration across the Eurozone through the solutions improvised in response to the issues.²⁷ As we will see, this same idea of necessity drove responses during the COVID-19 pandemic as well and served the same integration-deepening function.

Schengen in the Preceding Years

The COVID-19 pandemic led to the reimposition of numerous controls at the area’s internal borders, restricting the free movement of goods, services, and people that Schengen normally provides for. But even before this, the past decade of Schengen’s existence has not been entirely kind to it as it has come face-to-face with numerous crises that have challenged its existence. One of the implications of multiple sovereign states eliminating their shared borders is that the external

²⁵ BBC News. “Merkel: 'If the euro fails, Europe fails!'.” 07 September, 2011.

²⁶ van Middelaar, 37

²⁷ Jones *et al*, 1025-1027

borders of one become the external borders of all. In the years preceding the COVID-19 pandemic, it was this shared external border that caused the most issues to Schengen.

In 2011, Italy was faced with a large influx of migrants arriving from North Africa, most notably on the southern island of Lampedusa. In response to what it perceived as a lack of support from the EU in managing the arrivals, Italy issued 20,000 travel permits to migrants in order to allow them to leave Lampedusa and travel freely through the Schengen Area.²⁸ The majority of migrants originated from Tunisia, which had a history under French colonial rule, and therefore France was sought as the ultimate destination for many.²⁹ This situation triggered a diplomatic dispute between France and Italy, with France reinstating patrols and checks on its border with Italy, and refusing entry to individuals carrying the aforementioned travel permits.³⁰ Despite statements from both sides that they were in compliance with Schengen rules in this case, it has since been argued that the actions of both sides are legally difficult to justify.³¹ This situation led to both France and Italy pushing for reform in Schengen and a subsequent proposal by the European Commission to address these concerns. But this was only a preview of a migrant crisis that would go on to dominate the conversation surrounding Schengen for the remainder of the decade.

Due to instability overseas, record numbers of migrants sought refuge within the European Union, arriving mostly from North Africa and the Middle East. The crisis reached its peak in 2015, a year which saw 1.8 million irregular crossings at Europe's external borders.³² In September 2015,

²⁸ Cini and Borragán, 332

²⁹ Connor, Richard. "Italy and France agree on patrols to stop Tunisian migrants." *DW*, 04 August 2011.

³⁰ Associated Press. "Italy protests as France blocks train carrying migrants from Tunisia." *The Guardian*, 17 April, 2011.

³¹ Carrera, Sergio, Elspeth Guild, Massimo Merlino, and Joanna Parkin. *A Race against Solidarity The Schengen Regime and the Franco-Italian Affair*. Centre for European Policy Studies, 2011: 18

³² European Commission. Communication from the Commission to the European Parliament and the Council Stronger and Smarter Information Systems for Borders and Security. 04 June, 2016.

Germany was the first Schengen nation to re-introduce border controls in response to this crisis.³³ In the months that followed, numerous other Schengen members imposed border controls citing the influx of migrants, including Austria, Belgium, Denmark, Hungary, Norway, Slovenia, and Sweden. This crisis has left a lasting impact on Schengen's internal borders. A handful of countries have claimed risks relating to secondary movements and terrorism to justify the continued imposition of some internal border controls even into the 2020s.³⁴ But while the severity of this crisis cooled down in the following years, an even greater threat to Schengen was looming just around the corner.

The virus that came to be known as COVID-19 was first reported in China in December 2019, and the outbreak rapidly evolved in the weeks and months that followed. The first several cases of COVID-19 in Europe were detected on 24 January 2020. Less than a week later, the World Health Organization declared that the COVID-19 outbreak was a public health emergency of international concern. Italy was the first European nation to be hit hard by COVID-19. The Italian Cabinet of Ministers declared a state of emergency on 31 January 2020.³⁵ During that period, the EU had already seen the activation of multiple emergency response programs in response to COVID-19, including the Integrated Political Crisis Response mechanism (ICPR), the general rapid alert system (ARGUS), and the Union Civil Protection Mechanism (UCPM).

The following weeks saw responses to the COVID-19 pandemic from all different levels of EU governance. In late February, the European Commission also called upon member states to ensure

³³ Votoupalová, Markéta. "The Wrong Critiques: Why Internal Border Controls Don't Mean the End of Schengen." *New Perspectives* 27, no. 1 (2019): 85

³⁴ European Parliament, Directorate-General for Internal Policies of the Union, Carrera, S., Chun Luk, N. *In the name of COVID-19: an assessment of the Schengen internal border controls and travel restrictions in the EU.* (2020): 9-11

³⁵ Carrera, Sergio, and Ngo Chun Luk. *Love Thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area.* Centre for European Policy Studies, 2020: 83

that any potential border control measures be, above all else, coordinated with other member states.³⁶ The Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), one of the configurations of the Council of the European Union, held an extraordinary meeting on 13 February 2020, and again on 06 March 2020. At this point in time, it was claimed that that member states stood ready to establish of containment measures where necessary while maintaining the freedom of movement principle.³⁷

But despite the speeches and calls for preparedness, March 2020 saw reintroductions of internal border controls being widely implemented across the Schengen Area. The World Health Organization declared the COVID-19 outbreak a pandemic on 11 March 2020, and that very same day Austria became the first country in the Schengen area to reintroduce internal border controls due to COVID-19.³⁸ By the end of March, Belgium, Czechia, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Malta, Norway, Poland, Portugal, Slovenia, Spain, and Switzerland had all introduced internal border controls due to COVID-19 as well, with Slovakia and Iceland following in April.³⁹

The First Wave

The widespread reintroductions of internal border controls across the Schengen Area were responsible for a host of issues that afflicted Europe, causing both great economic and social harm. It is doubtful that member states would have been unaware of the impacts that reimposed internal

³⁶ Michaelopoulos, Sarantis. "Commission calls for coordination before any border measures for coronavirus." *Euractiv*, 24 February 2020

³⁷ Croatian Presidency of the Council of the European Union. "EU will ensure a coordinated response to the COVID-19." 06 March, 2020.

³⁸ European Parliament, *In the Name of COVID-19*, 19

³⁹ European Parliament, *In the Name of COVID-19*, 19-23

border controls would generate. Yet so many still took those decisions. Why? Because national preferences reflect domestic concerns.⁴⁰ As concerns can shift, national preferences are therefore also mutable. In this high-pressure early pandemic period, information on the virus was limited, and concern over these unknowns took center stage. What was known was that the virus had left the Italian health system catastrophically overloaded, and that the virus was beginning to spread rapidly across the continent.⁴¹ This prompted member states to take greater caution with regards to health in the short term across numerous policy areas, with internal borders being no exception. Article 27 of the Schengen Borders Code requires that member states notify the Commission and other member states of any decision to reintroduce internal border controls. During this first wave, only Italy, Malta, and Slovenia failed to provide notifications.⁴² This shows that for the vast majority of member states, there was a willingness to continue abiding by other elements of Schengen which did require increase their exposure to health risks.

While the key focus of the migrant crisis was on the external border, during the COVID-19 crisis we saw a much greater focus on internal borders. External threats were still an important aspect of the COVID-19 crisis, but threats from within played a more prominent role in the reintroduction of internal border controls during this time, as viral hotspots were developing throughout the Schengen Area itself.

Perhaps the most infamous issue caused by the reintroduction of borders controls during the first wave of the pandemic were the traffic jams at borders faced by freight trucks delivering goods across Europe. In some locations, the border queues for trucks were recorded as being up to 50 km

⁴⁰ Moravcsik, 1650.

⁴¹ Bossong, Raphael. *EU Border Security in a Time of Pandemic: Restoring the Schengen Regime in the Face of Old Conflicts and New Requirements for Public Health*. German Institute for International and Security Affairs, 2020: 1

⁴² European Parliament. The impact of coronavirus on Schengen borders. 27 April, 2020: 2-3

long.⁴³ These major delays were crippling to supply chains across Europe, and creating unsafe working conditions for drivers.

A second major issue during this time period concerned cross-border workers, and the impacts the reintroduction of border controls had on their ability to perform their jobs. Although this issue could be found across all industries, it impacted them all to different degrees. For example, this issue was of particular concern in Luxembourg, as the majority of the nation's health workers commuted from France and Germany.⁴⁴ The agricultural sector was also particularly at risk, as was highlighted by MEP Norbert Lins, the Chair of the European Parliament's Committee on Agriculture and Rural Development. In a letter addressed to the EU Agriculture Commissioner on 24 March, he warned that in order to avoid upcoming food shortages in Europe, freedom of movement for seasonal workers during the harvest was essential, and therefore both the Commission and member states needed to take action.⁴⁵

A third major issue that was most prevalent early in the pandemic was the inability for many EU citizens and residents to simply return home. While this was of course a problem affecting some who were overseas at the time, this was an issue within the Schengen Area as well. The most prominent example of this was Poland's ban on entry for foreigners in March. This left EU citizens and residents trying to return home to Estonia, Latvia, and Lithuania in the lurch, as they had no routes to take by land.⁴⁶ Such events were leading to raised tensions between member states.⁴⁷

⁴³ European Commission. Communication from the Commission to the European Parliament, the European Council and the Council upgrading the transport Green Lanes to keep the economy going during the COVID-19 pandemic resurgence. 28 October, 2020: 1.

⁴⁴ European Council, Press Conference by Charles Michel and Ursula von der Leyen. 17 March, 2020

⁴⁵ European Parliament. "COVID-19: Helping farmers secure supply of food for all." European Parliament Press Release, 24 March, 2020

⁴⁶ Shotter, James, Richard Milne and Sam Fleming. Flow of goods slows as Poland tightens borders. *Financial Times*, 17 March, 2020.

⁴⁷ European Council, Press Conference by Charles Michel and Ursula von der Leyen. 17 March, 2020

A lack of clarity surrounding the inconsistent restrictions was also a major issue during this time. Some states, such as Austria and Slovenia, began with restrictions on persons crossing the border from Italy, while others such as Poland barred everyone without a residence permit.⁴⁸ In the Netherlands, although there were no explicit internal border controls put in place, passenger flights from several Schengen states were suspended in March.⁴⁹ ⁵⁰ Countless other differences existed as well. From mandatory quarantines to different restrictions on land, sea, and air mobility, it was not a simple process to understand what restrictions had been implemented and where. This was especially worrisome considering that numerous states had implemented sanctions for violating restriction measures. Even these were hopelessly out of sync. While the maximum possible fine in Lithuania was up to €1,500, fines in Germany could reach as high as €25,000. In Finland, a prison sentence could last up to 3 months while a prison sentence in Ireland could last as much as double that.⁵¹

These issues all shared a common root: A failure in coordination between member states. Traditionally, control over borders plays a key role in a state establishing itself as a sovereign entity.⁵² Under this historical background, Schengen was designed so that the majority of power over these now-internal borders in the Schengen Area remained in the hands of the individual member states. During the first wave of the COVID-19 virus, a lack of coordinated action between Member states undoubtably contributed greatly to the issues that came to define this crisis period. Individualistic national actions created many of these issues, and disjointed rules across the Schengen area exacerbated them. One cannot pin the blame solely on the member states, however.

⁴⁸ Carrera and Luk, *Love Thy Neighbour* 3-12

⁴⁹ Carrera and Luk, *Love Thy Neighbour*, 77

⁵⁰ European Parliament, *The impact of coronavirus on Schengen borders*, 3

⁵¹ European Parliament, *The impact of coronavirus on Schengen borders*, 37-39

⁵² Kallis, Aristotle. "Populism, Sovereignism, and the Unlikely Re-Emergence of the Territorial Nation-State." *Fudan Journal of the Humanities and Social Sciences* 11, no. 3 (2018): 295

As noted above, it is clear that the EU's preventative measures and attempts to organize a common internal border response amongst the member states failed.

This initial supranational failure and the unilateral national decision-making has led many to consider member states as the only effectual actors in this early crisis period. In the face of strong nationalist action, supranational institutions are portrayed as being unable to provide an impactful response, thus being relegated to the sidelines.⁵³ But what we see by looking at the supranational output during this time contradicts these notions. During these first few months, the European Commission released eight different sets of guidelines and recommendations which addressed issues at Schengen's internal borders.⁵⁴ Providing effective solutions to the above issues, these documents demonstrated the pragmatism and responsiveness of the Commission. Ultimately, what was lacking in preparation was made up for in responsiveness.

Released just five days after the World Health Organization declared COVID-19 to be a global pandemic, the Commission's guidelines of 16 March were an important first step in addressing the ongoing crisis.⁵⁵ In addition to recommendations encouraging the free movement of transport

⁵³ For several strong arguments to this point, see Bouckaert, Geert, Davide Galli, Sabine Kuhlmann, Renate Reiter, and Steven Van Hecke. "European Coronationalism? A Hot Spot Governing a Pandemic Crisis" and Genschel, Philipp, and Markus Jachtenfuchs. "Postfunctionalism Reversed: Solidarity and Rebordering During the COVID-19 Pandemic."

⁵⁴ These include the *Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, the *Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, the *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, the *Guidelines on EU Emergency Assistance in Cross-Border Cooperation in Healthcare related to the COVID-19 crisis*, the *Joint European Roadmap towards lifting COVID-19 containment measures, Tourism and transport in 2020 and beyond*, *Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls*, and the *Guidelines on the progressive restoration of transport services and connectivity*.

⁵⁵ European Commission. Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 86 I/01. (2020). *Official Journal of the European Union*, C 86: 1-

workers, the Commission proposed the introduction of ‘green lanes’, priority lanes for freight transport across Europe.

Support for a green lane strategy was seen widely across the EU’s different halls of power. Heads of State and Government endorsed the Commission’s Guidelines during a videoconference of the members of the European Council on 17 March 2020.⁵⁶ In the Council of the EU, Transport Ministers agreed to support the strategy at an informal videoconference on 18 March 2020. Later that very same day the Chairs of the Internal Market and Consumer Protection Committee and the Transport and Tourism Committee of European Parliament released a joint statement advocating for the green lanes as well, referring to them as being “of the utmost importance.”⁵⁷ There was also much support from private sector, with companies and industry associations urging member states to implement green lanes.⁵⁸

Shortly afterwards on 23 March, the Commission released a communication which fleshed out details regarding the implementation of green lanes. Member states were advised to designate border crossing points on the trans-European transport network (TEN-T) as green lane crossing points open to all freight vehicles, with streamlined procedures in order to ensure that crossing the border took no more than 15 minutes.⁵⁹ Through this guidance and practical advice on the green lanes we can see the commission targeting the underlying causes of this issue and providing practical solutions. For example, industry members had highlighted that one of the causes of the transport bottlenecks across Europe was paperwork related, as truck drivers were being asked to

⁵⁶ European Council, Press Conference by Charles Michel and Ursula von der Leyen. 17 March, 2020

⁵⁷ European Parliament. “Delivering masks across borders: EU Single Market protecting citizens’ health.” European Parliament Press Release, 18 March, 2020

⁵⁸ Nelson, Arthur, Zosia Wanat, and Eddy Wax. “How Europe will keep food on the shelves.” *Politico*, 24 March, 2020

⁵⁹ European Commission. Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 96 I/01. (2020). *Official Journal of the European Union*, C 96: 2

provide official documents proving they were carrying out essential transport activities, and there was no singular documentation that worked at all borders.⁶⁰ In response, the Commission produced a standardized template for use by companies.⁶¹ Member states were called upon to recognize such certificates during this crisis, and not require any further documents other than identification and a driver's licence.⁶² Member states were also specifically called upon to set up transit corridors for the use by private drivers, to allow for citizens to return to their home countries.⁶³

While the Commission's 16 March guidelines requested that members facilitate the crossing of frontier workers at internal borders, it was on 30 March that specific guidelines concerning the free movement of workers were presented by the Commission.⁶⁴ ⁶⁵ These guidelines were presented as the Commission's response to the European Council's call upon the Commission to address the need for workers to continue essential activities.⁶⁶ In these guidelines, we see the Commission set out a list of critical occupations and provide recommendations for how to enable burden-free border crossings for workers in these roles.⁶⁷ It was also recommended that Member states communicate using already established channels in the Technical Committee on the Free Movement of Workers.⁶⁸

⁶⁰ FoodDrinkEurope. "5 urgent actions to help ease food supply pressure." FoodDrinkEurope Press Release, 25 March, 2020.

⁶¹ European Commission, *Communication from the Commission on the implementation of the Green Lanes*, Annex 3

⁶² European Commission, *Communication from the Commission on the implementation of the Green Lanes*, 3

⁶³ European Commission, *Communication from the Commission on the implementation of the Green Lanes*, 4

⁶⁴ European Commission, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 7

⁶⁵ European Commission. Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak 2020/C 102 I/03. (2020). *Official Journal of the European Union*, C 102: 12-14.

⁶⁶ European Council. "Joint statement of the members of the European Council, 26 March 2020." 26 March, 2020.

⁶⁷ European Commission, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 2

⁶⁸ European Commission, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 3

On the subject of communication, an informal high-level video conference of EU Transport Ministers on 18 March 2020 led to the creation of a network of national contact points and of an online platform set up by the Commission to collate information on transport-related measures taken by member states.⁶⁹ The information that shared through these measures included information on traffic flows, notifications of national measures adopted, and more.⁷⁰

It did not take long for efforts to bear fruit. On 02 April 2020, Commissioner for the Internal Market Thierry Breton reported to the European Parliament's Internal Market and Consumer Protection Committee on the measures taken so far. In response to a question about the effectiveness of the green lanes in restoring the flow of goods, the Commissioner highlighted that feedback from industry had shown that the worst was already behind them.⁷¹ During a meeting of the European Parliament's Committee Transport and Tourism Committee on 28 April, it was highlighted that the waiting time for haulers at most borders had been reduced to no more than 15 minutes.⁷² This is a remarkable change from the previous month, where wait times at some internal borders had surpassed 24 hours.⁷³ During the meeting, Members of European Parliament highlighted how the green lanes proposed by the Commission had helped restore the functionality in the single market following the breakdown in the flow of vital goods caused by the unilateral actions of member states. The same reaction could be seen coming out of the Council of the EU. During an informal videoconference of Transport Ministers on 29 April 2020, members expressed their satisfaction with the effectiveness of the measures undertaken. In particular, the green lanes

⁶⁹ European Commission, *Communication from the Commission on the implementation of the Green Lanes*, 3

⁷⁰ Croatian Presidency of the Council of the European Union. "Presidency Summary of the Informal Videoconference of Transport Ministers." 29 April, 2020.

⁷¹ European Parliament. Committee on the Internal Market and Consumer Protection Extraordinary Committee meeting video recording. 02 April, 2020.

⁷² European Parliament. Committee on Transport and Tourism meeting video recording, 28 April, 2020.

⁷³ European Commission, *Communication from the Commission on the implementation of the Green Lanes*, 1

were highlighted as being essential in ensuring the flow of goods across Europe, as were the freight transit corridors used by rail.⁷⁴ Looking forward, EU Transport Ministers also saw the need to ensure that these green lanes would be maintained going forward in as the volume of goods and private transportation on the roads began to increase once again.⁷⁵ These national focal points for communication also proved their worth during this time period. One point in particular that to highlight is that the information sharing brought about by this network had played an important role in the operation of the green lanes, and thus the maintenance of supply chains across Europe.⁷⁶ Due to the positive impact of this network and others, the European Commission proposed to continue their use to facilitate a coordinated lifting of internal border controls.^{77 78} A month later near the end of May, it was reported by Commissioners to the European Parliament that 90% of the green lane border crossing points had been meeting the 15-minute target goal during the crisis.⁷⁹

The capacity to improvise is essential to the process of decision-making.⁸⁰ This early crisis showed that Europe has those capabilities. Practicality was at the heart of the solutions developed here. These issues were all time-sensitive, therefore the solutions had to come rapidly. The pragmatic *ad hoc* measures established by the European Commission during this time focused on facilitating communication and harmonization in decision-making between member states, and ensuring that

⁷⁴ Croatian Presidency of the Council of the European Union. “Presidency Summary of the Informal Videoconference of Transport Ministers.” 29 April, 2020.

⁷⁵ Croatian Presidency of the Council of the European Union. “Presidency Summary of the Informal Videoconference of Transport Ministers.” 29 April, 2020.

⁷⁶ Croatian Presidency of the Council of the European Union. “EU Transport Ministers discussed future challenges that may occur as a consequence of relaxing measures.” 29 April, 2020.

⁷⁷ European Parliament. Committee on Transport and Tourism meeting video recording, 28 May, 2020.

⁷⁸ European Commission. Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19 2020/C 169/03. (2020). *Official Journal of the European Union*, C 169: 37

⁷⁹ European Parliament. Committee on Transport and Tourism meeting video recording, 28 May, 2020.

⁸⁰ van Middelaar, 22

such intergovernmental activity was facilitated under the EU's supranational umbrella. This early pandemic period would come to be seen as a time when the principle of free movement within Europe and the functionality of the EU's single market was teetering on the edge of a precipice. The guidelines, recommendations, and systems of communication helped to ensure stability during this trying time.

Reopening Europe

As the weeks passed, the focus began to shift away from staunching the bleeding and towards reopening Europe, solving the underlying problem. While the earlier solutions gave much insight into the flexibility and responsiveness of the EU, the next steps taken by the member states and the supranational bodies make visible the hierarchy of forces driving the reopening.

On 15 April 2020, the European Commission, working in Cooperation with the President of the European Council, presented the *Joint European Roadmap towards lifting COVID-19 containment measures*. This roadmap, published by the European Commission, creates a framework which places national power at the forefront, and European institutions in a supporting role.

We can see this deference to State power reflected quite openly in this publication. It is plainly stated that this roadmap is only meant to help inform decisions of member states, each of whom have their own specificities to take into account.⁸¹ From a liberal intergovernmentalist perspective, domestic interests are key in the development of the national positions from which states approach intergovernmental bargaining. Therefore we can understand the above statement as clearly

⁸¹ European Commission. Joint European Roadmap towards lifting COVID-19 containment measures 2020/C 126/01. (2020). *Official Journal of the European Union*, C 126: 3

acknowledging the importance and need for consideration that states apply to these domestic influences. Even the criteria for assessing an appropriate time to relax restrictions adds that the decision lies with member states “to decide at what level compliance with the criteria above should be assessed.”⁸²

The supporting role that the EU institutions are designated in this roadmap comes through clearly as well, as they are tasked with duties that serve to enable informed decision-making by member states. For example, the ECDC is charged to cooperate with member states in maintaining a list of areas in which there is comparably low circulation of COVID-19 to facilitate reopening of travel between them. This is in order to facilitate the easing of border control measures between them.⁸³

This document was only the very start of the transition away from short-term problem solving to more permanent solutions. But even here it is clear that the supporting role of EU institutions as facilitators and guides for member state action would be an important part in rebuilding Schengen.

On 13 May 2020, the European Commission released a package of guidelines and recommendations detailing a phased and coordinated approach for restoring freedom of movement and for lifting internal border controls. As with the earlier roadmap, the European Commission positioned itself as a facilitator, “invit[ing] member states to engage in a process of re-opening unrestricted cross-border movement within the Union.”⁸⁴ They would play a supporting role by preparing coordinated action, but it was on the Member states to take the decisions.⁸⁵ These guidelines reiterated the principle of non-discrimination. They call for restrictions at borders being

⁸² European Commission, *Joint European Roadmap towards lifting COVID-19 containment measures*, 5

⁸³ European Commission, *Joint European Roadmap towards lifting COVID-19 containment measures*, 12

⁸⁴ European Commission, *Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19*, 30

⁸⁵ European Commission, *Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19*, 37

based on public health considerations, rather than nationality. As an example, if a member state were to open its borders to another, it should do so to all other Members with a comparable health situation.⁸⁶ To coordinate this information, guidelines to ensure the interoperability of national contact tracing apps were also published.⁸⁷

Over the course of the first wave, the recommendations and guidelines from the Commission sought to weigh public health against the need to mitigate economic impacts. As the first wave began to recede however, greater importance began to be placed on economic issues, representing a shift in domestic interests and thus national preferences across the Schengen area. It is these economic concerns which primarily drove the push towards reopening.

Speaking to the Transport and Tourism Committee of the European Parliament on 28 May 2020, the European Commission was quite clear in stating that the objective of the guidelines they released earlier that month was to save the summer tourism season.⁸⁸ Tourism contributes to almost 10% of the combined GDP of the European Union.⁸⁹ Rather than ensuring that every single detail needed for a long-term solution was in place, the European Commission was providing practical guidance to ensure that the functionality of the tourism sector during those most important months. Also to this end, the Commission developed a website that collated information from member states and other COVID-19 monitoring structures in order to provide all Europeans with real-time access to information on borders and travel restrictions.⁹⁰ This website, <https://reopen.europa.eu/>, was launched on 15 June 2020. It was developed as a part of the Commission's 13 May package

⁸⁶ European Parliament. Committee on Transport and Tourism meeting video recording, 28 May, 2020.

⁸⁷ European Commission, *Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19*, 32

⁸⁸ European Parliament. Committee on Transport and Tourism meeting video recording, 28 May, 2020.

⁸⁹ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tourism and transport in 2020 and beyond. 13 May, 2020: 1

⁹⁰ European Parliament. Committee on Transport and Tourism meeting video recording, 28 May, 2020.

on Tourism and Transportation and was promoted as a tool with consistently updated information to help ensure confidence in a safe resumption of tourism across the EU.⁹¹

This proactive planning for potential problems shows how at this point in time they were transitioning away from being stuck on the back foot and merely handling consequences. The Commission framing their solutions around such an economically-important sector shows they recognized that the economic impacts of the pandemic was where main concerns of member states were trending towards.

Pressure to reopen borders was coming from more multiple levels. As time passed, the voice of employers and employees most affected by the reintroduction of border controls became more important in highlighting the negative economical impacts of internal border closures. At locations such as the Poland-Germany border, protests raised awareness of the issues faced by intra-EU workers, and exerted pressure from below on states to act.⁹²

A combination of pressures and guidance led to greater coordination between member states. Smaller travel bubbles between multiple member states were developed to allow a more limited return to normalcy.⁹³ Despite being outside of the EU, we see such coordination coming through on the part of the Schengen Associated States as well, with Switzerland lifting border controls with Austria, France, Germany, and Italy on 15 June 2020.⁹⁴ As Summer rolled across Europe, the

⁹¹ European Council. Re-open EU: Commission launches website to safely resume travelling and tourism in the EU. 15 June, 2020.

⁹² Paul, Ruxandra. "Europe's Essential Workers: Migration and Pandemic Politics in Central and Eastern Europe During COVID-19." *European Policy Analysis* 6, no. 2 (2020): 253-254

⁹³ van Eijken, Hanneke and J.J Rijpma. "Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona." *Utrecht Law Review* 17, no. 3 (2021): 44

⁹⁴ Sager, Fritz, and Céline Mavrot. "Switzerland's COVID-19 Policy Response: Consociational Crisis Management and Neo-corporatist Reopening." *European Policy Analysis* 6, no. 2 (2020): 297

majority of internal border controls in the Schengen area had been dropped.⁹⁵ This was a marked improvement from the near dead-stop Europe found itself at just several months prior.

The European Commission

With the developments during the first wave reviewed, we now turn our focus to consideration of the role and aims of the European Commission. The first goal of the Commission was to enable cooperation and coordination between the member states. This was clearly stressed in virtually every communication regarding internal borders that they released. But what is also important is that the European Commission sought to have this cooperation and coordination be organized at the supranational level. We can see this holding true in from the very first responses they provided to the pandemic to the proposals to transit back towards normality. In the 16 March Guidelines, paragraph 25 specifically states state that cooperation and coordination between member states (in particular neighbouring Member states) should occur at the EU level.⁹⁶ In the Joint Opening Roadmap, the lifting of internal border controls is recommended to be coordinated between neighbouring member states in conjunction with the Commission.⁹⁷

Through this, there was a clear desire by the Commission to avoid fragmentation. If the single market could be said to have broken off into individual numerous pieces during the crisis, then the Commission was attempting to make sure that it would glue itself back together as a single whole. As the Commission has the goal of ensuring the functionality of the area without internal borders, ensuring this was of high priority. This is not to say that complete policy coordination between all

⁹⁵ van Eijken and Rijpma, 44

⁹⁶ European Commission, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 4

⁹⁷ European Commission, *Joint European Roadmap towards lifting COVID-19 containment measures*, 12

member states was the only goal they would accept, however. Much of the return to normalcy experienced by the start of the summer season was the result of small clusters of member states and Schengen Associated States easing border controls among themselves, and which came to include more states over time.⁹⁸ The Commission, alongside the Council, supported such cooperation while still emphasizing that a pan-European approach would be required in the medium term.⁹⁹ This approach further demonstrates the pragmatism of the Commission as well. Even if a patchwork of travel blocs were most certainly not a long-term solution for Schengen, they provided a service that was much needed during the ever-so-economically-important summer season.

On that note, ensuring level-headed reopening measures was also important. Preservation of the single market had to be balanced with the need to protect public health. Just as sudden and uncoordinated closures led to an economic crisis, sudden and uncoordinated reopening strategies could have led to a surge of infections across Europe. This idea was embodied by the May 2020 guidelines on the phased and coordinated approach to lifting controls.¹⁰⁰

Protecting the principle of non-discrimination was a third goal. The fact that the same rules should be applied to all EU citizens and residents regardless of nationality is laid out in virtually all guidelines and recommendations. In the guidelines for the free movement of workers, we see recommendations that health screening be the same for frontier and posted workers that it is for nations in the same roles.¹⁰¹ In the guidelines on tourism and transport, it is insisted that any when

⁹⁸ Thym, Daniel and Jonas Bornemann. "Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics." *European Papers* 5, no. 3 (2020): 1151

⁹⁹ Thym and Bornemann, 1151

¹⁰⁰ European Commission, *Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19*, 33

¹⁰¹ European Commission, *Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, 3

restrictions on movements between states are lifted that they apply to all peoples residing in those areas.¹⁰² This strong push for non-discrimination was important to upholding European values and ensuring that Schengen would not be reopened based on processes of exclusion. Principles such as non-discrimination are part of the core promise of the EU, so it is no surprise to see the Commission attempting to ensure member states remain committed to it.

With a greater understanding of the actions the European Commission took and what drove them, we now turn to the area where it did not act. That is, in pushing back directly against the unilateral internal border closures. As the custodian of the area without internal borders, the European Commission has the power to bring infringement proceedings against those states who contravene Schengen legislation. As it was, most of the justifications for the reintroduction of border closures due to COVID-19 were not backed with solid arguments regarding their necessity and proportionality.¹⁰³ While it could be said that the protection of public health falls under justifications based on internal security, the SBC specifically highlights threats to public health as justification for external border controls, while the section on internal border controls does not.¹⁰⁴

The Commission's stance gave a quite generous interpretation in their guidelines of 16 March, where they reiterated what was written in the SBC, but also added that "in an extremely critical situation, a member state can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease."¹⁰⁵ Later, in a letter addressed to Member of European Parliament Tanja Fajon dated 30 April 2020, European Commissioner for Home Affairs Ylva Johansson made

¹⁰² European Commission, *Tourism and transport in 2020 and beyond*, 3

¹⁰³ Montaldo, Stefano. "Internal Border Control in the Schengen Area and Health Threats: Any Lessons from the COVID-19 Pandemic?" *European Journal of Migration and Law* 23, no. 4 (2021): 429.

¹⁰⁴ Montaldo, 414

¹⁰⁵ European Commission, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 4

it clear that European Commission believed that Europe remained in an extremely critical situation.¹⁰⁶ In the roadmap developed by the European Commission and the European Council, the restrictive measures introduced by member states are specifically referred to as “necessary to delay the spread of the epidemic and alleviate pressure on health care systems,” and that this approach was supported by the prevailing scientific view of the time.¹⁰⁷ This was very clear justification of the continued use of internal border controls by the member states. These allowances came to be a subject of disagreement between the European Commission and European Parliament. On 19 June 2020, the European Parliament passed a resolution on the situation in the Schengen area following the COVID-19 outbreak.¹⁰⁸ In this resolution, the Parliament calls out the fact that that nowhere in the Schengen Borders Code are risks to public health mentioned as grounds for the reintroduction of internal border controls.

Now, despite the rules set out in the Schengen Borders Code and the pushback by the European Parliament, it may be asked why the European Commission took such a lenient approach to the internal border restrictions put in place by member states. The reasoning for this boils down to necessity. Just as during the Euro crisis, the existing rules did not fit the reality of the situation. The existing Schengen framework was simply not created to respond to a public health crisis such as the likes of COVID-19.¹⁰⁹ At the time, restrictive national measures had popular support as well. In a public opinion survey commissioned by the European Parliament during the first few months of crisis, roughly two-thirds of respondents across Europe believed that the recent restrictions on

¹⁰⁶ Johansson, Ylva. Public Letter to Ms Tanja Fajon, Member of Parliament. 30 April, 2022.

¹⁰⁷ European Commission, *Joint European Roadmap towards lifting COVID-19 containment measures*, 3

¹⁰⁸ European Parliament. European Parliament resolution of 19 June 2020 on the situation in the Schengen area following the COVID-19 outbreak (2020/2640(RSP)). (2021). *Official Journal of the European Union*, C 362, 77-81.

¹⁰⁹ van Eijken and Rijpma, 48

their individual freedoms were justified by the fight against the COVID-19 pandemic.¹¹⁰ The actions of the Commission in this case can be seen as an awareness of how these domestic interests shaped the national reintroductions of border controls across the Schengen Area.

The European Commission not taking a hardline approach towards these reintroductions of border controls by the member states was not as a result of timidity, but pragmatism. The strategies employed by the European Commission kept discord between EU institutions and member states or member states and other member states lower than in previous crises.¹¹¹ As the Commission was at the time focused on fostering cooperation to prevent the collapse of the single market, antagonizing member states would have been counterproductive and put the process at risk. Considering that virtually nobody living in the EU was unaffected by the ongoing situation, any action taken by the Commission would have been highly visible. The issue of internal borders was already politically charged, and this crisis was creating a tense situation that was exacerbating emotional responses.¹¹² From this point of view, the Commission's reluctance to initiate infringement proceedings during this time was a reasonable choice. They were aware that the crisis had shifted national preferences, therefore they sought to ensure the commitment of member states towards Schengen on a more limited basis, such as through the aforementioned phased approach to reopening. Later when the situation was more settled, we saw the Commission pushing back more strongly against member state reticent towards commitment. One such a case occurred that September, where the Commission called out Hungary for impacting the integrity of the Schengen Area with their new border control measures, which failed to apply to all EU citizens and residents

¹¹⁰ European Parliament, Directorate-General for Communication, Zalc, J., Maillard, R. *Uncertainty/EU/hope: public opinion in times of Covid-19*. European Parliament, 2020: 76

¹¹¹ van Eijken and Rijpma, 48

¹¹² De Somer, Marie. "Schengen: Quo Vadis?" *European Journal of Migration and Law* 22, no. 2 (2020): 185

in a non-discriminatory fashion.¹¹³ As more time passed, the focus began to shift towards the long-term future of Schengen.

The Future of Schengen

The economy has ever been at the heart of European integration, serving as a foundation by which prosperity is built upon since the post-WWII period.¹¹⁴ This holds true for the ongoing reforms to Schengen governance. With the goal to protect the European economy, these changes seek to ensure the resilience of the Schengen Area after years of adversity and ensure that the rules contain the tools member states need to effectively respond to crises.¹¹⁵ Regarding internal borders, what we find is that these proposed changes aim to bring about deeper integration, and formalize many impromptu solutions implemented during the first wave of COVID-19.

In November 2020, the Commission convened a forum on Schengen. Invited to this event were Members of European Parliament and national Ministers of Home Affairs, and the main goal was to foster cooperation and dialogue.¹¹⁶ This first Schengen Forum was followed by a second on 17 May 2021. Based on the successes of these two events, the Commission adopted such Schengen Forums as a vital important part of a new Schengen governance cycle in the 2021 Schengen Strategy.¹¹⁷ These Forums allow for political dialogue between member states, EU institutions,

¹¹³ Makszimov, Vlad. "Brussels writes to Budapest over discriminatory border measures." *Euractiv*, 01 September, 2020

¹¹⁴ Dabrowski, Marek. "The Future of the European Union: Towards a Functional Federalism." *Acta Oeconomica* 66, (2016): 24

¹¹⁵ European Commission. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. 14 December, 2021: 1

¹¹⁶ European Commission. "First Schengen Forum: Towards a stronger and more resilient Schengen area." European Commission Press Release, 02 June, 2022.

¹¹⁷ European Commission, *A strategy towards a fully functioning and resilient Schengen area*, 16

and non-governmental organizations, and the third and most recent event took place on 02 June 2022.¹¹⁸ As we learned, structured and regularly scheduled dialogue played an important role in ensuring harmonized mitigation strategies during the first wave, and these Schengen Forums seek to build upon this experience.

The experiences of the first wave are also being capitalized upon through the formalization of other tools which proved their worth during that time. Stop-gap mitigation measures developed during the pandemic (such the identification of categories of essential travel) have gone on to be included in such things as the EU's Practical Handbook for Border Guards, to be used as reference points in future crisis situations.¹¹⁹ The Green Lanes system in particular is being championed as an essential part of a new Schengen contingency plan, able to be reactivated in response to future crises.¹²⁰ A contingency plan for transport was revealed by the Commission in May 2022, and it is quite clear that this document is built upon the impromptu measures from the first wave.¹²¹ In fact, when providing recommendations for action by member states, this contingency plan directly points towards the documents developed during that time as sources for guidance. This plan details a crisis-response toolbox containing both immediate actions and long-term preparatory schemes.¹²² Many of these measures are based on ensuring greater communication, cooperation, and coordination between the member states, which heralds greater integration in this area going forward.

¹¹⁸ European Commission. "Third Schengen Forum: setting the way forward." European Commission Press Release, 02 June, 2022.

¹¹⁹ Johansson, Ylva. Transcript of speech delivered at the Second Schengen Forum, 17 May, 2021.

¹²⁰ European Commission, *A strategy towards a fully functioning and resilient Schengen area*, 19

¹²¹ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A contingency plan for transport

¹²² European Commission, *A contingency plan for transport*, 11-19

In June 2021, the Commission presented a new strategy for Schengen, and indicated that a new proposal to amend the Schengen Borders Code was in the works.¹²³ This proposal was finally released by the European Commission later that December.¹²⁴ This proposal replaces the Commission's previous proposal for SBC amendments, which had been in existence since 2017 but were left off the table due to lack of support from the co-legislators. Therefore, this new proposal contains amendments based on lessons learned during both the Migrant Crisis and the COVID-19 Pandemic. Especially important to note about this proposal are the numerous amendments to Chapter II of the SBC, which covers the rules surrounding temporary reintroductions of border control at internal borders. Through a closer examination of these proposed changes, we can see how the EU's initial response to COVID-19 related internal border closures has helped shape future policy.

Article 25: In contrast to the current rules, “large scale public health emergencies” are now specifically added as an example of threats to public policy or internal security that may lead to the reintroduction of internal border controls.

The change to this article is one of the most clear examples of letting the law play catch-up with practice, as such justifications were widely used throughout the early pandemic period. This is another indication that the EU is not shying away from the measures taken during that early pandemic period, but instead embracing the elements that worked in order to build a stronger Schengen.

¹²³ European Commission, *A strategy towards a fully functioning and resilient Schengen area*

¹²⁴ European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders*

Article 25a: The new Article 25a paragraph 5 grants member states the ability to implement renewable periods of border control due to persistent threats for a period of up to two years.

Article 26: This article was modified to provide much more detail regarding the criteria that member states must consider when establishing whether reintroductions of border controls are necessary and proportionate. Considerations noted include potential impacts on the movements of persons and of goods, and potential impacts on cross-border regions are highlighted as requiring particular consideration. The need for these considerations is direct response to the issues caused by the internal border control reintroductions caused by COVID-19.

Additionally, this Article now requires that Member states assess whether their objectives could be accomplished via alternative measures not requiring the reintroduction of border controls. This can be seen as an attempt to double down on internal borders controls being an option of last resort. Finally, when border controls have been reintroduced, this article requires that member states take appropriate measures to mitigate the resulting impacts.

Article 27: The redone Article 27 specifically aims at improving the flow of information on border control measures.

Article 27a: Newly added, Article 27a establishes a new mechanism which allows the Commission to establish a consultation process in response to internal border controls. Dialogue between member states plays an important role here, building upon the lessons learned during the first wave. It also opens the door for other member states to issue an opinion regarding the prolongation of internal border controls. But more than all this, we can see that this Article is reinforcing the ‘soft law’ role of the European Commission. Should border controls be continued for a total of 18 months in accordance with Article 25a(4), the Commission is obliged to issue an opinion on their

necessity and proportionality. Additionally, should a member state attempt to exceed the maximum duration of border controls set out in Article 25(5), they must take the given opinion of the Commission in their justifications directly, and again the Commission is obliged to issue a follow-up opinion.

Article 28: Replacing the previous Article 28, this article introduces a new mechanism which allows the Council to implement a decision authorizing the reintroduction of internal border controls by member states in the case of a serious threat which puts the overall functioning of the area without internal borders at risk. Furthermore, the Commission is granted the role as both as the initiator of the proposal and as the watchdog meant to ensure proper use. This new mechanism encapsulates the nature of decision making in the area of internal border controls. It shows a preference for intergovernmental power tempered by institutional oversight.

Article 31: Furthering the theme of enhanced communication, Article 31 has been greatly expanded. There is now an obligation on the part of member states to inform both the European Parliament and the Council of the finer details surrounding the reintroduction of border controls, such as the duration, reasoning, measures to be taken by other member states, etc. This now ensures that when a member state reintroduces border controls, other member states, the Commission, the Parliament, and the Council must all be duly informed.

Article 33: The additions to Article 33 require that member states provide continual reports regarding any persistent internal border controls. In a show of transparency, these reports will be made available online as well.

As we see through Articles 25a, 27, 27a, and 28, this proposal aims to improve the coordination and cooperation between Schengen Members. The underlying root cause of many of the issues

during the initial COVID-related border closures were due to a lack of both, and this proposal follows in the footsteps of the guidelines and recommendations developed by the European Commission in Spring 2020 that sought to address this absence.

The application of a liberal internationalist viewpoint also produces interesting insights with regards to the oversight reforms found in Articles 31 and 33. The Commission, Council, and Parliament are all identified as bodies that a member state reimplementing border controls must notify and provide pertinent details to. In this LI view, this can be understood as an attempt to realize the roles of these bodies as guarantors of commitment. A push for more stable commitment to the Schengen Agreement indicates that Member states see value in this agreement and are willing to put greater effort into maintaining it, thereby conforming that these reforms are meant to bring about greater integration between the member states.

The need for member states to consider and mitigate impacts to cross-border regions under Article 26 is also interesting from an LI perspective. As noted above, cross-border regions are of great significance European economies. The proposed introduction of these new provisions is a clear indication that this policy area is being influenced heavily by the economic interests within the member states. Also interesting are the requirements to issue opinions and launch consultations Article 27a puts on the Commission in certain cases. From a liberal intergovernmentalist view, this should be seen as ensuring that the Commission serves its role as a commitment mechanism. In turn, this tells us that the member states are not seeking to distance themselves from Schengen rules, but desire expanded engagement. This same attitude comes across in the State of Schengen Report 2022, where it was highlighted that one of the priority actions for the Schengen Area is to ensure that internal borders controls are: measures of last resort, maintained only for limited

periods, and accompanied by mitigation measures where necessary.¹²⁵ In other words, to tighten the rules surrounding the unilateral powers of Member States to reimplement border measures. This proposed doubling down on commitments and obligations make it plain to see that these new Schengen reforms seek to bring about deeper integration.

States have greater power in terms of implementing border controls (Articles 25 and 25a), but the same time, States must take greater responsibility. This comes in the form of a stronger need to explore alternative options (Article 27a), stronger supranational and peer oversight (Articles 31 and 33) and stronger requirements to implement mitigation measures (Articles 26 and 28). All together, these changes aim to ensure that States are able to take the measures they need while still under the purview of Schengen rules, while at the same time ensuring that these measures are saved for occasions when they are truly necessary.

While these proposed reforms to the Schengen Borders Code are still a work in progress, we have already been able to have a first taste of the inevitable intergovernmental bargaining. The Justice and Home Affairs Council met from 09 to 10 June 2022, and Ministers discussed the proposal and the amendments it has seen over the past several months, ultimately agreeing on the general approach of the reform of the Schengen Borders.¹²⁶ These proposed reforms have not been watered down through this recent work. Instead, we see an even greater push to force member states take intergovernmental accountability when reimplementing border controls. For example, the revisions to Article 27a add that any member state directly affected by the prolongation of border controls of another can request the Commission to begin a consultation process in order to examine

¹²⁵ European Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions State of Schengen Report 2022. 24 June, 2022: 4

¹²⁶ Council of the European Union. "Schengen borders code: Council adopts its general approach." Council of the European Union Press Release, 10 June, 2022.

the necessity and proportionality of those measures.¹²⁷ Of course, there are still plenty of opportunities for these proposals to be changed, and as the ‘failing forward’ model posits intergovernmental bargaining leads to lowest common denominator settlements.¹²⁸ But as it is now, these proposals can be seen as strengthening the commitment mechanisms that the Member states must adhere to, thereby making it clear that a deeper integration in this area is sought by member states.

Other supranational actors have had an impact on recent developments as well. On 26 April 2022, the Court of Justice of the European Union ruled on Joined Cases C-368/20 and C-369/20, concerning the reintroduction of internal border controls that go beyond the six-month limit set out in Article 25(4) the Schengen Borders Code. The Court gave a fairly strict interpretation of the clauses in the SBC, ruling that border controls that exceed the limits established in the document cannot be contravened, and member states should instead seek alternative measures to deal with persistent threats.¹²⁹ Additionally, the Grand Chamber of the Court of Justice also ruled that Article 72 of the Treaty on the Functioning of the European Union, which has been used in the past to justify non-compliance with EU law under exceptional situations of risk, could not be used to circumvent the time limitations set out in the SBC either. In effect, this judgement answers the question on the legality of the recent spat of long-term internal border controls across the Schengen Area: for the most part, they have been in contravention to the law.¹³⁰ As noted above, the proposed reforms from December 2021 provided some extra leeway to the member states by allowing them

¹²⁷ European Council. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders - General approach. 09 June, 2022: 38

¹²⁸ Jones *et al*, 1014

¹²⁹ Martins Pereira, Mariana. “The Court of Justice’s ruling in the case of temporary reintroduction of internal border controls: to codify or not to codify? (joined cases C-368/20 and C-369/20).” EU Law Live, 24 May, 2022

¹³⁰ Thym, Daniel. “Illegality of Internal Border Controls: The Court of Justice feeds the Appetite for Legislative Reform: Landespolizeidirektion Steiermark (C-368/20 & C-369/20).” EU Law Live, 04 May, 2022

to extend internal border controls for longer periods than what is currently allowed, provided they are able to continually produce a strong justification for doing so. In light of this recent decision however, more strict limitations on these provisions were included in the general approach agreed by Ministers in June 2022.¹³¹

When it comes to the issue of internal borders, the new proposed structure of Schengen is built upon the foundations of proven solutions from the early days of the crisis, and attempts to shore up areas that clearly failed. As a result of this, a path that leads towards greater integration is being followed.

Conclusion

“Les hommes n'acceptent le changement que dans la nécessité et ils ne voient la nécessité que dans la crise” – Jean Monnet, Mémoires, 1976

The COVID-19 pandemic and the numerous internal border issues that arose alongside it has both revealed what Schengen really means to the EU and acted as a cause for its reform.

To begin, the decisions taken by the member states to reintroduce border controls does not imply that they are seeking to scuttle Schengen. Votoupalová argues that the reintroduction of border controls should not be treated as an aberration, but instead as an integral feature of Schengen governance. These reintroductions serve to help manage emergency situations and balance the imperatives of both security and mobility.¹³² The same arguments can be applied to the early events

¹³¹ European Council, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders - General approach*, 4

¹³² Votoupalová, 84

in the COVID-19 crisis. Rather than being seen as selfish attempts to reassert unilateral control, the reintroductions of internal border controls during the pandemic can be interpreted as practical measures deemed necessary in the absence of rules that adequately addressed the ongoing crisis. This necessity was driven by domestic concerns over safety and health, as the widespread reintroductions only came after Member states witnessed the crisis faced by the Italian health system and as the virus began to spread rapidly across the rest of Europe. Member states have an economic stake in seeing Schengen succeed, the initial actions they took were based on necessity and a short-term shift in domestic interests.

While the role of the European Commission in this crisis is oft overlooked by observers, we have seen that there is great value in paying closer attention. In 2005, Cini highlighted how the European Commission had adopted a pragmatic approach to its five-year Strategy, leaning towards the use of soft powers such as consensus-building and brokerage to persuade the member states to implement key commitments. She argued that this approach should not be taken as a sign of weakness by the Commission, but instead that it played towards its strengths and allowed the Commission to define itself as working alongside (rather than in opposition to) member states. This same approach defines the role of the Commission during the first wave of COVID-19. During this crisis, we saw the European Commission act as policy entrepreneurs, attempting to steer intergovernmental power to achieve their goals through facilitation, coordination, and guidance. The European Commission can only act so far as its remit allows it, and in the area of internal borders, member states hold the vast majority of the power. The Commission's recognition of this reality led them to provide the solutions that saw them creating avenues through which this national power could be coordinated and utilized by the member states in an effective manner.

The role the Commission played here does not contravene with their role as guarantors of commitment as understood in the LI view. The Commission's actions in this crisis have served to encourage member states to meet their commitments partially at the very least. This was a much more preferable outcome for all than seeing all member states abandon their commitments entirely. Additionally, the fact that the Commission's *ad hoc* measures are serving as important pillars in the new reforms to Schengen shows that their actions are serving to develop a more credible commitment by member states going into the future.

Looking towards more recent developments, we can see that there has been an ongoing attempt to both codify the most successful measures and to build a new framework for Schengen based on the *ad hoc* measures developed by the commission. Thus, while member states remain the primary drivers of policy (playing a role in both formation and implementation) at Schengen's internal borders, the Commission also has shown to have an important role to play in policy formation.

The legislation which underpins the Schengen did not spring into the world fully formed. It has seen numerous evolutions since its inception. For example, the original Schengen Agreement of 1985 did not even begin to consider the need for temporary emergency action, it was only years later in the Schengen implementation agreement in which we began to see provisions that allowed for limited reimposition of border controls by the contracting parties.¹³³ Schengen is a continual work in progress, with updates to the underlying rules acting to deepen integration over time. These latest proposals serve the same purpose.

As for why these reforms are being developed, it is clear that the failure of the system and the resulting impacts on the economy have been the drivers of change. The 'failing forward' model

¹³³ Votoupalová, 80-81

discussed earlier can be used as a framework to chart the failure during COVID-19 and subsequent proposed reforms. As the existing rules were unable to meet the needs of member states during the crisis, they took matters into their own hands by unilaterally introducing internal border controls. As we have seen, this led to practical short-term improvisation on the part of the European Commission. But it also led to greater calls for integration and coordination. In the survey conducted on behalf of the European, 69% of respondents believed that the EU should have greater competencies to deal with crises such as the ongoing COVID-19 pandemic.¹³⁴ Following the pattern, the next step in the process comes through less-than-comprehensive reforms. While it may be too early to judge how well the proposed reforms to the Schengen Borders Code will end up conforming to the cycle of continually of incomplete solutions, it is clear that integration is being deepened.

While a pandemic of this scale was most certainly never outside the realm of possibility, it was a first for Schengen and the European Union. The *sui generis* nature of the EU means that in a sense it is always exploring uncharted waters, so the capacity for reform and adaptation is vital. By making the weakest aspects of policy visible, failure provides the opportunity to make positive change. What is important is that the system is able to absorb the impact of this failure and have the resilience to rebound. But, relying on failure as a catalyst for change does carry risks. In the EU it has led to the perception that the system is plagued by crises, undermining its popular support domestically and weakening its credibility internationally.¹³⁵ Recognizing and understanding this is of key importance to ensuring a stable future for the EU.

¹³⁴ European Parliament, *Uncertainty/EU/hope: public opinion in times of Covid-19*, 30

¹³⁵ Jones *et al*, 1013

Regarding the future, during her speech as the first Forum on Schengen in November 2020, European Commission President Ursula von der Leyen stated the following:

*“The first months of the pandemic showed us what happens when Schengen stops functioning: Europe grinds to a halt. It may sound like a paradox, but this experience made me very confident in the future of Schengen. It is too precious for us all. We will not allow it to fail.”*¹³⁶

Her final remarks here expose the heart of issue, the parallels to the language used during the Euro crisis are unmistakable. At that time, the President of the European Central Bank Mario Draghi noted they would do “whatever it takes” to ensure the Euro persevered.¹³⁷ It was made clear during that time of crisis that when the member state and supranational actors involved see economic well-being at stake, they will take action to ensure the survival of the system even if it requires being flexible with existing rules. The same can be said for Schengen. The EU will not force itself to drive off a cliff simply because the existing legislation says that is the correct course of action. As stated by Luuk van Middelaar, “necessity knows no law.”¹³⁸ The first wave of COVID-19 proved that the EU was willing to take steps it deemed necessary and allow the rules to catch up afterwards.

For all its rules, regulations, and processes, the European Union remains incomplete, at least in the sense of integration. This has caused great trouble to the EU in the past, such as during the Euro crisis when the EU did not initially have the correct tools to respond.¹³⁹ For as much as it is an integral part of the EU, this incompleteness extends to the Schengen Area as well. During the first wave of COVID-19, it was made painfully clear that the expectations of the existing legislation

¹³⁶ von der Leyen, Ursula. Transcript of speech delivered at the Schengen Forum, 30 November 2020.

¹³⁷ Jones *et al*, 1025

¹³⁸ van Middelaar, 37

¹³⁹ Jones *et al*, 1011

did not match up with the reality faced by the member states. But effective improvisation helped ensure that Schengen was able to weather the storm. Today, Schengen is being reformed in order to better meet the needs of the member states, which is serving cultivate deeper integration between them.

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