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# The Schengen Crisis and the EU's Internal and External Borders: A Step Backwards for Security-Oriented Migration Policy?

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*The EU was founded on the project of “Europe without borders”, which means elimination of internal borders between Member States according to Article 26 of the Treaty on the Functioning of the European Union. The counterpart of this objective has been the transfer of the controls to the external EU borders. In the Schengen area, external borders are controlled by common principles and procedures encompassed in the 2016 Schengen Borders Code. Member States have negotiated the Schengen agreement to maintain such external border controls, with the aim of protecting their citizens from various dangers and guaranteeing their national migration policies towards third-country nationals. Member States have therefore transposed the function of national border controls to the external EU borders. Cross-border cooperation within the EU has developed to reinforce the Schengen Space of free movement and has been jeopardized by the unorganized massive peak arrivals of migrants in 2015. This article analyses whether the 2015 Schengen crisis confirms the security-orientated approach or not, specifically as the crisis confronts the EU with national claims to recover the control of internal borders. It has been argued that this movement is proof of the resilience of Westphalian borders. This article is an attempt to show how European judicial power tried to limit such a national re-appropriation of borders, leading to a functional distinction between internal and external borders that may allow a departure from an exclusive security-orientated approach of external borders of the European Union towards a more cohesive approach to controls at EU external borders.*

## Introduction

Legal analyses of European integration generally underline that the DNA of the European Union is to eliminate national borders between Member States.<sup>1</sup> Such an objective seems to be contradicted by the 2015 Schengen crisis and is said to even have died with the COVID-19 crisis. The assumption of this paper is that the elimination of borders is still at stake between Member States of the European Union (EU) but such

borders must still be activated in times of crisis. This new approach is the result of the Schengen crisis and is based on a legal distinction between internal and external borders of the EU by the supranational EU institutions, namely the Court of Justice of the EU and the European Commission. It allows for a subsequent move in the orientation of EU asylum and migration policy to depart from a purely security-oriented approach.

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From a legal perspective, the 2015 Schengen crisis is characterized by the political decisions of certain Member States to take back systematic controls of migrants on their national borders. These Member States mainly claim to protect their public order and public security by avoiding secondary movements of migrants within the Schengen Space. Peter Thalmann concluded a recent study with these words: "by having internal border checks in place, Member States [showed] that the Westphalian nation-state as a guardian of essential state functions, thus, has never entirely been a thing of the past" (2019, 134).

This paper will take a slightly different view, drawing on 2019 case law and recent proposals of the European Commission on Asylum and Migration policy to prove that such a Westphalian conception of national borders remains partial and limited within the European Union. The Court of Justice of the EU has given landmark judgements in 2019 to protect the DNA of European integration and the content of the solidarity principle which is one of the legal foundations of EU asylum and migration policy.<sup>2</sup> One of the paradoxes of the 2015 Schengen crisis is also a constant attempt of the European Commission to disconnect asylum and migration policy from exclusive security perspectives and to propose a more integrative and cohesive approach.

These two movements will be interpreted in parallel to explain how the Schengen law has been transformed to develop a specific legal status of EU internal borders and a constant reinforcement of common controls on the EU external borders. The Schengen crisis has been the catalyst of a new narrative of EU borders which explains that internal borders cannot take on the traditional role of safeguarding the essential functions of nation-states on their territory in migration policy but play the role of a protective barrier in case of emergency or risk to national identity. The European Court of Justice (ECJ) is the watchdog of such a protection and has privileged cross-border cooperation instead of unilateral national actions.

After recalling how Schengen is historically rooted in a security-orientated approach based on the estrangement of migrants (part 1), the analysis will concentrate on the consequences of the 2015 Schengen crisis on internal borders of the EU and will show that the ECJ has tried to limit the national claims of re-appropriation of controls of migrants on national borders by different legal means (part 2). The analyses will then concentrate on the increasingly integrated management of external borders as a result of the crisis to reform the Schengen set of rules (part 3). Finally, a new narrative for EU borders will be examined as a solution to the Schengen crisis and a clearer acceptance of the necessity of borders for the sake of European integration (part 4).

## 1. An Historical Security-orientated Approach to EU External Borders

The management of external borders is not, from a legal perspective, the parallel tracing of EU internal borders. Internal borders are far from the Westphalian model of line of demarcation between sovereign States. EU law had the effect of devitalizing the protectionist function of internal borders but is evidently not devoted to the complete elimination of borders as political objects (1.1). The Schengen model has been drawn as a counterpart to the "elimination" of internal borders and play the role of traditional national borders as a place for control of persons trying to enter the European territory (1.2).

### *1.1 The constituent objective of the elimination of internal borders*

It has been commonly asserted that borders do not exist anymore in the Schengen Area. What is correct is that the Schengen Borders Code has profoundly changed the controls at the EU borders: internal borders are spaces of free movements that should ensure "the absence of any controls on persons, whatever their nationality" (Article 77 of the Treaty on the Functioning of the European Union, hereafter TFEU). Internal border control can be organized by border police only to protect public order or public security in exceptional circumstances. External borders of the EU are maintained as spaces of differentiated controls for European citizens and third-country nationals, and the EU pilots a "gradual introduction of an integrated management system for external borders" (Article 77 TFEU).

It is however wrong to think that borders have disappeared within the Schengen Space. National borders still exist and Article 77 of the TFEU states that the EU migration policy shall "not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law". The whole process of economic and political integration has been to devalue the protectionist function of borders, so to avoid any border effects and therefore to allow a transformation of borders into spaces of free movement.

As it is assessed by the EU law doctrine, the EU internal market and Area of Freedom, Security and Justice are based on an effective application of non-discrimination principle, freedom of access to national markets and mutual recognition of various national standards (Azoulai 2011). Border effects are exceptional in that respect and only when they adequately protect a national general interest, such as public health, security, or environmental protection. Borders as such are no longer systematically sites of control of the host state (Labayle 2013). The EU favored, for example, post-market controls which are realized when products are sold (Regulation (EU) 2019/515 of 19 March 2019 on the mutual recognition of goods lawfully marketed in

another Member State, OJ L91, 29.3.2019). This has led in a number of cases to new social or environmental borders within the Member States (Barbou des Places 2013).

### *1.2 The constant reinforcement of security controls on EU external borders*

What is also true – but often forgotten – is that the Schengen system is also based on the opposite view. The Schengen agreement has been developed as a means of reinforcement of external borders to control immigration, perceived as a threat to public order and public security (Guiraudon 2011).

This position is evident in the Schengen crisis of 2015. Controls were in place for all entry and exit at the border crossing-points of the EU external borders. As Article 5 of the Schengen Borders Code states: "External borders may be crossed only at border crossing points and during the fixed opening hours" (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), OJ L77, 23.3.2016). The crossing of borders is subject to proof that third-country nationals (non-EU nationals) entering the EU are in due possession of travel and entry documents such as visas or working permits (Article 6 of the Schengen Borders Code). In other words, migration is subjected to documented movement across external borders for third-country nationals, whereas movement of EU nationals within the European Area of Freedom, Security and Justice is in principle free from any administrative authorization (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L158, 30.4.2004).

Article 8 of the Schengen Borders Code gives strict obligations to border guards. They must rapidly check the identity of European citizens. They are required to proceed in more detail with third-country nationals to check if they have the proper documents to enter European territory or if they are asylum seekers. For third-country nationals it is clear that the EU external border is a space of physical immobility and scrutiny. Member States therefore have to provide infrastructures and border guards in sufficient number. This policy led to concentrations of migration influx at the external borders of frontline Member States, *i.e.* Member States which are the first on migratory routes.

The very function of external borders of the European Union as organized by the Schengen Borders Code is implicitly to block migration movements – which are often described as waves – at the checkpoints defined as such by Member States. External borders are the lines at which national authorities and FRONTEX

must be able to classify migrants to organize the protection of asylum seekers, the free movement of legal migrants, and the return of illegal migrants. The EU has therefore established a classification under which a legal status, which determines the right to cross the border, is assigned for each migrant (Barbou des Places 2010). For legal migrants the principle is that they enter the Union and stay in the country that has given them a legal permit to stay, and for asylum seekers, in the competent State for the examination of their asylum claim. Under the rules of Dublin Regulation, the competent State is the one with which asylum seekers have objective links (for example a family) or their first country of entry into the European area (Dublin III Regulation, N° 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ C 212 E, 5.8.2010). Illegal migrants – undocumented persons – do not have the right to enter Europe. They are subjected to strict controls to secure their return back to a safe country or their country of first arrival (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348, 24.12.2008). To avoid any irregular entry, asylum seekers and illegal migrants wait at the border in formal or informal camps, the infamous so-called "jungles". In that sense, the EU is transformed into a fortress built on strong police cooperation between Member States. The justification put forward is the fight against illegal migration and other security objectives such as the fight against terrorism (Bouagga 2017; Thalmann 2019, 122). External borders are organized to become infrastructures for controlling migrants and to be secured points of entry into European territory. This new architecture of entry points derives from a legal approach based on the potential threats that migration represents for Member States. This led to a legal tension between the European organization of external borders and the competence devoted by Article 4 of the Treaty on European Union, hereafter TEU, to the Member States to protect public order and public policy.<sup>3</sup>

The massive arrivals of migrants in Greece and Italy in 2015 had many consequences for this Schengen Area and its borders. This constitutes a crisis of the Schengen set of laws which is sometimes described as a suspension of the Schengen regulations. This point of view does not correspond to the reality: Schengen is fully applied but the derogations provided by Schengen Borders Code for national controls of internal EU borders tend to become the norm since 2015 (Guild 2016). In that respect, we should speak of an abuse of the Schengen system instead of its *de facto* suspension. This shift in the Schengen way of functioning must be observed from the perspective of the re-appropriation of migrant controls by some Member States.

## 2. The Schengen Crisis and Disconnecting the Legal Status of Internal and External EU Borders

The Schengen Borders Code and the EU treaty resulted in an imbalanced burden for Member States regarding the registering and reception of migrants which explains the 2015 Schengen crisis (2.1). This also explains the primary reaction of Member States: getting back the control of their national borders to protect their territory from what they have perceived as a massive and threatening arrival of migrants in 2015. Our argument is that such measures are built into the Schengen Agreement and should not be condemned as such if implemented duly respecting EU law. The role of the ECJ will therefore be analyzed in more detail (2.2). The problem faced by the supranational European institutions is to find out how to go back to the "normal" functioning of internal borders within the Schengen Area (2.3) and to protect the principle of solidarity that is at the heart of the Schengen system (2.4).

### 2.1 An imbalanced Asylum and migration policy developed in the Schengen Area

The Freedom, Security and Justice Area has not been developed on a territorial basis but rather on spatial logic determined by the will of the Member State to be part of it or not. It explains the development of special status for certain Member States according to various protocols attached to the EU treaties (Burgorgue-Larsen, 2004). The Schengen Area is a sub-space of the Freedom, Security and Justice Area, which is added to the "space without internal borders" that constitutes the internal market. One of the key elements to understand the changes that have occurred since the 2015 Schengen crisis is the asymmetric position between the EU and its Member States but also between Member States themselves.

These asymmetric positions result from the EU Asylum policy encompassed in the so-called Dublin system. According to Article 78 of the TFEU: "The Union shall develop a *common policy* on asylum, subsidiary protection and temporary protection with a view to offering *appropriate status* to any third-country national requiring international protection and ensuring compliance with the *principle of non-refoulement*" (emphasis added). Asylum policy was first developed in an inter-governmental convention designed to determine single-country responsibility for the lodging and examination of an asylum claim in order to avoid any secondary movements between Member States and the risk of "asylum shopping". The reforms of the convention – later transformed into an EU regulation – were mainly concentrated on the question of the effectiveness of the Common Asylum System by establishing a set of criteria (by order of importance) to determine the responsible state. The Member States blocked any sort of uniformization of

the right to asylum as they considered the granting of asylum as a matter of national sovereignty. This gives the European Asylum System a prominent security objective to avoid any secondary movements of asylum seekers even at the expense of the principle of solidarity between Member States. All European regulation or directive on the rights of migrants (Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L180/96, 29.6.2013) or the determination of categories of migrants have been reduced by Member States to coordination procedures (Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337, 20.12.2011). We agree with the literature assessing that the 2015 Schengen crisis stemmed from this lack of uniform asylum procedure, which resulted in an imbalanced burden on Member States for the administration of asylum seeking applications and migrants' reception to determine their legal status under EU law (Jasiewicz 2018).

The EU institutions tried to solve these problems by establishing clearer criteria to determine the competent country for the examination of an asylum claim. It appears from a 2016 evaluation of the Dublin III System that the criteria are not fully applied by all the Member States which gave rise to the movement of many "Dublinated" which cross internal borders within the EU to try to find a more favorable treatment to their asylum claim (Evaluation of the Dublin III Regulation, DG Migration and Home Affairs, Final report, 4 December 2015, available at [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en)). Notwithstanding a reform in 2013 of the reception conditions directive and the directive determining "qualification of migrants", the Dublin III regulation did not encompass any explicit principle of distribution of migrants between Member States, thus creating permanent imbalanced movements of asylum seekers between Member States. The flaws of the system were blatant when the German Republic decided to open its borders to asylum seekers in the summer 2015; after a de-bordering movement of Hungary to let migrants arrive to German borders, many Member States decided to close their national borders to avoid being overwhelmed by a wave that never occurred. Germany itself had to close its borders to diminish the number of arrivals in its territory. Such unilateral control of national borders seems to be contrary to the "spirit of the Schengen System" and the clearest sign of its crisis (Communication of the Commission of the 4th of March 2016, Back to Schengen (revenir à l'esprit de Schengen in French) – A Roadmap, COM(2016) 120 final). Member States believed that they still had the power to determine who has the right to stay on their territory. Such an approach has been denied by the

ongoing process of reform of the Dublin regulation. As odd as it might appear the only solution suggested by Member States within the European Council of the EU to solve the Schengen crisis is to develop a more common approach to asylum (New Strategic Program 2019-2024 adopted in June 2019 by the European Council). Our assumption in this article is that such a unified approach is possible *only* because Member States have the right to activate national control of their own borders in case of danger. EU institutions are trying to frame these attempts as provisional responses to an incoming danger (see below).

The EU migration policy has also been profoundly impacted by the terrorist attacks in 2015 and 2016. The Schengen Borders Code has been reformed in 2017 to allow for a more stringent and systematic control of all entries of persons within the Schengen Area, but also all the exits from the EU by a control of documents and EU databases in order to ensure that nobody hides his or her real identity, together with a diversification of police controls and the development of joint controls between national police forces (Regulation 2017/458 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders, OJ L74, 18.3.2017). What is striking in this respect is that the fight against terrorism resulted in more integrated management of external borders concerning the controls of migrants' movements.

The Schengen Borders Code was also reformed in 2011 to proceduralize national controls of internal borders to allow for a better protection against serious threats to public order and public security of each Member States.<sup>4</sup> The Schengen crisis is indeed not a one-way process: it generates unilateral claims based on national sovereignty to control national borders and fuels more integrated management of common external borders to safeguard national public migration choices.<sup>5</sup> In this respect, unilateral control of national borders appears much more as a delaying tactic than a return to a Westphalian approach of national borders.<sup>6</sup>

## 2.2 *The strategy of the ECJ to limit national controls of internal borders*

The ECJ has an increasingly heavy influence on the Schengen Area and has used different techniques to reduce the imbalances of the Dublin system (Warin 2018). Judges have used the *human rights perspective* to impose the use of "sovereignty clause" of the Dublin Regulation (Article 17(1)) as a mandatory means not to send migrants back to the country of first entry when it is contrary to human rights standards.

The ECJ is indeed fully aware that Member States never faced the same pressures of migration, and maintains their sovereign right to determine who is in their territory (ECJ, 2 April 2020, Commission v. Poland, Hungary and Czech Republic, C-715, 718 and

719/17, ECLI:EU:C:2020:257). This led to considerable problems in the application of the Dublin System, which stemmed from an increase in secondary movements of migrants. Belgium for example has been condemned by the European Court of Human Rights because it transferred migrants back to Greece, the country of first entrance, irrespective of massive human rights violations in asylum camps contrary to the Human Rights Convention, *i.e.* Article 3 of the European Convention on Human Rights (European Court of Human Rights, MSS, 21 January 2011, 30696/09). The Court of Justice of the European Union confirmed that Member States should use the sovereignty clause of the Dublin II Regulation to avoid any transfer contrary to systemic violations of human rights, making use of Article 18 of the European Charter of Fundamental Rights which explicitly protects the right of asylum (ECJ, 21 December 2011, N.S., C-411/10 and C-493/10, ECLI:EU:C:2011:865 and 14 November 2013, Puid, C-411 and 493/10, ECLI:EU:C:2011:865). The Courts tried to diminish the sovereignty defense by Member States by confronting them with one of the core articles of the ECHR and the right of asylum embedded in the EU "constitution". At the same time, such an approach was not strong enough to rebalance the whole Dublin system. The Court of Justice had to give an answer to the status of the national decisions to take back controls of national borders. The European judges have clearly privileged the *protection of the legal DNA of the European integration process*.

Many Member States decided to unilaterally solve imbalanced secondary movements of migrants by recovering national control of EU internal borders. The Schengen Borders Code has even been adapted to this strong demand and contains two mechanisms that allow Member States to take back control of their own borders. One is designed as a "general framework for the temporary reintroduction of border control at internal borders" (Article 25) in case of "serious threat to public policy or internal security". The second mechanism, embodied in Article 29, is actionable in the case of the systemic incapacity of a Member State to control external borders.<sup>7</sup> Both possibilities are limited in time and should be strictly proportionate to the danger.

It is interesting to underline the role of the Court of Justice of the European Union in this respect. It has interpreted the principle of EU Law stating that the management of internal borders by Member States is done *mutatis mutandis* following the Schengen Borders Code. In the *Abdelaziz Arib* judgment, the judges stated that the internal border does not exactly play the same role as the external one: "Under Article 2 of the Schengen Borders Code, the concepts of 'internal borders' and 'external borders' are mutually exclusive. The very wording of the Schengen Borders Code therefore *precludes*, for the purposes of that directive [*i.e.* the Return Directive], an *internal border* at which border control has been reintroduced under

Article 25 of the code *from being equated with an external border*" (emphasis added, ECJ, 19 March 2019, C-444/17, ECLI:EU:C:2019:220; see also ECJ, 13 December 2018, *Touring Tours und Travel GmbH*, C-412 and 474/17, ECLI:EU:C:2018:1005). To reassert control of an internal border does not mean that Member States regain the same use of their national borders that they had before Schengen. Internal borders have been definitively transformed by EU integration and does not allow for a management of migration as such but for the free movement of persons. As Advocate General put it into its conclusions: "The general rule, which is the *raison d'être* and the key provision of the code, is set out in Article 22 of Title III: internal borders may be crossed at any point without a border check on persons being carried out". In this sense the Court of Justice clearly decided to limit the ambit of the re-appropriation of national borders by Member States. If they can intensify controls under the terms of the Schengen Borders Code, they cannot consider that they regain the power to control as if their border is an external border of the European Union. In this sense, the European Court of Justice is limiting the Member States' attempt to re-nationalize the control of external borders and makes instead a clear step towards a more supranational management of external borders. These borders are still viewed as a place for the organization of controls of dangerous migrations; the Court maintains the management of external borders based on security which contrasts with the management of internal borders based on freedom.

### *2.3 The necessity to guarantee a concerted lifting of national control of internal borders to protect free movement*

The Court does not have yet to decide on the legality of the lifting of national controls but we have decisive guidelines of the European Commission for such a lifting in the framework of a health crisis such as the COVID-19 pandemic. What is clear from the May 2020 Communication of the European Commission is that it is easier to decide controls at the national border than to reopen national borders for free movement. The Schengen crisis showed these drawbacks. The COVID-19 crisis gives new impetus to develop necessary tools for such a movement and may be interesting to revive the Schengen Area. For the first time, the Commission provided for a toolkit for a progressive lifting of controls imposed at national borders to protect public health (Communication issued on 13 May 2020, COM(2020) 3250 final). This could also be applied to the migration controls to go back to the spirit of the Schengen Borders Code as it is stated in recital 22 of the 2016 regulation: "In an area without internal border control, it is necessary to have a common response to situations seriously affecting the public policy or internal security of that area, of parts thereof, or of one or more Member States, by allowing for the *temporary* reintroduction of internal border control in *exceptional*

circumstances, but without jeopardizing the principle of the free movement of persons. [T]he conditions and procedures for reintroducing such measures should be provided for, in order to ensure that they are exceptional and that the *principle of proportionality* is respected" (emphasis added).

The European Commission promotes a progressive and coordinated lifting of controls if warranted by the epidemiological situation on both sides of borders. The Member States will exchange information to assess if health conditions are comparably amenable to re-opening borders. The Commission recommends developing regional or local controls at borders in case of new infectious outbreaks. The Commission also underlines the importance of informing people of their rights to cross borders. The European roadmap emphasizes that such reopening is by nature progressive and coordinated. Borders are means that can be mobilized by Member States but with limitations, such as behavioural obligations (*i.e.* social distancing) and with proportionality in a manner so as to fight against the pandemic.

Permanent exchange of information and regular meetings between administrations are necessary to enhance mutual trust needed for multilateral assessments of the risks and common protocols to lift obstacles to free movement. This technical approach could also be used for a de-escalation of border controls of migrants. It might be a good way to relaunch solidarity between Member States for the settlement of migrants.

The main concern is the effectiveness of such recommendations. We know that the question for EU institutions is how to get away from the kind of derogations provided for by the Schengen Borders Code. For example, France is the only country which uses Article 25 to fight against terrorism by enhancing controls at certain national crossing-points of its internal borders. As the level of this specific threat is alleged to not diminish, the French government argues that it respects Article 25 by re-conducting national border control every six months, which is "strictly necessary to respond to the serious threat". As for now, the French Conseil d'Etat has never censured these administrative decisions which shows the limits of judicial control of that kind of discretionary decisions (Hamon & Fadier 2018).

### *2.4 The necessity of a stronger solidarity between Member States promoted by courts*

The national control of borders is a sign of a profound lack of solidarity between Member States, which the Court of justice indicated was a core principle of the Schengen Area. Article 78 paragraph 3 provides that "In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the

Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned". This article has been used for a reallocation process of asylum seekers to help the frontline Member States decided in 2015 (Decisions (EU) 2015/1523 and (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L239, 15.9.2015). The objective of the decision is to allow for a provisional system of transfer of asylum seekers from Greece and Italy in derogation of the Dublin Regulation principle of the responsibility of the country of first entry (it does not concern the other criteria to determine the responsible State according to special linguistic, cultural or family ties).

Such a system has in practice never worked. Hungary, Poland and the Slovak Republic refused it and contested its legality before the ECJ (ECJ, 6 September 2017, *Slovak Republic and Hungary v. Council*, C-643 and 647/15, ECLI:EU:C:2017:631). Having said that, the Court assessed that the 2015 decisions are within the ambit of competence of Article 78 §3 of the TFEU as they were provisional and non-legislative measures "intended to respond swiftly to a particular emergency situation facing Member States" (point 73). It is not general measures intended to regulate asylum seeker fluxes that ought to be based on Article 78 §2 of the TFEU, which allows for the application of the ordinary legislative procedure and not decision by the Council on proposal of the Commission. According to Hungarian arguments, the decision to impose binding quotas is a disproportionate burden because of the migratory pressure on its own borders. The ECJ first stated that such a pressure has been diminished by "the construction by Hungary of a fence along its border with Serbia and the large-scale westward transit of migrants in Hungary, mainly to Germany" (point 287). The ECJ justified the sharing of the burden of massive migrants' arrival as being "in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with article 80 TFEU, that principle governs EU asylum policy" (point 291).

The Court pointed out in April 2020 that the refusal of Hungary, Poland and the Czech Republic to accept the relocation of asylum seekers for reasons of public order or security was illegal (ECJ, 2 April 2020, *Commission v. Poland, Hungary and Czech Republic*, C-715, 718 and 719/17, ECLI:EU:C:2020:257). The ECJ stated very clearly that the protection of public order or internal security "does not confer on Member States the power to depart from the provisions of European Union law based on no more than reliance on the interests linked to the maintenance of law and order and the safeguarding of internal security, but requires them to *prove that it is necessary* to have recourse to that derogation in order to exercise their responsibilities on those matters" (point 152).

The temporary relocation of migrants had been negotiated in compensation of a common system to help migrants. It was therefore decided to create *hotspots* in frontline Member States to organize a fully effective registration of migrants and to accelerate the treatment of asylum claims. As relocation was a political fiasco, hotspots have been transformed in detention centers for migrants waiting for an administrative decision in Greek or Italian islands (Casolari 2015).<sup>8</sup> The lack of solidarity had therefore very clear and harmful consequences for migrants and for European values. The ECJ did not develop a clear view on that point unless validating the relocation process provisionally decided by the Council on proposal of the Juncker' Commission. The European Court of Human Rights has already tried to rebalance the system in favour of the respect the most basic human rights. In a decision in 2020 the Court also took on board the necessary protection of public order and backed Spain's deportations at African enclaves of Ceuta and Melilla (European Court of Human Rights, N.D. and N.T. v. Spain, Applications 8675/15 and 8697/15, 13 February 2020, which contradicts on appeal the previous decision of the Court, CEDH, 3 October 2017, N.D and N.T. v. Spain). The judgement considered that the asylum seekers "placed themselves in jeopardy by participating in the storming of the Melilla border fences" and that they "have failed, without cogent reasons" to seek entry through an official border crossing. It shows the delicate balance between States' rights and human rights of asylum seekers and has been heavily criticized as not taking into account the pressure exercised on asylum seekers to arrive in Europe by illegal migratory routes.

Another problem has arisen before French courts and is concerning an *additional dimension of the principle of solidarity*. Due to the lack of State organization of the reception of migrants, more and more private undertakings and NGOs are involved in border management (Gammeltoft-Hansen and Nyberg Sørensen 2013). It is a concern explicitly mentioned by the EESC (2020) in its advisory opinion on the Asylum and Migration Pact, which expresses concern over the heavy tendency of Member States to criminalize any help given to migrants by private persons. Citizens helping migrants mainly for humanitarian reasons have therefore been charged by French authorities under the penal qualification of "facilitation of illegal migration". The French Constitutional Council has condemned this kind of practice, invoking a newly established principle under French Constitutional Law, *i.e.* the principle of fraternity embedded in the third word of the French republican motto. The Constitutional Council precisely stated that the principle of fraternity permits a freedom to help a migrant in humanitarian need without taking account of the regularity of his or her stay in the national territory.<sup>9</sup> Humanitarian aid cannot be criminalized unless public authorities violate the necessary balance between the principle of fraternity and the safeguard of public order on their own territory. The French Cour de Cassation has recently decided to extend such a protection to

associations protecting human rights of migrants (*Cour de cassation française*, decision 33, 26 February 2020 (1981.561), ECLI:FR:CCAS:2020:CR00033). It is striking to observe that this principle of humanitarian reception of migrants is developed not by states but mainly by towns, acting in the framework of their powers to integrate migrants in local development. Such initiatives are part of the Intercultural cities concept developed by the Council of Europe (see its website, <https://www.coe.int/fr/web/interculturalcities>)

As the solidarity principle is a core principle of the EU Common Asylum Policy and a requirement for a more coherent EU immigration policy, a more cohesive management of EU external border should also be found to end the Schengen crisis due to the imbalance of Member States’ obligations according to EU asylum and migration policy. Commissioner Ylva Johansson recently declared: “We need a new pact on migration and asylum, first of all because the most vulnerable depend on it, and, second, because our economy and society depend on it: the future of our welfare state is at stake and our companies need skilled people” (EESC 2020). It is clear from this declaration that asylum seekers are not solely seen as a burden for the EU but are perceived as necessary to ensure the proper functioning of the economy and social protection, which is the heart of the European social model.

### 3. The paradoxical need for a more supranational and cohesive management of external borders

The Schengen crisis revealed two key points with which the European Union must learn to live: permanent migratory pressure (which means that it should not be considered as a temporary emergency) and the necessity for more common controls of external borders. A lot of EU law reflects as we have said a constant reinforcement of the historical security-oriented approach of migration policy. At the same time, the development of solutions to the 2015 Schengen crisis is following another perspective, *i.e.* a disconnection of migration policy from security perspectives to promote a more cohesive approach to migration as a potential benefit for the European economy and social security funding (3.1). The pathway to smart borders reveals the same ambiguity for more secure external borders founded on an individual risk-based approach which avoids considering every migrant as a potential danger (3.2). The recent Von der Leyen’s Commission has moved towards a migration policy based on a more positive view of migration (3.3).

#### 3.1 An ambiguous shift towards disconnecting security and migration

The enhanced powers given to FRONTEX, the European Border and Coast Guards Agency, in 2016 and 2019 are for example a means to reinforce a common approach of EU external borders’ management (Regulation (EU)

2019/1896 of 13 November 2019 on the European Border and Coast Guard, OJ L295, 14.11.2019). It helps for a stronger cooperation to secure external borders and also created the European Border and coast guards to allow for a common set of rules for common management of migration. The weakness is that the Agency still relies upon the material implication of Member States which maintains an intergovernmental approach to allow for more unified action. The Eurosur Handbook also encompassed a compendium of Good Practices for border management. Eurosur is one of the many databases developed by the EU to register data on migration and migrants. It is linked to FRONTEX and helps to exchange information since 2013 to reduce illegal immigration, combat international crimes and safeguard the lives of migrants and their protection at sea. The Handbook gives guidance for surveillance and risk assessment more than guidelines for protective borders (adopted on 15 December 2015, C (2015) 9206 final). This goes in the sense of a disconnection between security policy and borders’ management.

A concurrent and opposite example of a full security-oriented approach to migration policy can be nevertheless found in the *Sophia* operation decided in the field of EU defense policy to fight against illegal migration in the Mediterranean Sea. According to elements revealed by *Politico* in February 2019, the real mission of *Sophia* relying on private boats was to organize the “re-foulement” of migrants and not their safeguard (Campbell 2019).<sup>10</sup> Member States first drastically reduced its financial means of action and obtained that the operation is now primarily functioning to secure their coasts.

The EU may find an impetus to depart from an exclusive security-oriented migration policy in international law. The Global compact for Migration signed in December 2018 is for example based on a much more inclusive approach to migration, considering that crossing borders cannot be considered as a public offense but should be conceived as a global challenge and opportunity. The 11th objective of the Global Compact is to manage borders in an integrated, secure and coordinated manner. This general principle is of the utmost importance for the European Union as open borders is the heart of its integration. It is obvious that external EU borders generate differential treatments of crossing considering the necessity to guarantee internal security of the EU and its Member States. The Global Compact for Migration however insists on the necessary protection rather than on the detection of migrants. One of the consequences of such an approach is the development of technical cooperation agreements to strengthen border management, particularly in emergency situations. Solidarity between Member States is therefore not a simple question of sharing the burden generated by migration but on the contrary about enhancing solidarity to promote migrants’ fundamental rights. The Commission’s proposal for a new Asylum and



Migration Pact follows the same lines but it is not clear that Member States will consent to such a reorientation of European migration policy. The same ambiguous approach characterizes the development of smart external borders (Communication of the Commission, Commission Work Program 2020, A Union that strives for more, COM/2020/37 final).

### *3.2 The potential of Smart borders for a more effective and individualized management of borders*

The multiple exchanges of data between Member States and FRONTEX or other European data-bases have led to the constitution of the European Interoperability Architecture which is designed to facilitate cross-border cooperation. The consequences are obvious at the external EU borders which are transformed into smart borders. To manage migration influxes, the idea is to use smart systems to authorize effective and efficient management of external borders, which strikes a balance between facilitation for travelers and protection of internal security. The EU-LISA agency already managed Schengen Borders with a better interoperability of different databases (<https://www.eulisa.europa.eu/>).

The danger of such a new paradigm is that it is centered on the traceability of dangerous persons or persons placed in illegal situations. It may lead to an administrative coverage of populations in movement at a global scale. In such circumstances smart borders will become contrary to European fundamental freedom of movement and fundamental rights protected by the European Charter of Fundamental Rights. In that sense, smart borders are another form of security-orientated migration policy at a much greater scale.

It is also arguable that smart borders are a more efficient way to manage migrant flows. The EU must have the ambition to build a more resilient system to control migration, and smart borders can help in this perspective. The EU must indeed design an effective and secure migration policy to avoid unilateral national reactions endangering the economic and social cohesion of Member States. The collection and use of data collected for each travel into the EU would help to trace individuals but also to foresee a "wave" of migration. It would be far easier to manage migration and not just control it and to guarantee rights for documented migrants. The European Travel Information and Authorization System (ETIAS) has for example been adopted in that perspective. ETIAS "should provide a travel authorization for third-country nationals exempt from the visa requirement enabling consideration of whether their presence on the territory of the Member States does not pose or will not pose a security, illegal immigration or a high epidemic risk" (Recital 9 of the Regulation (EU) 2018/1240 of 12 September 2018 establishing a European Travel Information and Authorization System (ETIAS), OJ 19.9.2018 L 236). In

this definition, security risk is one of the three potential dangers of migration for Member States and not the only one (or even the most important one). Such reform allows for a more individual tracing of danger so to avoid a purely negative perception of movements of persons all around the world. Such a technical infrastructure is obviously a necessary tool for better control without obliging migrants to wait at borders or to know in which category of migrants they will be classified. Such technological control may help to develop a more inclusive approach of international migrations, supporting the proposals of the newly appointed Commission in December 2019.

### *3.3 The advocacy for structural reforms based on orderly migrations*

A book published in 2018 concluded that the Schengen system must be radically revised following three assumptions (Stoyanova & Karageorgiou 2018). First, the Schengen crisis has resulted in a shift of frontline Member States to more stringent control of migrants' movements. The Court of Justice never endorsed the responsibility to change the perception of migrants as burden for the host country: a refugee is not the person to be protected but a person to be fenced out.<sup>11</sup> Second, EU institutions<sup>12</sup> are protecting the Dublin system as such, even if it is not effective for asylum seekers and Member States. This is not sensible for human rights protection and should be changed to guarantee effective protection of asylum seekers. Thirdly, countries that were once on the sidelines of asylum in Europe have started to play a significant role in shaping the asylum system in the EU.

The Von der Leyen Commission is taking on board part of these assumptions to propose a new Asylum and Migration Pact for Europe. Her proposals are based on a unification of asylum policy which is the only way to block any secondary movements of migrants in Europe. Such a proposal is a strategic move of the Commission to eliminate the country of first arrival principle with a clear "federal" proposal. It is interesting to see that this sensitive point is possible because a consent of Member States is expected on a uniform Asylum Policy as an indirect result of the 2015 Schengen crisis. This uniform Asylum Policy should be complemented by secure migratory routes guaranteed by the EU for documented migrants and various legal pathways for people in need, for example resettlement programs and humanitarian visas to diminish illegal migration. These are the conditions for an orderly, monitored and managed migration in Europe. This program has been recently supported by the European Economic and Social Committee in March 2020.

The main challenge for the next coming months is the refusal of certain Member States to share the administrative and economic burden of migration. A federal step forwards would probably imply more differen-

tiation between Member States to promote an effective solidarity between them. In early July 2020, the German Federal Interior Minister, chairing the Council of the EU, declared that almost all Member States were "prepared to show solidarity in different ways". This implies differentiated participation to strengthen solidarity. For example, "while about a dozen member states would like to participate in the distribution of those rescued from distress at the EU's external borders in the event of a 'disproportionate burden' on the states, other states signaled that they wanted to make control vessels, financial means or personnel available to prevent smuggling activities and stem migration across the Mediterranean" (Goßner 2020). Since the very beginning of the Schengen system a more integrative approach to migration policy has been encompassing intergovernmental foundations (Guiraudon 2011): if Member States do not want to transform the Schengen crisis into the new norm they must accept a more uniform migration policy. This considerable change would give less importance to security perspectives and develop a more integrative migration policy based on the rights of migrants as being part of European integration.

#### 4. New narrative of borders in the EU to solve the 2015 Schengen crisis

The EU has been built on the legal premises of the elimination of border controls and it has continually strived for their gradual devaluation (Berrod and Bruyas 2020). The reform of the Schengen governance in 2011 gave the Member States the opportunity to get back provisional national control of internal borders in cases of serious risk for public order and internal security. The 2015 Schengen crisis proved that the provisional character of such process is difficult to control, so much that controls of national borders still exist in 2020. But it has to be said that more stringent controls on some borders has allowed for a more balanced analysis of the return of borders within the European Union.

What has been realized by the 2015 Schengen crisis is the legal capacity to re-use national borders to secure Member States from massive influx of migrants. It has resulted in a double-mechanism: at first, migrants are controlled and "selected" at external EU borders and secondly, they are controlled within the Schengen Area to solve imbalanced movements and administrative burdens between Member States. To be able to tackle this need of borders to secure national identity and European integration, the EU has to define a new narrative to explain the differentiated function of borders based on a functional difference of status between internal and external borders. In 2019, the EU already considered its external borders as "protective filters" for goods arriving from outside (Regulation (EU) 2019/1020 of 20 June 2019 on market surveillance and compliance of products, OJ L169, 25.6.2019). In 2020 it redefined these borders differently: as a health and

safety mechanism of the utmost importance in the COVID-19 crisis. To do so, external borders are the point of systematic controls of every person entering the EU to prevent the entry of the coronavirus into the Union (Communication from the Commission on the assessment of the application of the temporary restriction on non-essential travel to the EU, COM/2020/148 final). These borders are now "viscous", so that infected people can be detected and isolated. Information is coordinated between Member States to allow for opened internal borders. The European Commission has even provided Member States with a sort of handbook to close the internal borders and reopen them after a sanitary crisis.

Borders may therefore be used as filter to prevent dangers. But such a controlled border must be a proportionate means to protect the European Union or the Member States. It is however not a wall nor a defensive fence. It should be a zone of control and of protection of migrants. This allows for new forms of "laissez passer", leaving to external borders a role of protection of European sovereignty with a Westphalian flavor and to internal borders a role of chosen interconnection of national spaces. It is quite a profound evolution of the European integration.

#### Notes

- 1 See the wording of the Internal Market Strategy, 2015: "The Single Market is at the heart of the European project, enabling people, services, goods and capital to move more freely, offering opportunities for European businesses and greater choice and lower prices for consumers. It enables citizens to travel, live, work or study wherever they wish" ([https://ec.europa.eu/growth/single-market/strategy\\_en](https://ec.europa.eu/growth/single-market/strategy_en)).
- 2 The spirit of solidarity between Member States is enshrined in Article 80 of the TFEU, which states that "the policies of the Union set out in [the] Chapter [on Border Checks, Asylum and Immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States".
- 3 Article 4-2 of the TEU states that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".
- 4 The first Schengen crisis in 2011 led to a new possibility of control on internal borders: the present Article 29 of the Schengen Borders Code.
- 5 Let us remind that it is for the Member States to determine their quota of migrations accordant to Article 79-5 of the TFEU.
- 6 On this approach, see Thalmann (2019, 129). He concludes that such an approach has never disappeared but that the EU has profoundly changed the set of the game.

- 7 This mechanism was used by several Member States; only Sweden decided to stop applying controls at borders. See [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en).
- 8 See also the report of the European Court of auditors which objectively describes these bottlenecks: <https://op.europa.eu/webpub/eca/special-reports/refugee-crisis-hotspots-06-2017/en/>.
- 9 The French wording is the following: « il découle du principe de fraternité la liberté d'aider autrui, dans un but humanitaire, sans considération de la régularité de son séjour sur le territoire national ». Decision 2018 717/718, QPC, 6 July 2018, Cédric H. and others.
- 10 On the revamp of Sophia, see Barigazzi (2020).
- 11 See esp. ECJ, X and X, where the CJEU clarified that any state willing to provide refugees with alternatives to accessing asylum would have to deal with this individually as a matter of national policy (ECJ, 7 March 2017, Case C-638/16 PPU, ECLI:EU:C:2017:173).
- 12 The ECJ had for example the opportunity in the Jafari case (ECJ, 26 July 2017, C-646/16, ECLI:EU:C:2017:586) to declare the first entry criterion in Dublin Regulation not suitable within a context of a crisis, chiefly as opposing the principle of solidarity between states. The court could have opted for a circumstance-specific interpretation of the Dublin Regulation based on relevant EU and international norms and principles which would have alleviated some of the disproportionate pressure put on the countries in question and, most importantly, make it more likely for asylum seekers to receive proper treatment.

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