EXECUTIVE SUMMARY

Study for the LIBE Committee

European Parliament

An Assessment of the State of the EU Schengen Area and its External Borders - A Merited Trust Model to Uphold Schengen Legitimacy [1]

ABSTRACT

This Study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the state of play of the EU Schengen area and the latest legal and policy developments with direct relevance to the Schengen *acquis*. It analyses the impact of these developments, and the role of 'declared crisis', on the Schengen Borders Code, Luxembourg Court standards and EU Treaty principles and fundamental rights. The Study calls for an approach based on 'merited or deserved trust' to uphold the legitimacy of the Schengen area. Such an approach should focus on the effective and timely enforcement of EU rules and Treaty values – chiefly the rule of law and fundamental rights – instead of expanding intra-EU policing and the proliferation of technological surveillance and databases leading to the (in)securitisation of people's freedom of movement.

This Study examines the state of play of the EU Schengen area and its external borders. It analyses how declared crises and emergencies affect the functioning and legitimacy of the EU Schengen system. The Study provides a detailed assessment of the latest EU decision-making dynamics and key policy developments, legislative initiatives and case law with direct relevance to the Schengen *acquis*. Particular attention is paid to their impact on the founding principles of the EU Treaties, as well as issues related to legal coherence, consistency and fundamental rights.

Key Findings

- Schengen is not in crisis. The Schengen Borders Code (SBC) and the Schengen Evaluation and Monitoring Mechanism (SEMM) have established EU-wide checks and balances and an evidence-based model for the Schengen area. Some Member States have acted systematically 'outside the law' and evaded their legal commitments under the Treaties (*Section 1*). The Study identifies four cross-cutting challenges for the Schengen system: (i) a systematic lack of compliance; (ii) an enforcement gap; (iii) Schengen diplomacy and data-mushrooming; and (iv) policy laundering.

[1] Full study in English: https://www.europarl.europa.eu/RegData/etudes/STUD/2023/737109/IPOL_STU(2023)737109_EN.pdf

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I. Systematic lack of compliance with EU law and fundamental rights violations at EU internal and external borders

- Since 2015, six Member States have unlawfully retained 'internal border controls' on grounds such as 'secondary movements of third-country nationals', terrorism and crime, Covid-19 or the Ukraine war (*Section 2.1*). The CJEU confirmed that Article 72 TFEU does not allow Member States to reintroduce internal border controls beyond the time limits in Article 25 SBC; these can only be renewed when the grounds are truly new and distinct (*Section 2.2*). Internal border controls have become 'permanent precautionary measures' against abstract 'threats' and 'risks'.

  The Notifications have not included evidence on why the intra-EU mobility of asylum-seekers would be a 'threat' to 'public order and internal security'. The unauthorised entry or residence of an asylum seeker does not constitute a legitimate ground to justify the existence of a 'sufficiently serious threat' (*Section 2.3*). The Study shows the systematic use of: (i) illegal expulsions at EU external borders – *pushbacks*; (ii) 'delegated containment' through support to non-EU countries – *pullbacks* (*Section 3.1.*); (iii) border fences and walls with border surveillance technologies (*Section 3.2*).

II. An EU enforcement gap

- The Commission is not effectively performing its role as 'Guardian of the Treaties' (*Section 4*). It has not issued Opinions on the internal border controls, nor has it taken any of the six Member States before the CJEU. It also has not initiated infringement proceedings against Member States engaging in pushbacks, pullbacks or border fencing. Diplomatic tools have proven ineffective at addressing Member States' non-compliance. They lack transparency and hinder accountability and democratic scrutiny. The Study calls for a more structured and transparent approach to infringement proceedings in the Schengen area.

III. Schengen diplomacy and venue mushrooming

- The Commission has developed 'Schengen diplomacy' venues and tools under the notion of European Integrated Border Management (EIBM). The effectiveness of these *diplomacy-driven* tools in ensuring Member States compliance remains unproven. They support an understanding of border management based on risk analysis and futurology, and not on knowledge or evidence (*Section 5.2*).

- The new SEMM is an excellent tool for evaluation (*Section 5.3*), but it is not an enforcement tool. There is no evidence that its results are followed up with infringement proceedings. It is not clear how the evaluations under the SEMM will cover fundamental rights, and it is worrying that EU agencies fall outside its scope. The SEMM could ensure a much-needed evaluation of Frontex's operations.

- The Study highlights the importance of an Independent Monitoring Mechanism (IMM) to ensure compliance with fundamental rights and the rule of law. An *ad hoc* approach for national monitoring mechanisms is not appropriate to achieve effective fundamental rights monitoring at EU external borders. The implementation of the Fundamental Rights Agency's 2022 Guidance on 'Establishing national independent mechanisms to monitor fundamental rights compliance at the EU external borders' should be a requirement to access EU funding (*Section 5.4*).

- The debates on the accession of Bulgaria, Romania and Croatia reveal that evaluation results are embedded in politics. Fear-based arguments on the mobility of asylum seekers have resulted in additional criteria for accession. Evidence also shows non-compliance with the CFREU in external border controls, surveillance and pushback practices (*Section 5.5).*

IV. Policy laundering

- The von der Leyen Commission has produced a huge body of Schengen-related legislative initiatives. This crisis-led 'policy laundering' approach is characterised by (i) speed and 'worst' regulation and (ii) ad hoc legalisation and exceptionalism (*Section 6*).

Speed and 'worst' regulation:

- New legislative proposals have been prepared in a highly expedited fashion. Several legislative acts lack Impact Assessments or a meaningful evaluation of their effectiveness, consistency and fundamental rights compliance, as required by the Better Regulation Guidelines and the Inter-Institutional Agreement on Better Law-Making.

- The level of complexity of the proposed secondary legislation is overwhelming. The proposals include cross-references and consecutive amendments to other proposals and existing laws, often beyond the Schengen *acquis* and Article 77 TFEU. This hyper-complexity goes against the principle of legal certainty and hinders democratic accountability. The Parliament's role is increasingly challenging.

Ad hoc legalisation and exceptionalism

- Several proposals legalise *ad hoc* or provide 'flexibility' for the illegal practices of some Member States. The presentation of new legislation creates an illusion that, with a new legal reform, Member States will comply with the law and the Commission will enforce it.

- The 2021 Commission's SBC proposal expands the grounds for internal border controls and the time limits in Articles 25 and 28 SBC (*Section 6.1*). The inclusion of asylum seekers and refugees' intra-EU mobility as a ground for internal border control could make internal border controls permanent, in contradiction with the current SBC provisions and Article 77 TFEU.

- Crucial derogations from the SBC and the asylum *acquis* are envisaged in the Instrumentalisation proposal (*Section 6.2*) and the Screening Regulation (*Section 6.3)*. These can result in arbitrary detention, the unlawful penalisation of refugees and asylum seekers, and interference with privacy.

(In)securitisation

- The Commission has favoured an (in)securitisation agenda comprising intra-EU police checks and surveillance, expedited intra-EU expulsion arrangements, and the proliferation of surveillance technologies and interoperable databases. These measures prioritise policing Schengen over the rule of law and fundamental rights principles. While these initiatives are allegedly facilitating mobility, 'speed' is to the detriment of the fundamental rights of those who move.

- These policies show important risks, such as racial profiling and structural discrimination (*Section 7.1*), illegal practices in intra-EU expulsions and readmissions (*Section 7.2*), interferences with the rights to privacy and data protection and the blurring of boundaries between distinct EU and national policies on asylum, migration, borders, police and criminal justice (*Section 7.3*)

The Study recommends, in *Section 8*, a **merited or deserved trust model** to address these challenges to the Schengen area. Member States and EU agencies must comply with the law and EU Treaty principles, chiefly the rule of law and fundamental rights. The EU must effectively enforce them, as they are preconditions for the legitimation of the Schengen area, as well as EU border, asylum and migration policies.

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