

Schengen reform

Key challenges and proposals

SUMMARY

The Schengen area without internal borders has been under stress over the past decade owing to several successive crises, including the sudden arrival of large numbers of people across the EU's external borders, persistent threats to internal security, and the outbreak of the coronavirus pandemic. Although according to the Schengen rules the reintroduction of border controls at internal borders should be a temporary and exceptional measure, several Member States have maintained internal border controls uninterrupted for more than six years.

The massive and largely uncoordinated internal border controls and other restrictions to freedom of movement imposed at the beginning of the pandemic revealed several shortcomings in the Schengen systems. These shortcomings concern Schengen's normative framework (gaps in the legal framework), implementation and enforcement (at internal borders and in the management of external borders), and governance (including evaluation and strategic direction).

Building on previous attempts to reform the Schengen system, and responding to renewed calls for reform, in December 2021 the European Commission presented a new Schengen strategy. This was accompanied by several proposals and measures aimed at revising the Schengen rules, enhancing police cooperation, reinforcing the management of external borders and strengthening the overall governance of Schengen.

The European Parliament has repeatedly stressed the need to safeguard the Schengen area, urging the Member States to remove all unjustified controls at internal borders and asking the Commission to enforce the Schengen rules properly. In the context of the pandemic, Parliament called for a 'recovery plan' for Schengen and for 'truly European governance of the Schengen area'.



IN THIS BRIEFING

- Introduction
- Major challenges
- Key proposals to safeguard the Schengen area
- Main concerns



Introduction

One of the objectives of the EU is to 'offer its citizens **an area of freedom, security and justice without internal frontiers**, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' ([Article 3\(2\) of the Treaty on European Union – TEU](#)). Regarding borders, EU policies should ensure 'the absence of any controls on persons, whatever their nationality, when crossing internal borders', carry out 'checks on persons and efficient monitoring of the crossing of external borders', and gradually introduce 'an integrated management system for external borders' ([Article 77 of the Treaty on the Functioning of the European Union – TFEU](#)).

Whereas the [Treaty of Rome](#) already provided for the abolition of obstacles to the freedom of movement of persons, the removal of internal border controls took place gradually after the signature by five Member States of the [Schengen Agreement](#) (1985) and the [Schengen Convention](#) (1990). The Treaty of Amsterdam (1997) brought these instruments into the EU framework.

Today, the **Schengen area** without internal border controls on persons comprises 26 Member States,¹ including 22 EU countries (all the EU's Member States except Bulgaria, Croatia, Cyprus, Ireland and Romania) and 4 non-EU countries, namely Iceland, Norway, Switzerland and Liechtenstein. The **Schengen acquis** covers measures on the absence of internal borders, the management of external borders, compensatory measures (visa policy, Schengen information system, police cooperation), and monitoring and evaluation.

Major challenges

Ongoing controls at internal borders

The free movement of persons is generally acknowledged as one of the [major achievements](#) of EU integration. The reintroduction of internal border controls **hinders the free movement of persons** and goods, resulting in significant social and economic costs.

Temporary introduction of internal border controls (SBC)

According to the Schengen Borders Code ([SBC](#)), Member States may temporarily reintroduce internal border controls to deal with serious threats to public policy or internal security in cases of:

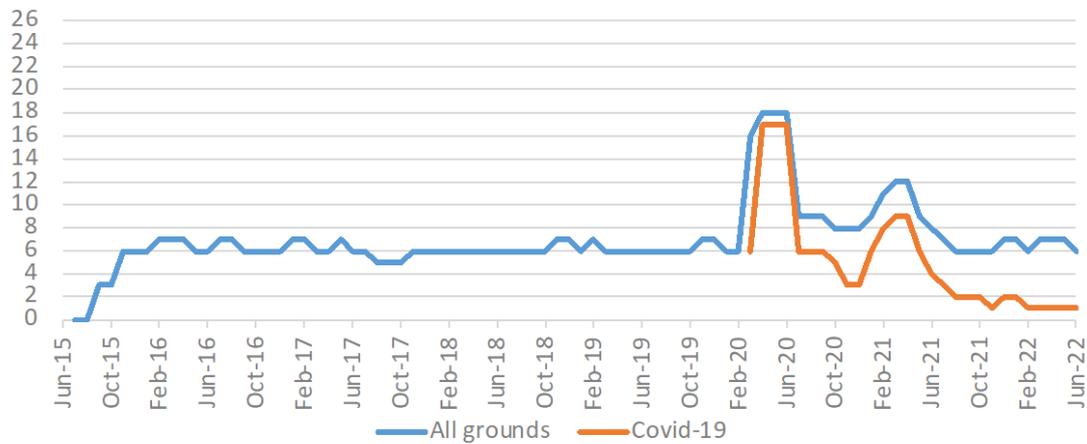
- a) a **foreseeable serious threat** to public policy or internal security – border control for maximum 30 days, renewable by 30-day periods, and up to 6 months (Article 25-27)
- b) an **immediate serious threat** to public policy or internal security – border control for maximum 10 days, renewable by 20-day periods, up to 2 months (Article 28) and,
- c) **persistent serious deficiencies relating** to external borders – border control for six months, renewable 3 times, up to 2 years (Article 29)

Despite the prescribed temporary nature of internal border controls, **six Member States** have maintained internal border controls since 2015 owing to concerns relating to the situation at the EU's external borders and/or security threats (see Figure 1). In accordance with Article 29 of the SBC, the Council sanctioned the temporary reintroduction of border controls by Austria, Germany, Denmark, Sweden, and Norway only between May 2016 and October 2017. France introduced identity checks at its borders in November 2015 in relation to the Paris Conference on Climate; the controls were renewed and have been maintained ever since following a series of terrorist attacks on French territory.

The outbreak of the **COVID-19 pandemic** in early 2020 led to a new wave of internal border controls. By [mid-April 2020](#), 18 Member States had internal border controls. In certain cases, internal border controls relating to the pandemic were imposed on top of pre-existing controls introduced on grounds of migration and/or security threats. Internal border controls were accompanied by

other restrictions on the freedom of movement of persons, such as entry or exit bans or entry requirements.² In many cases, internal border controls served to implement such restrictions.

Figure 1 – Number of Member States with internal border controls



Data source: [European Commission](#).

Partial compliance with the Schengen rules

There is strong evidence to suggest that **Member States have not abided fully by the Schengen rules** when (re)introducing internal border controls. A 2016 [study](#) found that many Member States' justifications for the reintroduction of internal border controls had been 'woefully inadequate' (p. 72). A follow-up [study](#) in 2018 questioned Member States' justifications for internal border controls in the context of reduced pressure at external borders. A 2020 [study](#) found that Member States had not sufficiently substantiated the reasons for introducing internal border controls early during the pandemic and that they had failed 'to provide robust independent and scientific evidence demonstrating the proportionality of internal border checks and intra-EU travel bans' (p. 10).

Member States' obligations when introducing internal border controls (Articles 25 SBC)

- **Assessment:** assess the extent to which the measure is likely to adequately remedy the threat to public policy or internal security, assess the proportionality of the measure and consider the likely impact on free movement of persons within the area (Article 26 SBC)
- **Notification:** notify the Commission providing the reasons for and details of the duration and location of border controls (Article 27 SBC)
- **Consultation:** engage in consultations with a view to organising mutual cooperation and examining the proportionality of the measures
- **Information:** inform the European Parliament and the Council as soon as possible of any reasons triggering internal border controls (Article 31 SBC)
- **Reporting:** (after lifting the controls) present a report to the European Parliament, the Council and the Commission outlining the initial assessment, the operation of the checks, effectiveness, and the resulting impact on the free movement of persons (Article 33 SBC).

In its 2022 [special report](#) on free movement during the pandemic, the European Court of Auditors (ECA) found that Member States' notifications of internal border controls 'did not provide sufficient evidence that the controls were a measure of last resort, proportionate and of limited duration'.

The **European Parliament** has on several occasions **questioned Member States' justifications** for internal border controls. In a 2018 [resolution](#) the Parliament stated that 'many of the prolongations are not in line with the existing rules as to their extensions, necessity or proportionality and are therefore unlawful'. In its [resolution](#) of 19 June 2020, in the context of new controls triggered by the

outbreak of the pandemic, the Parliament criticised the 'little justification' and the 'lack sufficient detail' provided by the Member States in their notifications.

In its 2021 impact assessment (IA) [report](#) on the proposal to amend the SBC, the Commission acknowledged that 'the quality of the data on duration and grounds of decisions on temporary reintroduction of border checks at internal borders is problematic' (p. 63). It stated that internal border controls were 'applied against an abstract threat or used as a first aid measure (and as such are often disproportionate and inadequate to address the threats that are supposed to tackle)' (p. 8).

The Commission has been criticised for **not living up to its duties to enforce the Schengen rules**. A 2020 [study](#) found that the main challenge was not the rules but an 'EU enforcement and evaluation gap'. The 2022 ECA [special report](#) concluded that the Commission 'did not exercise proper scrutiny to ensure that internal border controls complied with the Schengen legislation'.

Commission's obligations relating to internal border controls (Articles 25-28 SBC)

- **Assessment:** receive states' notifications and assess their reasons, checking the measures' necessity, proportionality, and likely impact on free movement (Article 27 SBC)
- **Opinions:** issue opinions regarding internal border control. These are mandatory when the Commission has concerns about the necessity or proportionality of internal border controls.
- **Consultations:** participate in consultations and joint meetings with the Member States to enable cooperation and examine the proportionality of the measures
- **Information:** inform the European Parliament and the Council as soon as possible of any reasons triggering internal border controls (Article 31 SBC)
- **Reporting:** present to the European Parliament and to the Council, at least annually, a report on the functioning of the area without internal border controls (Article 33 SBC).

As the 'guardian of the Treaties', the Commission can launch an infringement proceeding when it is of the opinion that a Member State is in breach of its obligations under EU law (Article 258-260 TFEU).

There is little evidence of the Commission questioning Member States' justifications for internal border controls. The only available Commission [opinion](#) was issued in October 2015, which assessed positively the necessity and proportionality of internal border controls reintroduced by Germany and Austria in 2015. In a 2017 [communication](#), the Commission considered that 'the overall situation has greatly improved' and acknowledged that the Council had authorised the remaining internal border controls 'for the third and last time' until 11 November 2017.

Although the Commission has threatened to launch **infringement proceedings** in relation to internal border controls, it has so far refrained from doing so. In its 2020 [communication](#) on the new pact on migration and asylum, the Commission stated that it would 'more systematically consider launching infringement procedures'. In February 2021, it [urged](#) six Member States to abolish some problematic entry restrictions. In a 2021 [report](#), the Commission explained that it had refrained from taking formal steps because it was seeking to resolve the issue through **political dialogue**. This argument was repeated before the Court of Justice of the European Union (CJEU) during a recent case hearing.³

In April 2022, the CJEU issued a [judgment](#) holding that the SBC precluded internal border controls from being reintroduced by a Member State on the basis of a serious threat to its public policy or internal security (Article 25 SBC) where the duration of its reintroduction exceeded the maximum total duration of six months and **no new threat existed**. The CJEU clarified that Member States **could not use Article 72 TFEU** (on Member States' responsibilities to maintain law and order and safeguard internal security) to circumvent this time limit. The CJEU also reminded the Commission and the Member States of their obligations to '**exercise the powers conferred upon them** by that code...' (para. 92). Moreover, the Court rejected the states' argument that the Commission's inaction was equivalent to an acceptance of the legality of internal border controls. With regard to the issue of Member States switching between legal bases (a point raised, for example, in the 2020 [study](#),

pp. 54-55), the CJEU stated that, in principle, Member States could use two different legal bases 'in the event of a **new serious threat** to public policy or internal security arising', for example on the basis of Article 29 and Article 25 SBC (para 71).

Limited use of alternative measures

The Commission has repeatedly recommended that Member States **make the best use of police checks and police cooperation** measures to tackle public threats affecting the Schengen area. In a 2017 [recommendation](#), the Commission encouraged Member States to assess whether enhanced police checks could achieve the same results as internal border controls. However, this recommendation 'has not led to any legislative or operational changes' (2021 [report](#), p. 29).

Police checks and cross-border police cooperation within the Schengen area

According to Article 23 SBC, the absence of internal border controls must not affect the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers **does not have an effect equivalent to border checks**. The SBC provides a list of criteria to assess whether such measures are not equivalent to border checks (are not intended as border checks; are based on general police information and experience regarding possible threats to public security; are distinct from systematic checks on persons at the external borders). The CJEU has further clarified the scope of these provisions, limiting the discretionary powers of Member States (e.g. [C-554/19 – Staatsanwaltschaft Offenburg](#); [C-278/12 – Adil](#); [C-444/17 – Arib](#); [C-412/17 – Touring Tours und Travel](#)).

Police cooperation between Member States is regulated through several instruments. The 1990 **Schengen Convention** (CISA) sets out general obligations for contracting parties regarding mutual assistance and information exchange, cross-border surveillance, hot pursuit, liaison officers, etc. The core CISA provisions are implemented mainly through **bilateral or multilateral agreements** concluded by the Member States (including provisions on joint patrols and joint operations across internal borders).

Rules on **cross-border sharing of information** and intelligence between law enforcement authorities are provided in the [2006 Council Framework Decision](#) and the 2008 [Prüm Decision](#) (which also provides baseline rules on how to conduct joint patrols and other joint operations across EU internal borders). [Council Directive 2004/82/EC](#) on advanced passenger information (the API Directive) obliges air carriers to transmit, upon request, passenger data to the Member State of destination prior to the flight's take-off, for inbound flights from a third country. Although the directive applies only to extra-EU/Schengen inbound flights, Member States may decide to collect API for intra-Schengen flights. [Directive \(EU\) 2016/681](#) on passenger name records (the PNR Directive) obliges Member States to collect and exchange passenger data from airline companies operating extra-EU flights for law enforcement purposes. The directive also allows Member States to collect this data for intra-EU flights.

According to the Commission, the **fragmented legal framework** on police cooperation limits the potential of these tools. For example, the 2020 [report](#) on Schengen evaluations found that Member States' needed to revise their bilateral or multilateral agreements to facilitate operational cross-border cooperation. There is also **untapped potential regarding the use of information** gathered through the API and PNR Directives. According to a 2020 [study](#) evaluating the API Directive, several Member States have extended the scope of API data collection to also include other flights (outbound flights and intra-EU/Schengen flights) (p. 45). According to a 2019 [study](#) on PNR, 24 Member States planned to collect PNR for intra-EU flights. The API evaluation [study](#) noted that several Member States were interested in extending the scope of the API Directive to cover intra-Schengen flights, since this would enable them 'to connect PNR data with API data and increase data quality, and thus more easily identify suspicious persons' (p. 46).

The European Parliament has generally supported the use of targeted police checks. In a 2018 [resolution](#), it stated that targeted police controls might 'prove more effective than internal border controls, notably as they are more flexible and can be adapted more easily to evolving

risks. In a 2020 [resolution](#), Parliament called on the Member States to consider using alternative measures such as 'minimum health checks' or 'stepping up police checks within the territory'.

New challenges at the EU's external borders

Strong EU external borders are a prerequisite for the Schengen area. The outbreak of the pandemic affected **EU border management**, disrupting mobility and delaying the implementation of key reforms (e.g. establishing [integrated EU border management](#), updating the EU information systems for borders and security, including [interoperability](#), and upgrading Frontex, etc.).

Border control at the EU's external borders (SBC)

The SBC provides common rules on border control, including on checks on persons at border crossing points (Article 5) and on border surveillance (Article 13). Article 8 SBC requires Member States to carry out **systematic checks on entry and exit** of all persons, including third-country nationals and persons enjoying the right of free movement under EU law. During border checks, individuals are assessed as to whether they are considered a **threat to public policy**, internal security, public health or international relations of any of the Member States. This assessment is carried out at **individual level**. A third-country national who does not fulfil all the entry conditions must be refused entry.

According to Article 13 SBC, a person who has **crossed a border illegally** and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures in line with [Directive 2008/115/EC](#) (Return Directive). Article 2(2)(a) of the [Return Directive](#) provides that Member States **may decide not to apply** this directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 SBC, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border.

Early in the pandemic, the Member States agreed to implement the Commission [recommendation](#) to **temporarily restrict non-essential travel** from third countries into the EU. The Council then adopted a [recommendation](#) inviting the EU Member States to start lifting the temporary restriction on non-essential travel into the EU for the residents of certain third countries, depending on the countries' epidemiological situations. Despite this recommendation, EU Member States took [different approaches](#), some banning all travellers, others allowing travellers from countries that were not included in the list. This situation revealed that the EU does not have specific rules or procedures for taking coordinated measures at external borders in the event of public health crises.

Another new challenge concerns the attempt by foreign governments to **instrumentalise migrants in order** to put pressure on the EU. In 2021, the Belarussian government orchestrated a [hybrid attack](#) against the EU by sponsoring and encouraging irregular migrants to cross into the EU. Whereas the numbers irregular crossings at the eastern land borders remained low compared with other migratory routes (about [8 000 irregular crossings](#) detected on this route in 2021) the migrant instrumentalisation tactics used by Belarus led to several thousands of people being [trapped](#) at the borders and reported deaths. The phenomenon of migration instrumentalisation is not entirely new. For example, Turkey, which is host to at least [3.7 million](#) refugees and [agreed](#) to prevent irregular migrants from crossing into the EU, has often used the [threat of irregular migration](#) to obtain financial resources and political concessions from the EU. In 2021, Morocco also [reportedly](#) pushed thousands of people across the border to the Spanish exclaves of Ceuta and Melilla in response to the Spanish offer of hospital treatment for a rebel leader from the contested territory of Western Sahara.

Evaluation and governance issues

A well-functioning Schengen area depends on the correct and efficient implementation of the Schengen *acquis* and on mutual trust among Member States. For this it is essential to have in place a robust monitoring system to verify how countries implement the Schengen *acquis*.

The Schengen evaluation and monitoring mechanism (SEMM) has been criticised for **lack of robustness** and **limited scope**. A 2019 special [report](#) of the ECA regretted the 'long time' it took Member States to remedy weaknesses identified because of 'a lack of binding deadlines for the adoption of evaluation reports and the implementation of corrective actions.' A 2020 [study](#) recommended developing the scope of the mechanism to allow for 'a more systematic and independent assessment of the impacts, lawfulness and shortcomings that characterise the reintroduction and implementation of internal border checks, police border checks inside-territory and in border areas' (p. 79).

Schengen evaluation and monitoring mechanism (SEMM)

Under [Article 70](#) TFEU, 'without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, **conduct objective and impartial evaluation of the implementation of the Union policies** referred to in this Title [AFSJ] by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation'. [Council Regulation \(EU\) No 1053/2013](#) established a monitoring and evaluation mechanism for the Schengen *acquis* (SEMM) to ensure mutual trust between Member States in respect of their capacity to implement the Schengen *acquis* properly. A peer-to-peer review mechanism, SEMM is based on a multi-annual programme agreed between the Commission and the Member States. The Commission is responsible for the overall coordination and organisation of evaluation and monitoring.

The first SEMM cycle took place between 2015-2019 resulting in 198 Commission evaluation reports and more than 4 500 Council recommendations. The 2020 Commission [report](#) on the functioning of SEMM concluded that although 'overall, Member States comply with the essential provisions of the Schengen *acquis*', 'evaluations showed that there are some recurrent deficiencies in Member States and equally divergent practices among Member States due to an incoherent implementation of the Schengen *acquis*'. The report also identified several **shortcomings of the mechanism** and made recommendations for operational improvements. One key issue identified was the reduced political visibility and limited impact of evaluation findings on the broader debates on Schengen.

Delayed completion of the Schengen area

Accession to the Schengen area without internal border controls

According to Article 4(2) of the [Act of Accession](#) of **Bulgaria and Romania**, certain parts of the Schengen *acquis*, such as the lifting of checks at internal borders, shall only apply pursuant to a decision of the Council to that effect after verification in accordance with the applicable Schengen evaluation procedures. The Council shall take its decision unanimously, after consulting the European Parliament. As the verification of Romania and Bulgaria was successfully completed before the adoption of the SEMM Regulation, the two have not been subject to a SEMM evaluation. Article 4(2) of the [Act of Accession](#) of **Croatia** contains a similar provision regarding the lifting of checks at internal borders. The SEMM Regulation is applicable to Croatia. For **Cyprus**, the relevant provision is included in Article 3(1) and (2) of the [2003 Act of Accession](#). Moreover, Article 1 of [Protocol 10](#) attached to the Act, provides that the application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.

On 9 June 2011, the Council [concluded](#), in accordance with the applicable Schengen evaluation procedures, that the conditions in all relevant areas of the Schengen *acquis* had been fulfilled by **Bulgaria** and **Romania**. At the [Council](#) meeting of September 2011, a [draft](#) Council decision on the full application of the provisions of the Schengen *acquis* in **Bulgaria and Romania** did not receive unanimous support. The Schengen evaluations for **Croatia** took place between 2016 and 2020. Following the Commission's [assessment](#) that Croatia had met the necessary conditions for the application of the Schengen *acquis*, on 9 December 2021, the Council adopted [conclusions](#) on the

fulfilment of the necessary conditions for the full application of the Schengen *acquis* in Croatia. On 29 June 2022, the Council [asked](#) the European Parliament for its opinion on the draft Council decision on the full application of the Schengen *acquis* in Croatia. The Schengen evaluation process to assess **Cyprus's** readiness to join the Schengen area is ongoing.

The **Parliament** has called repeatedly for the **completion of the Schengen area**. In a 2011 [resolution](#), the Parliament approved the draft Council decision on the full application of the provisions of the Schengen *acquis* in Bulgaria and Romania. In its [resolution](#) of 11 December 2018, the Parliament urged the Council 'to present a new draft decision on the full application of the provisions of the Schengen *acquis* in Bulgaria and Romania'. It emphasised that the failure to reach consensus in the Council called into question 'the unitary application of the provisions of the EU Treaties and the credibility of the EU, which continuously erodes public support for common EU policies'. In its 2020 [resolution](#) on the situation in the Schengen area, the Parliament reiterated 'its call on the Council to present a new draft decision on the full application of the provisions of the Schengen *acquis* in Bulgaria and Romania as soon as possible'.

In its 2021 [Schengen strategy](#), the Commission reiterated its call on the Council to take the necessary steps for Bulgaria, Romania and Croatia (as well as Cyprus once it had successfully completed the evaluation process) to become part of the area without internal border controls. In March 2022, in the context of negotiations on the revision of SEMM, Romania and Bulgaria made a [joint declaration](#) (see point 26) to the Council stressing their commitment to apply the Schengen *acquis* correctly and inviting on a voluntary basis a team under the coordination of the Commission, to assess the application of the latest developments of the Schengen *acquis*. The Commission [declared](#) that it stood ready to coordinate and implement those assessments.

Key proposals to safeguard the Schengen area

The Schengen area was already under stress **long before the pandemic**. In response to tensions between Member States triggered by irregular migration and secondary movements, in 2013 the SBC was amended to allow for temporary internal border controls in cases of persistent **serious deficiencies at the external borders** (new Article 29). Another amendment in 2017 [introduced](#) the obligation on Member States to carry out **systematic checks** of all persons entering or exiting the EU. In the context of ongoing internal border controls imposed by Member States following the massive influx of refugees and irregular migrants, in September 2017, the Commission [proposed](#) to **amend the SBC**. The proposal, which sought to prolong time limits for border controls and to introduce additional procedural safeguards, did not win support from the co-legislators.

The coronavirus pandemic created a new impetus for reform. In June 2020, the Commission presented a new [Schengen strategy](#) aiming to: (1) ensure effective and modern management of the EU's external borders; (2) reinforce the Schengen area internally; and (3) improve governance to foster trust between Member States as well as better crisis preparedness.

In its 2021 [resolution](#) on Schengen, the **Parliament** acknowledged that 'the Schengen Borders Code, in particular as regards rules on internal border controls, is **no longer fit for purpose** and requires urgent and meaningful reform'. It noted the need to adopt 'clearer rules on public health emergencies' and suggested that each prolongation of border controls should trigger additional safeguards and oversight measures. The Parliament also called for 'a structured and transparent consultation mechanism in the event of crisis situations'.

Updated rules on internal border controls

In December 2021, the Commission presented a [proposal](#) to revise the SBC. One aim of the proposal is to provide more specific rules for dealing **threats to public health**. Currently, the SBC does not provide for the possibility to introduce internal border controls on grounds of public health. In fact, it was [noted](#) that during the negotiations on the original SBC regulation, the Council [removed](#) a reference to 'public health' for temporary reintroduction of border controls. As pointed out by the

Commission in its IA [report](#) accompanying the proposal, the pandemic revealed that the EU had no 'pre-agreed and formalised institutional answer to a health crisis' (p. 29). While the activation of integrated policy crisis response (IPCR) at the level of the Council helped to coordinate various measures, the mechanism could not focus too much on border measures.

The proposal amends Article 25 of SBC to include specific examples of situations creating a serious threat to public policy or internal security, namely: (a) activities relating to terrorism or organised crime; (b) **large-scale public health emergencies**; (c) a situation characterised by large-scale unauthorised movements of third-country nationals between the Member States, putting at risk the overall functioning of the area without internal border controls; and (d) large scale or high profile international events.

The proposal also introduces a specific procedure to deal with situations where a **serious threat to internal security or public policy affects a majority of Member States**, putting at risk the overall functioning of the area without internal border controls. This procedure will enable the Council to authorise, on the basis of a proposal from the Commission, the reintroduction of internal border controls in some or all Member States affected by an immediate threat. No time limit is provided in this case. If the Commission considers that internal border controls are not appropriate, it must adopt a recommendation specifying the more appropriate measures to be taken.

The proposal **updates the safeguards** applicable when internal border controls are introduced. It clarifies and expands the list of elements that must be assessed by Member States when introducing internal border controls, including the impact on the **cross-border regions**. In cases of prolongations, Member States also need to assess the appropriateness of **alternative measures**. They must also carry out a **risk assessment** when they intend to prolong internal border controls beyond six months. The Commission and other Member States will continue to be able to issue **opinions** on the necessity and proportionality of controls. In cases of prolongations beyond 18 months, the Commission must issue an opinion and to launch a consultation with Member States. The proposal allows for the prolongation of internal border controls for **up to 2 years**, although Member States may extend controls beyond this time frame, in which case the Commission is required to issue a follow-up opinion.

Regarding **police checks and police cooperation**, the proposal seeks to clarify and broaden the scope of 'police or other public powers by the competent authorities of the Member States in their territory'. A revised Article 23 expands the list of criteria under which the exercise of police or other public powers may not be considered equivalent to border checks. These include cases when controls are based on general information and the experience of the competent authorities regarding possible threats to public security or public policy and aim to '**combat irregular residence or stay, linked to irregular migration**' and when they are 'carried out, where appropriate, **on the basis of monitoring and surveillance technologies** generally used in the territory, for the purposes of addressing threats to public security or public policy'. The proposal clarifies that the absence of controls does not affect checks for security purposes of passenger data against **relevant databases on persons** travelling within the Schengen area.

The proposal introduces a new procedure allowing **irregular migrants** apprehended at the internal borders to be **transferred swiftly** as part of cross-border police cooperation operations if there is a clear indication that they just arrived from another Member State. The proposed amendment of the SBC is bundled with a proposal for a **targeted revision of the Return Directive** (Article 63) aiming to lift the 'stand-still' clause currently applicable to bilateral agreements and arrangements between Member States on such transfers. Member States will be able to update and establish new bilateral readmission agreements and arrangements.

Enhanced control of the EU's external borders

The SBC proposal establishes an **emergency procedure** for imposing restrictions on non-essential travel to the EU in response to threats to public health. It provides for a mechanism allowing the

Council to adopt a binding instrument setting out temporary travel restrictions at the EU external borders in case of a threat to public health. The instrument (an implementing act) would specify the categories of persons exempted from travel restrictions (including EU citizens, third country nationals holding a residence permit, and asylum seekers) based on objective indicators, and any additional conditions to be imposed on travellers to make travel safe.

The proposal defines the **instrumentalisation of migrants** and states that in such situations Member States may limit the number of border crossing points or their opening hours and should intensify border surveillance, including by using mobile units and modern technologies such as drones and motion sensors. It also states that Frontex may carry out a **vulnerability assessment** with a view to providing the Member States concerned with the necessary support. On the basis of this assessment, and in line with Article 41(1) of the [Frontex Regulation](#), the executive director of Frontex shall recommend that the Member State concerned request that the Agency initiate, carry out or adjust joint operations, rapid border interventions or any other relevant measures.

Complementary measures to reinforce Schengen

As part of the new [pact on migration and asylum](#), in September 2020, the Commission presented a [proposal](#) to establish a procedure for **screening third country nationals** apprehended crossing the external borders irregularly. To tackle situation of **instrumentalisation** of migrants, in December 2021 the Commission put forward a [proposal](#) for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, and a [proposal](#) for a regulation addressing situations of instrumentalisation in the field of migration and asylum. In December 2021, the Commission proposed a new **EU police cooperation code** to ensure that law enforcement authorities have adequate access to information held by other Member States when fighting crime and terrorism. The code consists of a [proposal](#) for a Council Recommendation reinforcing operational cross-border police cooperation, a [proposal](#) for a directive on information exchange between law enforcement authorities, and a [proposal](#) for a regulation revising the automated data exchange mechanism for police cooperation.

Improved Schengen governance

In June 2020, the Commission published a [proposal](#) to **revise the SEMM Regulation**. This aims to increase the efficiency and flexibility of the mechanism, foster political dialogue on the results of evaluations, and strengthen the evaluation of respect for fundamental rights. The strategic role of the SEMM will be reinforced by involving the Council more strongly in key aspects, including in the follow-up and monitoring of recommendations, and by bringing forward the key findings of the evaluation into the Schengen governance process.

In 2020, the Commission established a **Schengen Forum** to improve the way **threats to public health** are addressed by the relevant stakeholders. Three forums have so far taken place (on [30 November 2020](#); [17 May 2021](#); and [2 June 2022](#)). In February 2021, the French Presidency of the Council proposed to set up a **Schengen Council** formation to discuss strategic aspects of Schengen and to provide general political guidelines on the state of Schengen. The [first Schengen Council](#) met on 3 March 2021. Schengen Councils will be held during Justice and Home Affairs Council meetings and whenever needed.

In its first [state of Schengen report](#) (May 2022), the Commission presented a **new Schengen governance model**. This consists of a 'Schengen cycle' designed to ensure a regular 'health-check' on the state of Schengen. According to the Commission, Member States **endorsed** the Schengen cycle during the first Schengen Council of March 2022. The Commission will present a regular **Schengen barometer**. It also plans to appoint a **Schengen coordinator** to steer and coordinate the Schengen cycle, in coordination with the Member States.

Main concerns

A major concern is that changing the Schengen rules might further **weaken safeguards** and authorise existing problematic practices of Member States. For example, the new SBC proposal extends the current time limits applicable when (re)introducing internal border controls and provides additional avenues for introducing such controls.⁴ There is also the concern that the recent CJEU judgment on the SBC will encourage the Member States to embrace the new proposal and push it through swiftly to take advantage of its more flexible provisions.⁵ In the past, the European Parliament has been wary of changing the SBC rules without putting in place proper safeguards. In its legislative [resolution](#) on the Commission's 2017 proposal, the Parliament opposed extending the time limits for temporary checks at internal borders and questioned the effectiveness of the reinforced safeguards.

By extending the possibilities for reintroducing checks at the internal borders, including police checks, the proposal may affect **EU freedom of movement** negatively. Increased police checks and other public power measures may also increase the **risk of discrimination** at internal borders, leading to systematic targeting⁶ of certain EU citizens and third-country nationals. For example, a 2020 [study](#) cited evidence demonstrating that 'police identity checks including spot-checks in border areas and the enforcement of COVID-19 policies disproportionately affect certain individuals' and 'may further magnify previously existing discriminatory patterns characterised by the selection and profiling of target groups of police checks inside the Schengen area'.

The extended definition of checks at internal borders, combined with generalised monitoring and surveillance, including by technological means, may also affect the **right to international protection**. The concern is that, without adequate guarantees,⁷ the changes may sanction existing Member States 'practices of **summary returns** across internal borders⁸ and provide 'a way to **evade the rules of the Dublin Regulation**'.⁹ As pointed out by the 2020 EPRS [study](#) on the Return Directive, most Member States rely on Article 2(2)(a) of the Return Directive and do not apply the Directive in border cases, meaning that 'the procedure applicable in such contexts affords **fewer guarantees** to the person concerned and typically involves the deprivation of liberty'.

MAIN REFERENCES

Carrera S. and Luk N. C., [In the Name of COVID-19: Schengen Internal Border Controls and Travel Restrictions in the EU](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, September 2020.

Carrera S. et al., [The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, March 2018.

Dumbrava C., [Revision of Schengen Borders Code](#), EPRS, European Parliament, April 2022.

Dumbrava C., [Towards a common EU approach to lifting coronavirus-related restrictions on freedom of movement](#), EPRS, European Parliament, July 2021.

Dumbrava C. and de Groot D., [EU Covid-19 certificate: A tool to help restore the free movement of people across the European Union](#), EPRS, European Parliament, May 2021.

Dumbrava C., [Free movement within the EU](#), EPRS, European Parliament, September 2020.

Eisele K., [The revision of the Schengen Borders Code](#), EPRS initial appraisal of Commission's impact assessment, European Parliament, 2022.

Guild E. et al., [Internal borders in the Schengen area: Is Schengen crisis-proof?](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, June 2016.

Madatali H.A., [Schengen Borders Code Revision of Regulation \(EU\) 2016/399](#), EPRS Implementation Appraisal, European Parliament, March 2021.

Wagner M. et al., [The state of play of Schengen Governance](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, November 2020.

ENDNOTES

- ¹ For the purposes of this briefing 'Member States' refers to the Schengen countries, whereas 'EU Member States' refers to the 27 countries that are members of the European Union.
- ² For discussions of the issues raised by COVID restrictions to free movement, see S. Carrera and N. C. Luk, [In the name of COVID-19: An assessment of the Schengen internal border controls and travel restrictions in the EU](#), 2020; D. Thym, Travel bans in Europe. A legal appraisal ([Part I](#) and [Part II](#)), in EU Migration Law Blog, 2020; D. Thym and J. Bornemann, [Schengen and free movement law during the first phase of the Covid-19 pandemic: Of symbolism, law and politics](#), European Papers, 2020; and H. van Eijken and J.J. Rijpma, '[Stopping a virus from moving freely: Border controls and travel restrictions in times of corona](#)', *Utrecht Law Review*, 2021.
- ³ For a discussion of the case and details about the hearing, see P. Cebulak and M. Morvillo, [The guardian is absent: Legality of border controls within Schengen before the European Court of Justice](#), Verfassungsblog, June 2021.
- ⁴ J. Bornemann, [The Commission's proposed reform of the Schengen area – stronger enforcement or conflict aversion?](#), EU Law Enforcement, 2022.
- ⁵ D. Thym., [Illegality of internal border controls: The Court of Justice feeds the appetite for legislative reform](#), EU Law Live, May 2022.
- ⁶ M. Weissensteiner, '[Cross-border police cooperation and 'secondary movements': on reconfigurations in enforcing differential mobility rights within the spatial-legal Schengen space](#)', *Utrecht Law Review*, 2022; PICUM, [The new draft Schengen Borders Code risks leading to more racial and ethnic profiling](#), February 2022.
- ⁷ A. Lübke, [Pushbacks? Never mind, we're doing it: The EU Commission's proposal to curb onward migration in the Schengen area](#), Verfassungsblog, January, 2022
- ⁸ See European Council of Refugees and Exiles, [Comments on the Commission proposal](#), March 2022.
- ⁹ Meijers Committee, [Commentary on the Commission proposal amending the Schengen Borders Code](#), May 2022.

DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2022.

Photo credits: © M-SUR / Adobe Stock.

eprs@ep.europa.eu (contact)

www.eprs.ep.parl.union.eu (intranet)

www.europarl.europa.eu/thinktank (internet)

<http://epthinktank.eu> (blog)