Schengen Borders Code
Revision of Regulation (EU) 2016/399

This briefing is one in a series of implementation appraisals produced by the European Parliamentary Research Service (EPRS) on the operation of existing EU legislation in practice. Each briefing focuses on a specific EU law that is likely to be amended or reviewed, as envisaged in the European Commission's annual work programme. Implementation appraisals aim at providing a succinct overview of publicly available material on the implementation, application and effectiveness to date of specific EU law, drawing on input from EU institutions and bodies, as well as external organisations. They are provided by the Ex-Post Evaluation Unit of the EPRS to assist parliamentary committees in their consideration of new European Commission proposals, once tabled.

SUMMARY


As stated in the Commission's 2021 work programme, the current health crisis and pandemic, and recent developments – relating to security concerns and the arrival of refugees – have exposed the EU's need to strengthen its crisis preparedness and improve its management of cross-border pressures, while also ensuring that the Schengen legislation is up to date and future proof.

Given the lack of agreement on the Commission's 2017 proposal amending the Schengen border code rules on reintroducing internal border controls, as well as the referred current framework of cross-border threats, the Commission intends to table a new proposal for this legislation. During the first Schengen forum, organised by the European Commission in November 2020, Members of the European Parliament and home affairs ministers agreed to look into the reform of the Schengen Borders Code. It is expected that a second forum will be organised in the spring of 2021.

1. Background

The Schengen area currently encompasses most EU countries, except for Cyprus, Ireland, Bulgaria, Croatia and Romania. However, Bulgaria, Croatia and Romania are in the process of joining and already apply the Schengen acquis1 to a large extent. Furthermore, the non-EU states of Iceland, Norway, Switzerland and Liechtenstein have also joined the Schengen area.

The Schengen Borders Code2 legislation (currently in force as Regulation (EU) 2016/399) was formulated in accordance with, and following the guidance established in, the Treaty on the Functioning of the European Union (TFEU).
The TFEU sets out certain fundamental rights for EU citizens:

- 'Every citizen of the Union shall have the **right to move and reside freely** within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' (Article 21(1)).

- The Union 'shall **ensure the absence of internal border controls** for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals' (Article 67(2)).

- 'The European Parliament and Council … shall adopt measures concerning the checks to which persons crossing external borders are subject' as well as measures concerning 'the absence of any controls on persons, **whatever their nationality**, when crossing internal borders' (Article 77(2)(b) and (e)).

In this respect, and in line with the rules governing the movement of persons across borders, Regulation (EU) 2016/399 (the Schengen Borders Code) establishes, among other provisions, that **checks at internal borders are abolished, and can only be reintroduced in exceptional situations, as a measure of last resort.**

The absence of these border checks remains **without prejudice to police checks**, as long as these do not have an effect equivalent to border checks. Checks at the internal borders introduced as a measure of last resort should be lifted once the problem underpinning the decision on the reintroduction of border checks has been addressed, or if it is found possible that the problem can be addressed by other measures.

**Between 2015 and 2020**, over a five-year period, internal border checks **were reintroduced 205 times**. A significant increase from the period between 2006 and 2014, when border checks were **reintroduced 35 times** over the course of nine years. The current health crisis and pandemic and recent developments relating to security concerns and the arrival of refugees have highlighted the EU's need to strengthen its crisis preparedness and improve the way it manages cross-border pressures, while also ensuring that keeping the Schengen legislation is kept up to date, and future proof.

Figure 1 provides a very succinct overview of the factors that over time have led to amendments to Schengen-related legislation.

2016

• Events in 2015, most notably the unprecedented arrival of migrants in the EU as well as security threats, challenged the effectiveness of the border management strategies first outlined in 2006 and the amendments thereafter - revision of the SBC.
• Legislation aimed at reinforcing the security of the EU’s external borders by increasing the powers of Frontex and by introducing increased entry and exit checks on anyone crossing these borders was introduced. The SBC and its subsequent amendments were codified as Regulation (EU) 2016/399.

Amendment of Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders, obliging Member States to carry out systematic checks against relevant databases on all persons, including those enjoying the right of free movement under EU law in response to the increase in security threats.

2017

• Covid-19 crisis: the Commission used an ad hoc process to develop a number of guidelines to mitigate the significant negative effects of measures taken by Member States to contain the spread of the virus.
• Proposal to review procedures: need for the EU to guarantee coordinated action and the uniform application of both rules and mitigation measures limiting the negative impact on the single market and freedom of movement.

2020
2. EU-level reports and evaluations

European Commission fitness check on EU legislation on legal migration (2019)

The Commission’s 2019 fitness check of EU legislation on legal migration looked at whether the EU legal migration framework was still fit for purpose, the inconsistencies and gaps existing in the legislation, and possible ways to streamline and simplify the existing rules. Although this fitness check did not concern the Schengen Borders Code directly, a serious coherence issue was identified in the entry, travel and intra-EU mobility phases, in particular concerning the link between short-term mobility and Schengen legislation.

The report states that the interaction between the Schengen rules and the legal migration directives appears inevitable when third-country nationals apply for a visa to enter the territory of the Member States. The differences between the geographical scope of the Schengen rules and that of the legal migration directives mean that there is a conflict between the two legal frameworks, in particular in cases where some directives make provision for short-term stays and mobility to other Member States. It was found that some legal migration directives (for example, ICT and S&RD) establish more generous intra-EU mobility schemes than the mobility rules under the Schengen acquis.

When considering the overall set-up of admission conditions and residence permits available to third-country nationals under the combined Schengen rules as well as the legal migration directives, some categories of third-country nationals (for example, non-seasonal low- and medium-skilled workers, job-seekers and self-employed people/entrepreneurs) were found to be insufficiently covered by EU rules.


In September 2020, the Commission issued a proposal for a Council recommendation on a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic. Although this proposal did not concern Schengen Borders Code legislation, the impact of the pandemic was seen in the free movement of people, goods and services across the Schengen area.

The Member States adopted various measures to limit the spread of the coronavirus, some of which had an impact on citizens’ right to move freely across the European Union. These measures often included restrictions on entry to another Member State or other specific requirements (such as quarantine requirements) applicable to cross-border travellers, including those moving for economic purposes, such as workers and entrepreneurs. While these measures were intended to safeguard the health and wellbeing of citizens, they had serious consequences for freedom of movement inside the Union, with knock-on effects on the internal market.

In order to ensure a coherent policy within the Union and protect the single market and the safe recovery of the EU, the Commission proposed that Member States adopt common health guidelines to guide the unilateral implementation of travel restrictions within the European Union. As such, using data provided by the Member States, the European Centre for Disease Prevention and Control (ECDC) would produce regularly updated maps, broken down by regions, which would indicate whether restrictions were justifiable.
Communication: The European Commission's new migration and asylum pact (2020)

The strain and difficulties experienced in managing the Schengen area in relation to migration were found to have been caused by gaps and loopholes and by diverging national asylum, reception and return systems. These elements increased unauthorised movements, both of asylum-seekers and of migrants who should be returned. The Commission proposed that the Union should focus on the need for a strong legal framework to give the clarity and focus needed for mutual confidence between Member States.

European Commission report on the functioning of the Schengen evaluation and monitoring mechanism (2020)

In November 2020, the Commission published a report on the functioning of the Schengen evaluation and monitoring mechanism (pursuant to Article 22 of Council Regulation (EU) No 1053/2013), for the 2015-2019 period. All Member States concerned were evaluated in line with the first multiannual evaluation programme, regarding the implementation of measures in the areas of external borders, return, visa policy, police cooperation, the Schengen information system (SIS), data protection, and the absence of border control at internal borders. The report found that:

- overall, Member States complied with the essential provisions of the Schengen acquis in all policy fields evaluated;
- nevertheless, the evaluations showed some recurrent deficiencies, areas for improvement and divergent practices among Member States, including:
  - incomplete or non-compliant transposition, implementation and application of the relevant Schengen acquis;
  - insufficient number of staff with inadequate qualifications and/or training;
  - diverging and inconsistent national practices arising from incoherent implementation of the Schengen acquis;
  - fragmented administrative structures with insufficient coordination and integration of the different authorities;
  - practical, technological and regulatory barriers to cooperation within the Schengen area.

For instance, the full potential of the visa information system (VIS) was found to be undermined by:

- inadequate quality of the data entered, discrepancies between national case handling systems and the database workflow, and
- a lack of adequate information technology (IT) training and limited awareness of the functionalities of the system.

Likewise, it was found that the legislative framework for Schengen police cooperation remained more fragmented than other components of the acquis, leaving great flexibility to the parties in the way they chose to implement it.

In the field of data subject rights in relation to the SIS and the VIS, a lack of proper information was found to constitute a constraint for the effective exercise of rights. In some cases a lack of human and financial resources to carry out SIS and VIS tasks was also found to be an impediment to the proper functioning of the legislation in force.

Member States generally took the steps necessary to follow up on the findings and recommendations. It was found that while some progress had been made to address deficiencies, the implementation of recommendations was slow.
Inception impact assessment: Amendment of Schengen Borders Code (2021)

At the beginning of 2021, the Commission published an inception impact assessment (IIA), proposing amendments to the Schengen Borders Code with regard to border checks across EU internal borders, and ensuring better coordination of the measures applied by Member States during crises such as the current pandemic. According to the IIA, amendments to the Schengen Borders Code – following an assessment of the challenges witnessed by the EU over the last five years – should aim at ensuring that:

- alternative measures such as police checks and modern technologies are used more effectively in the situation of a serious threat to internal security or public policy, before resorting to the reintroduction of checks at internal borders;
- in the event of prolongations, border checks at internal borders be objectively justified and operate within a clear framework, with the necessary safeguards to ensure that they remain exceptional and as short-lived as possible;
- extraordinary measures to address threats of a common nature are always consulted and coordinated at EU level;
- the application of extraordinary measures is automatically accompanied by mitigating measures;
- measures adopted at external borders are followed in a uniform manner by all Member States to protect the integrity of the Schengen area.

3. Members' written questions

Written question by Jean-Paul Garraud (ID), 30 July 2020

Subject: Free movement within the Schengen area falls victim to Covid-19

This question related to the controls re-introduced by Member States on their borders at the height of the Covid-19 crisis and the perceived 'insufficiency' of the package of health and safety guidelines and recommendations to help lift travel restrictions adopted in May 2020. The MEP inquired if ‘free movement within the Schengen area is an outmoded concept’.

Answer given by Mr Reynders on behalf of the European Commission, 16 November 2020

The Commission underlined that freedom of movement of EU citizens is a fundamental right enshrined in the EU Treaties and the Charter of Fundamental Rights of the EU, and one of the Union’s most cherished achievements.

He stated that gradually lifting restrictions linked to the pandemic was key to economic recovery, as restricting free movement and reintroducing internal borders harmed the single market and the smooth operation of supply chains. It was for this reason that in September 2020 the Commission adopted a proposal for a Council recommendation on a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic.

Written question by Sabine Verheyen and Pascal Arimont (EPP), 8 July 2020

Subject: ‘Cross-border labour mobility’

This question concerned the lengthiness of procedures allowing third-country nationals to be granted permission to work in one Member State while residing in another, and travel freely for these purposes inside the Schengen area – more specifically Member States’ consistency in the implementation of Schengen legislation.
Answer given by Ms Johansson on behalf of the European Commission

The Commission answered that residence permits issued to third-country nationals by one Member State did not generally grant the right to work in other Member States. If a third-country national residing in one Member State wished to work in another, they needed to request authorisation from the competent national authorities.

She explained that the conditions and procedures for granting authorisations were not regulated by EU law, but by national law, as was the time-frame within which authorisations were granted. However, EU law did facilitate the short-term and long-term intra-EU mobility of different specific categories of third-country nationals, namely: long-term residents, highly qualified workers, intra-corporate transferees, and students and researchers.

Written question by Maria Grapini (S&D), 17 September 2020

Subject: 'Functioning of the internal market and Schengen area'

This question concerned the admission of Romania and Bulgaria to the Schengen area (given that the technical conditions laid down in 2011 had been met), as the internal market 'cannot be expected to function properly if it is divided into a Schengen and non-Schengen area'.

Answer given by Ms Johansson on behalf of the European Commission

The Commission agreed that the functioning of the single market was facilitated by abolishing physical barriers and eliminating controls at internal borders. The Commission had already acknowledged the readiness of Bulgaria and Romania to join the area without controls at internal borders in 2011 and continued to support this objective.

4. European Court of Justice

Ruling in Case C-9/16

Crossing internal borders – checks within the territory

On 1 April 2014, 'A' crossed the Europe Bridge from Strasbourg (France) to Kehl (Germany) on foot and proceeded directly to the railway station operated by Deutsche Bahn AG, located approximately 500 metres beyond the bridge. This was observed by two officers of the German Federal Police on patrol in the area at the front of the railway station. Those officers carried out an identity check on 'A'. 'A', having forcibly resisted that check, was charged with the offence of resisting an enforcement officer. The German Court taking the decision wanted to verify the compatibility of the check taken at the border and of their judgment with the TFEU and Schengen Borders Code legislation.

In June 2017, the ECJ clarified (on C-9/16) that EU law conferred on the police authorities of the Member State in question the power to check the identity of any person, within an area of 30 kilometres from that Member State's land border with other States parties to the Convention implementing the Schengen Agreement. As such, the police officers were entitled to have checked 'A' and the court's decision was in accordance with EU law.

Ruling in Joined Cases C-225/19 and C-226/19

Area of freedom, security and justice

An Egyptian national, living in Egypt, and a Syrian national, living in Saudi Arabia (cases C-225/19 and C-226/19, respectively), applied to the Minister for Foreign Affairs in the Netherlands for 'Schengen' visas in order to visit members of their respective families living in the country. Their applications were refused as the result of objections raised by Hungary and Germany, which had been consulted beforehand by the Netherlands authorities in the context of the procedure laid down by the visa code.
The persons concerned had been considered to be a threat to the public order, internal security, public health or the international relations of one of the Member States. The two individuals lodged complaints with the Minister for Foreign Affairs, which were rejected. They then brought actions before the District Court of The Hague arguing that they were deprived of effective judicial protection, since they were not able to challenge those decisions as to their substance, nor were they informed of the identity of the Member States that had raised the objections.

In November 2020, the ECJ answered that a Member State that has adopted a decision refusing a visa because of an objection raised by another Member State must indicate the identity of the Member State that raised the objection and the specific grounds for refusal. In the second place, the courts of a Member State that has adopted a decision refusing a visa because of an objection raised by another Member State, cannot examine the substantive legality of that objection.

5. Stakeholder opinions/academic papers

Stakeholder opinions

In November 2020, the Commission organised the first Schengen Forum, bringing together Members of the European Parliament and home affairs ministers, in order to gather political opinions to be considered in the context of the revision of Regulation (EU) 2016/399 (the Schengen Borders Code). A press release summarised the main positions expressed during the event. The discussions focused on:

- how to improve the mechanism evaluating implementation of the Schengen rules;
- the way forward on the revision of the Borders Code;
- the management of the EU’s external borders;
- the need to enhance police cooperation and the exchange of information between Member States; and,
- the strengthening of the governance of the Schengen area.

Participants stressed the need to move quickly to put in place the entry/exit system (EES) and the European traveller information and authorisation system (ETIAS), complementing existing databases such as the SIS and the VIS, which needed to be put to full use. The work towards ensuring that information systems for migration, border management and security become interoperable by 2023 and deploying the European Border and Coast Guard standing corps was highlighted as crucial to give border guards the information they needed to know who was crossing the EU’s borders. The Member States representatives emphasised the need for regular meetings at both political and technical levels.

Academic papers

An academic paper published in 2019, ‘The Wrong Critiques: Why Internal Border Controls Don’t Mean the End of Schengen’, analysed the reintroduction of border controls in 2015 and 2016 in response to the security threats and the biggest refugee crisis since the end of the Second World War. The paper stated that ‘since autumn 2015, the question of whether the Schengen agreement is reaching the end of its lifespan has been broadly discussed’. It also claimed that ‘the re-impositions of internal controls cannot be seen as a violation of Schengen but, contrarily, as an inherent part of it’. Furthermore, according to the analysis, it was found that states did not use re-impositions to selfishly regain their sovereignty but ‘rather follow the Schengen acquis’ and that these re-impositions were a response to Schengen legislation ‘not being adequately observed’. It concluded that: ‘as current events demonstrate, if the Schengen area is to be endangered, it will be due to insufficient external border controls, not due to re-impositions or a lack of solidarity’.

A research paper published in 2020 by EPRS, titled ‘Free movement within the EU’, considered key data on freedom of movement in the EU and the opinions of EU citizens. It noted that the share of
EU movers (citizens residing in an EU Member State other than their country of citizenship) of working age (24-64 years) had increased from 2.5% to 4.2% between 2007 and 2018. In 2018, there were 17.6 million EU movers, of whom 12.9 million were of working age. In addition, there were 1.5 million EU cross-border workers (0.7% of the total employed population). According to estimates by the European Central Bank, since its launch in 1985, the single market has added between 12% and 22% to real gross domestic product (GDP) per capita, and the financial benefit of the free movement of workers to main EU destination countries in 2017 was estimated at €106 billion. The estimated benefit of free movement of goods totalled €389 billion in 2014.

The study underlined that free movement was one of the first ‘victims’ of the coronavirus pandemic. The unprecedented health crisis had prompted Member States to act unilaterally, adopting wide-ranging measures that, for instance, restricted freedom of movement within and across borders. An EU-wide ban on non-essential travel to the EU was agreed by Member States on 17 March 2020. Between 1 March and 30 June 2020, 17 Schengen states notified the Commission of the reintroduction of internal border controls in response to the pandemic. Moreover, nearly all EU Member States imposed additional entry or exit restrictions, such as mandatory quarantine and entry bans for non-essential travel, affecting both EU and non-EU citizens.

As a result, the Schengen area was all but suspended by mid-March 2020. While the rapid and widespread reintroduction of checks at internal borders has been generally justified by the need to reduce the spread of the virus, a number of issues have been raised about the way in which these measures were implemented, in particular with regard to their scope, necessity, proportionality, and potentially discriminatory nature.

Lastly, according to an EPRS study from 2019, entitled ‘Mapping the Cost of Non-Europe’, further common EU action could bring an overall potential economic gain to the European economy of over €2.2 trillion (or 14% of EU GDP – 2017 values) between 2019 and 2029. Removing the remaining barriers to the free movement of economically active EU citizens could lead to a gain of €53 billion. According to another projection, a drop in the number of EU movers (to 13 main EU destination countries) by one million would lead to a loss of at least €20 billion per year for the destination countries. The estimated cost for EU countries of reintroducing controls at all land borders in the Schengen area ranges between €100 billion and €230 billion over a 10-year period.

6. Consultations, citizen's enquiries, petitions

The 2019 Standard Eurobarometer survey found that ‘more than eight in ten Europeans say they are in favour of ‘the free movement of EU citizens who can live, work, study and do business anywhere in the EU’ (equivalent to 81%, 2 percentage points less than in autumn 2018), while 13% are ‘against’ (unchanged), and 6% ‘don’t know’ (2 percentage points more than in 2018). The ‘free movement of people, goods and services’ is perceived as the EU’s most positive achievement by six in ten EU citizens. More than half of Europeans say they have benefited from the absence or reduction of border controls when travelling abroad. Support for ‘the free movement of EU citizens who can live, work, study and do business anywhere in the EU’ is less widespread in the United Kingdom and Italy (where 68% were in favour of the common policies).
MAIN REFERENCES

Schengen Area, European Commission, Migration and Home Affairs.
Towards a new policy on migration, European Parliament, Legislative Train Schedule.

ENDNOTES

1 Schengen acquis: the body of law accumulated by the European Union relating to the regulation of the Schengen area.
2 Schengen Borders Code: code on the rules governing the movement of persons across borders.

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