

BlogDUE

Border controls and pushbacks as the new normal? The tension between freedom of movement and migration management under the reformed Schengen Border Control Regulation

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SUMMARY: 1. Introduction. – 2. The tension between freedom of movement and migration management regarding temporary border controls. – 3. The proportionality of temporary border controls to mitigate irregular migration. – 4. Pushbacks at internal Schengen borders. – 5. Strengthening the rule of law at internal Schengen borders: the role of the Commission and Member States. – 6. Conclusion.

1. Established in 1985, Schengen promised a borderless Europe, allowing free movement across participating Member States. Yet, several countries have reinstated internal border controls in recent years, with migration management playing a key role. As these controls continue to expand, a pressing question arises: Has Schengen's landmark achievement of a border-free zone been overshadowed by the push for more security and stricter migration control?

This shift towards prioritising migration management over the free movement of people is starkly illustrated by two practices adopted by several EU Member States: (a) the reintroduction of temporary border controls to address the “threat” of irregular migration and (b) the pushbacks of third-country nationals at internal Schengen borders. This blog post explores the current state of freedom of movement within the Schengen area, focusing on border controls and pushbacks and their compliance with EU law.

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2. The European Area of Freedom, Security, and Justice is characterised by providing freedom of movement for European citizens on one side and including rules on migration management for third-country nationals on the other. (See D. TYHM, *European Migration Law*, Oxford, 2023, p. 13). The rules on freedom of movement, including the right to live, work, or study in another EU Member State, apply not only to EU citizens but also to third-country nationals with long-term resident status. [EU Regulation 2016/399](#) of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code, hereinafter SBC) outlines specific rules on the freedom of movement for third-country nationals who are not permanent residents of an EU Member State.

In past years, freedom of movement has increasingly been challenged by the logic of migration management, which is more and more dominant and relegates the freedom of movement for EU citizens and regular residents to second place. Violeta Moreno-Lax argues that the “crisis mode” with which EU Member States approach migration since 2015 has led to a generalisation of derogations of the EU migration and asylum acquis (V. MORENO-LAX, *Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU*, in *europeanpapers.eu*, 2024, p. 180 ff.).

The European Commission [proposed a regulation to amend the SBC](#) in 2021. After over two years of negotiations, the Parliament and Council adopted the final text in Spring 2024. [Regulation 2024/1717](#) entered into force in July 2024. With this reform, Schengen was “asserted as a pan-European security project” and hence impaired “Schengen’s identity-creating dimension for citizens” (J. BORNEMANN, *Competing Visions and Constitutional Limits of Schengen Reform: Securitization, Gradual Supranationalization and the Undoing of Schengen as an Identity-Creating Project*, in *German Law Journal*, 2024, p. 408). As sections 3 and 4 aim to demonstrate, this reform has ultimately transformed Schengen cooperation to be dominated by the objective of migration control, rather than being primarily guided by the long-established principle of freedom of movement (D. VITIELLO, *Nel nome della libertà di circolazione: la riforma di Schengen e le alternative al ripristino dei controlli interni*, in *Quaderni AISDUE*, 2024, p. 22).

3. The normalisation of derogations to the functioning of Schengen is evident in the frequent reintroduction and extension of border controls since an extensive migration movement to Europe was triggered, among other things, by the Syrian civil war in 2015.

Art. 25 ff. SBC allow for a temporary reintroduction of border controls “in the event of a serious threat to public policy or internal security”. According to the general procedure outlined in Art. 27 SBC, when border controls are reintroduced, Member States must notify the other Member States and the European Commission and justify this decision. In the ruling, [Landespolizeidirektion Steiermark](#) (Judgment of 26 April 2022, Joined Cases C-368/20 and C-369/20, *Landespolizeidirektion Steiermark*), the Court of Justice of the European Union (CJEU) has underlined that the reintroduction

must be applied as a last resort measure in exceptional situations. Reintroducing “internal border control under Article 25 of that code and any prolongation thereof must, on the one hand, be necessary and proportionate in relation to the threat identified and, on the other, comply with the detailed criteria and procedural rules (...)” (para. 68). According to this ruling, a Member State can only extend the maximum period, which back then was six months, “where the Member State concerned is able to demonstrate the existence of a new serious threat affecting its public policy or internal security (...)” (para. 79). Therefore, exceptions to the principle of free movement must be interpreted narrowly (D. CHALMERS, G. DAVIES, G. MONTI, V. HEYVAERT, *European Union Law*, Cambridge, 2024, p. 513. See on this *Blog*: S. MARINAI, [*La Corte di giustizia e la durata massima delle misure volte a reintrodurre i controlli alle frontiere interne*](#), 2022).

An important change in the reform adopted in April 2024 is the time limit for Member States to reintroduce “temporary” internal border controls. Under the new SBC, these controls can last up to two years, compared to the current six-month limit. Member States must now provide a risk assessment when extensions exceed six months. If extensions exceed 18 months, the Commission must issue an opinion on their proportionality and necessity. The Commission is hence given a more significant role in intervening if border controls are unlawful.

The principle of proportionality is crucial for assessing the legality of temporary border controls. The proportionality test evaluates the legitimacy and appropriateness of temporary border controls based on four key criteria:

a) Whether the temporary border controls have a *legitimate aim*, namely, is there a threat to public security or public policy;

b) Whether the temporary border controls are *appropriate* for achieving the intended objective, namely reducing or eliminating the perceived threat to public security or public policy;

c) Whether the temporary border controls are *the least restrictive means*, meaning that no less intrusive but equally effective measures are available;

d) Whether the temporary border controls are *proportionate* in a narrow sense, ensuring that the restrictions imposed are not excessive relative to the objective pursued (A. K. MANGOLD, A. KOMPATSCHER, *Compatibility of Persistent Controls on the German-Danish Border with EU Law*, brief assessment on behalf of Rasmus Andresen, Member of the European Parliament, 2022, pp. 23-24).

The Commission has stressed in its 2023 [*State of Schengen Report*](#) (p. 16) that Member States needed to give sufficient information on the reasons behind the decisions to reintroduce border controls, the impact and the alternative measures that could help address the threats in question to ensure the respect of proportionality. This requirement has been included in the revised Article 26 SBC, which mandates that Member States conduct an impact assessment when reintroducing or extending internal border controls, in order to demonstrate the necessity and proportionality of such measures (for

a detailed discussion on the required impact assessment, see: D. VITIELLO, *op. cit.*, p. 29).

Despite this high threshold for the legality of temporary border controls, according to the 2023 State of Schengen report, Member States reintroduced or extended internal border controls 28 times, 19 of which were extensions of border controls in place since 2015. Hence, it has been argued that we can no longer call the Schengen area an area without border controls (D. CHALMERS, G. DAVIES, G. MONTI, V. HEYVAERT, *op. cit.*, p. 513).

Member States have justified the reintroduction and prolongation of border controls to the European Commission for varying reasons. (The list of notified current temporarily reintroduced border controls can be accessed [here](#)). A common justification cited is the “high levels of irregular migration”. It is one of the reasons brought forward for the current border controls by Austria, the Netherlands, Germany, Denmark, France, and Italy.

In Art. 25 para. 1, lit c), the reform explicitly introduced a justification for the reintroduction of border controls in cases of an “exceptional situation characterised by sudden large-scale unauthorised movements of third-country nationals between the Member States, putting a substantial strain on the overall resources and capacities of well-prepared competent authorities and which is likely to put at risk the overall functioning of the area without internal border control, as evidenced by information analysis and all available data, including from relevant Union agencies”.

It remains uncertain whether the CJEU would consider recent figures on secondary migration as indicative of “sudden” or “large-scale” movements. While infographics published on the [Council of the EU’s website](#) show a decrease in the number of irregular migrants reaching the EU compared to 2023, this provides little insight into secondary movements within the EU.

It is all the more essential to evaluate the nature and extent of the threat posed by secondary movements. According to the proportionality test outlined above, assessing whether the temporary border controls introduced by these countries pursue a *legitimate aim* requires an examination of whether the stated threat genuinely exists. This evaluation is particularly challenging because the authorities provide little to no information about the specific risks associated with the so-called “high” migration flow. If the concern involves a potential terrorist threat, it is reasonable that classified intelligence cannot be disclosed. However, the justification in the notification should explicitly reference a terrorist threat rather than vaguely citing “irregular migration”. Governments often present an extensive list of ambiguous reasons to justify the reintroduction of border controls without clearly explaining why there is a genuine threat rather than simply a perceived risk associated with irregular migration (see in detail an evaluation of the notifications provided by the Danish government: A. K. MANGOLD, A. KOMPATSCHER, *op. cit.*, pp. 19-22. See an evaluation of the notifications provided by the German government: A. NAGHIPOUR, S. SALOMON, L. ZÜLLIG, *The compatibility of German internal border controls with the Schengen Borders Code*, expert opinion commissioned by MEP Erik Marquardt, 30 April 2024, pp. 15-23).

Secondly, it is difficult to effectively assess if border controls are the *appropriate* and, thirdly, *least restrictive* means regarding the risk stemming from migration. It is hard to understand why other means, such as police checks as foreseen by Art. 23 SBC, are not equally appropriate and less restrictive measures to mitigate irregular migration. Border checks focussing on irregular residence will be carried out near the border to detect those who have crossed the border without authorisation to do so, which is why they must be selective and targeted to be distinct from border controls (S. PEERS, *EU Justice and Home Affairs Law, Vol. 1: EU Immigration and Asylum Law*, Oxford, 2023, p. 104).

Lastly, looking at *proportionality in a narrow sense*, it is highly questionable if the benefits of border controls outweigh their costs. A 2016 [study commissioned by the European Parliament](#)'s Committee on Internal Market and Consumer Protection estimated that reintroducing internal border controls within the Schengen Area could result in economic losses of up to €230 billion annually across the entire Schengen region. Consequently, the proportionality of temporary border controls as a response to irregular migration is highly questionable.

Despite the questionable legality and the high costs associated with border controls – both in terms of deploying police forces and disrupting the free flow of goods – states continue to carry out border controls and justify those with irregular migration flows.

4. Besides border controls to pick up irregular migrants, several Member States go further in their attempts to tackle irregular migration. Numerous reports by NGOs (for instance, [here](#), [here](#) and [here](#)) document systematic expulsions of third-country nationals occurring at internal Schengen borders. These actions can be called pushbacks if procedural safeguards under EU Law are not respected. They raise serious legal concerns when third-country nationals are denied the opportunity to file an asylum application in the country they have entered. Under the principle of non-refoulement, as set out in the Geneva Convention, the ECHR, and EU law, individuals seeking asylum must be given the opportunity to apply and cannot be denied entry.

The European Court of Human Rights (ECtHR) recently addressed a case involving systemic intra-EU pushbacks. In [H.T. v Germany and Greece](#) (judgement of 15 October 2024, App. no. 13337/19) the ECtHR determined that the automatic removal of Syrian citizen H.T. by Germany to Greece was unlawful. The Court identified deficiencies in an administrative agreement between Germany and Greece (the “Seehofer deal”, named after the then German Minister of the Interior), which failed to provide essential protections for asylum seekers prior to their removal.

The UN Special Rapporteur Felipe González Morales expressed 2022 that he sees a “regrettable continuation of a trend to legitimise pushback practices through the introduction of legislation and by means of government executive orders” (F. G. MORALES, *Report of the UN Special Rapporteur on the human rights of migrants (Felipe González Morales) on human rights violations at*

international borders: trends, prevention and accountability, A/HRC/50/31(2022), para. 27).

Intra-Schengen pushbacks could hardly be justified under the “old” SBC. The CJEU underlined that third-country nationals cannot simply be expelled without getting access to the possibility of filing for asylum. In [ADDE and Others](#) (judgment of 21 September 2023, Case C-143/22, *ADDE and Others*), for example, the CJEU clarified that the reintroduction of temporary internal border controls does not absolve the EU Member States of their obligations under the [Directive 2008/115/EC](#) (Return Directive), (see my analysis of this case [on this Blog](#)). The Return Directive mandates that Member States initiate a formal procedure when expelling an irregular migrant, providing them adequate time to voluntarily depart from the country—ranging from seven to 30 days, as Article 7 of the Directive stipulated. Member States cannot systematically deny entry to third-country nationals and have to assess individually whether the third-country national can be expelled. Additionally, the Directive obliges Member States to issue formal return decisions to third-country nationals residing illegally in their territory (Art. 6, para. 1). An exception applies if bilateral agreements or arrangements predating the Directive’s entry into force are in place (Art. 6, para. 3). Importantly, an individual who has made an application for protection is an asylum seeker under EU law and cannot be returned under these provisions.

Despite a clear legal framework prohibiting systemic pushbacks, several EU Member States continue to engage in such practices at a large scale, even at internal Schengen borders. Examples include [France at the Italian border](#), [Italy at the Slovenian border](#), [Germany at the Polish and Czech border](#). The practices of the French police at the French-Italian border have recently been [condemned by the French Ombudsman](#), who stated that it violates EU law. Similarly, in September 2024, Germany reintroduced border controls at all its land borders, with the stated aim of creating a model for “EU law-compliant and effective pushbacks”, as [declared by Nancy Faeser](#), Germany’s current Minister of the Interior. Faeser gave no information on how these pushbacks might comply with EU Law. The current German border controls are, hence, a “blanket migration management technique”, (E. TSOURDI, [Not only legally dubious but also ineffective](#), in *verfassungsblog.de*, 27 September 2024).

The key question is whether the systemic refusal of entry to third-country nationals within the Schengen area complies with the new Schengen rules, which have been in force since July 2024. Two articles are particularly relevant here:

The first one is the definition of internal border checks in Art. 23. The new article explicitly excludes measures “to reduce illegal migration” from measures that are equivalent to border controls and hence forbidden under EU law. According to Steve Peers, this amendment reflects the CJEU ruling in [PPU, Adil](#) (judgement of 19 July 2012, Case C-278/12), (S. PEERS, [Restoring the Borderless Schengen Area: Mission Impossible?](#), in *European Policy Analysis*, 2024, p. 10). With this judgement, the CJEU stated that identity checks aimed at combating irregular residence do not equate to border checks

if they are not systematic and do not aim to prevent entry. However, the more such checks resemble border controls, the stricter and more detailed the governing national laws must be to justify their necessity and ensure effective oversight (A. NAGHIPOUR, S. SALOMON, L. ZÜLLIG, *op. cit.*, p. 14).

The second key amendment in the reform relevant to pushbacks at Schengen borders is Article 23a on “transfer procedures”. This provision allows Member States to swiftly expel migrants apprehended in internal “border areas” back to the country they are believed to have come from within 24 hours. Instead of a formal decision, this process requires only a brief form, significantly simplifying the expulsion procedure. Daniel Thym has defined these transfers at internal borders as a “return light” (D. THYM, [Reinvigorating Schengen amid legal changes and secondary movements](#), in *European Migration and Diversity Programme*, 11 July 2024, p. 6). The provision poses some conditions for this fast-track transfer: it can only apply if the third-country national is apprehended during border checks involving the competent authorities of both Member States within the framework of bilateral cooperation and there are clear indications that the third-country national has arrived directly from the other Member State, “and it is established that the third-country national has no right to stay on the territory of the Member State in which he or she has arrived, on the basis of information immediately available to the apprehending authorities, including statements from the person concerned, identity, travel or other documents found on that person or the results of searches carried out in relevant national and Union databases”.

The provision applies to non-EU citizens apprehended in border areas who are not subject to Dublin rules. Under the new SBC, asylum seekers continue not to be subjected to these fast returns. The guarantees of the Return Directive will only be excluded in the specific cases mentioned. A Member State apprehending a third-country national may return them within 24 hours to the Member State they are believed to have entered. This expedited procedure involves providing a brief standard form to the individual instead of issuing a formal decision. Whilst the individual can appeal this “transfer” decision, the appeal will not have a suspensive effect, meaning the person will be returned regardless. The protections of the Return Directive are, hence, narrower under the new SBC, but they still apply to some extent. Steve Peers argues that systematic pushbacks remain illegal also under the rules of the new Schengen Border Code as the Return Directive continues to apply (S. PEERS, *op. cit.*, p. 14).

The reform of the Return Directive will be essential for the evolution of fast-track returns at internal Schengen borders (S. PEERS, *op. cit.*, p. 13). The European Commission presented a proposal for a recast of the Return Directive 2018 to accelerate return procedures by creating a border procedure. It was not adopted as the negotiations between the European Parliament and the Council have been [in a deadlock for several years](#).

The new SBC fails to address the ongoing issue of systemic pushback practices by Member States that, as laid out above, continue to be carried out by several Member States. These practices undermine mutual trust, risk

creating a domino effect with more internal borders being reintroduced, and could trigger a chain reaction of similar measures across countries (as argued by E. TSOURDI, *op. cit.*).

On the other hand, the deterrent effect for migrants seems limited, as [news reports](#) from the weeks after the reintroduction of the border control seem to suggest.

5. The question remains how to deal with the rule of law-related problem that Member States, firstly, reintroduce temporary border controls without respecting the principle of proportionality and, secondly, carry out pushbacks without respecting the rights of third-country nationals.

With the lens on the rule of law, the reaction of the European Commission, guardian of the Treaties, is crucial. It is the EU institution tasked with ensuring Member States comply with EU law. However, it has not taken action against the reintroduction of border controls or the vague justifications provided by Member States.

Under the recent reform, the Commission has been granted greater oversight of Member States' decisions on border controls. The amended Art. 27 and new Art. 27a SBC foresee a detailed procedure that Member States need to follow to notify the temporary reintroduction or prolongation of border control and the possibility of a consultation process between the notifying Member State, the Commission, and other affected Member States. However, whether these procedural safeguards will prevent Member States from the reintroduction and prolongation of border controls remains to be seen (doubtful: D. THYM, *op. cit.*, p. 5).

It also remains to be seen if the Commission will become more active and use its toolbox of enforcement measures, most importantly, infringement procedures. So far, the Commission has been very reluctant to use infringement procedures to ensure compliance with the SBC. This “strategy of conflict avoidance” will most likely be continued under the new SBC rules (J. BORNEMANN, [The Commission's proposed reform of the Schengen area – stronger enforcement or conflict aversion?](#), in *EU Law Enforcement*, 31 January 2022). Notably, the only case concerning the legality of the reintroduction of border controls (see judgment *Landespolizeidirektion Steiermark*, cit.) has reached the CJEU through a preliminary reference from a national court. Only once the EU Commission issued an [opinion](#) regarding the reintroduction of border controls at the Austrian-German border, concluding that they were justified for public order reasons due to the high number of arrivals of third-country nationals (see in detail: A. NAGHIPOUR, S. SALOMON, L. ZÜLLIG, *op. cit.*, p. 36). In this opinion, the Commission did not clearly assess the proportionality of this measure and accepted the arrival of migrants per se as a security threat (see the critique by E. BROUWER, [Migration Flows and the reintroduction of internal border controls: assessing necessity and proportionality – EU Immigration and Asylum Law and Policy](#), in *EU Migration Law Blog*, 12 November 2015).

Another tool the Commission has is the Schengen Evaluation and Monitoring Mechanism, established by the Council in 2013 and [reformed in 2022](#). This intergovernmental mechanism monitors Member States' compliance with Schengen rules and results in the Commission's annual report on the State of Schengen.

However, to date, the Commission has taken no action against pushbacks within the EU. One potential reason is that the Schengen Evaluation and Monitoring Mechanism does not include fundamental rights as an assessment criterion, which likely explains why pushbacks have not been addressed in its framework (T. STRIK, [Pushbacks in the EU: How to end impunity?](#), in *EPC Commentary*, 16 December 2020).

There is a precedent of the Commission taking action against pushbacks, not at internal Schengen but at the EU's external borders. Member States are engaging in pushbacks not only at internal borders but, more prominently, at the external borders of the EU. This practice has been widely criticised by the [Parliamentary Assembly of the Council of Europe](#), the [European Parliament](#), the [European Parliamentary Research Service](#), NGOs (see examples [here](#), [here](#), [here](#) and [here](#)), and scholars (see examples [here](#) and [here](#)). The European Commission has acted and [brought Hungary before the CJEU](#) for violating EU law in its treatment of asylum seekers, including conducting pushbacks at the border to Serbia. The CJEU deemed these actions unlawful in its [ruling on case C-808/18](#) from 2020. Although this paper concentrates on internal borders, it is important to emphasise that the Commission has the authority to actively oppose pushbacks if it chooses to exercise it. Its decision not to act in this regard appears to be driven by political considerations.

However, not only the European Commission can bring an infringement action before the CJEU. Other Member States may be unhappy about non-compliance with Schengen rules, such as the reintroduction of border controls or pushbacks, especially if these practices impact their territory. Under Article 259 TFEU, other Member States can also initiate an infringement procedure against a Member State (for this thought, I would like to thank Jonas Bornemann, who discussed this in SIEPS'webinar titled [Restoring the borderless Schengen area: Mission Impossible?](#), 21 November 2024). However, infringement procedures initiated by other Member States rarely happen.

More importantly, Member States can address the issue politically. Pushbacks, for example, can trigger a chain reaction between countries, as seen when Austria's Chancellor Kurz [announced](#) the potential reintroduction of border controls at the border with Italy if Germany began turning refugees back to Austria. This situation could be resolved politically, potentially preventing further law violations. The European Commission can play a crucial role in this context, as the rule of law issue might ultimately need a political solution.

6. In conclusion, the reform of the Schengen Border Code does not seek to legalise the practice of reintroducing or perpetuating border controls, nor

does it aim to legalise pushbacks within the Schengen area. However, it does grant Member States more flexibility in using border checks and controls to address irregular migration. Although returns between Member States of irregularly entering third-country nationals are made easier, they are only allowed under strict conditions.

The Schengen area faces a significant challenge due to eroded trust between Member States. Extended border controls and unlawful returns clearly indicate the system's dysfunction. If Member States genuinely view Schengen as a cornerstone of EU integration, they must focus on prioritising free movement and not solely on mitigating irregular migration flows. Furthermore, unlawful pushbacks must end immediately to uphold the rule of law and human rights. Only in this way can the integrity of the Schengen area be preserved.

ABSTRACT (ITA)

Negli ultimi anni, diversi Stati membri dell'UE hanno reintrodotta controlli alle frontiere interne dello spazio Schengen, mettendo in discussione il concetto di un'Europa senza frontiere. Considerando che le preoccupazioni legate alla sicurezza e il controllo della migrazione sembrano assumere una crescente importanza rispetto al principio fondamentale della libera circolazione nell'UE, questo contributo analizza lo stato attuale della libertà di movimento alla luce della recente riforma del regolamento sui controlli alle frontiere Schengen. L'articolo prende in considerazione due pratiche principali perseguite da diversi Stati membri dell'UE e ne valuta la conformità al diritto dell'UE: (a) la reintroduzione di controlli temporanei alle frontiere per affrontare la "minaccia" della migrazione irregolare e (b) i respingimenti di cittadini di paesi terzi alle frontiere interne dello spazio Schengen.

ABSTRACT (ENG)

In recent years, several EU Member States have reinstated border controls at their internal Schengen borders, raising challenges to the concept of a borderless Europe. With security concerns and migration control increasingly taking precedence over the EU's foundational principle of free movement, this contribution examines the current state of freedom of movement in light of the recent reform of the Schengen Border Control Regulation. It focuses on two key practices implemented by several EU Member States and evaluates their compliance with EU law: (a) the reintroduction of temporary border controls to address the "threat" of irregular migration and (b) the pushbacks of third-country nationals at internal Schengen borders.