



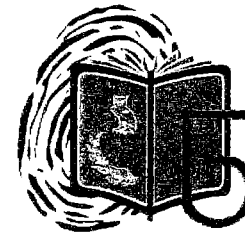
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Faculty of security  
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**МЕЃУНАРОДНА НАУЧНА КОНФЕРЕНЦИЈА  
БЕЗБЕДНОСНИ КОНЦЕПТИ И ПОЛИТИКИ - НОВА  
ГЕНЕРАЦИЈА НА РИЗИЦИ И ЗАКАНИ**



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**INTERNATIONAL SCIENTIFIC CONFERENCE**

**SECURITY CONCEPTS AND POLICIES - NEW  
GENERATION OF RISKS AND THREATS**

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## THE MIGRANT CRISIS AND THE AREA OF FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION

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### ABSTRACT

The paper presents an overview of the challenges facing the Schengen system within the Area of freedom, security and justice in the European Union under the pressure of the migrant crisis and terrorist attacks. The idea of free movement in the European Union has been under strong pressure due to the migrant crisis and the necessity to strengthen the fight against terrorism. Therefore, the Union has introduced measures to follow the movement not only of persons entering Europe, but also the movement of persons within the Union.

The increase in the number of refugees in Europe has created a new challenge for the Schengen area of the EU. Looking for a suitable solution to the crisis, EU Member States have begun to restore border controls and have raised the issue to reform the Schengen system. As main reasons for the movement of migrants are considered the war in Syria and the political and economic instability in countries like Pakistan and Afghanistan, whose citizens moved to Europe. The countries of Western Europe, such as Germany, France and Austria were most affected by the wave of refugees, but no less affected are the Scandinavian countries, such as Denmark and Sweden. The Republic of Macedonia was part of the Balkan route of migrants and part of the humanitarian corridor that funneled asylum seekers from Greece to Germany which was closed in March, 2016.

The migrant crisis raised the issue of whether it is possible to establish a temporary and limited lifting of the Schengen agreement to establish border control in terms of the flow of migrants in the EU. The paper presents an overview of the legal framework for action of the Member states of the European Union and gives proposals and suggestions of reforms that are necessary for the European Union in the area of the Schengen system.

“The challenge to the European project today is existential. The refugee crisis has brought that to light. What was unimaginable before now becomes imaginable, namely the disintegration of the European project”

*Frans Timmermans, European Commission First Vice President  
At the Friends of Europe's annual State of Europe debate  
(October 22, 2015)*

## INTRODUCTION

The 'Area of freedom, security and justice' (AFSJ) is one of the most striking examples of just how far beyond the pure economic integration of the EU has been developed after the Amsterdam Treaty. The third pillar of the Treaty framework has been introduced as Justice and Home Affairs with the Maastricht Treaty and later the Treaty of Amsterdam has presented more supranational approach to some covered matters, such as immigration, asylum and judicial cooperation in civil matters, having cross order implications in the field of courts' jurisdiction and recognition and judgment enforcement. The cooperation predating the entry into force of the Treaty of Lisbon 'has developed in various stages, evolved at variable speeds and has blended intergovernmental and integrationist elements in a unique way [1].'

Today, the Area of freedom, security and justice is based on the key principle of the internal market of the European Union for many years: an area without internal frontiers. As Article 3(2) TEU states: "The Union shall offer it citizens and 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", which precedes the objectives of an internal market and economic and monetary Union.

Therefore, the common policies and regulations mainly refer to external border regulation and limitation of third country immigration because once the persons enter the Union (regardless if they are EU citizens or not), their free movement is guaranteed as one of the key elements of the internal market. Besides the fact that the free movement of people and the absence of internal borders are one of the cornerstones of the AFSJ, the security and justice components might include repressive measures over the movement of citizens. The 'right to security', especially of law abiding persons (both citizens and third-country nationals), is a fundamental right and can result in restrictions on the liberty of persons who pose a threat to security [2]. Such Treaties are perceived to have been aggravated or augmented by the abolishment of internal border controls, the Europeanisation and internationalization of organized crime, and the influx of immigrants and asylum-seekers, including illegal immigrants into the Member States of the Union, and Article 67(3) TFEU thus sets the objective of promoting a 'high level of security'[3].

An alternative approach to migration governance would have to reflect critically on the concepts, legal initiatives and policies that have characterised the last thirty years of Member State cooperation in this area and to rethink, and reframe, the area of freedom, security and justice. Reframing the area of freedom, security and justice requires, among other things, the de-legitimation of the present law-enforcement approach and the de-securitisation of migration, that is, its removal from the conceptual realm of security and sovereignty and its designation as a 'normal' issue to be dealt with through political processes [4]. This approach is an alternative way to reduce the prevailing definition of migration as a threat and/or a problem.

But when the basic objective of abolishing internal border controls in the Schengen area for the benefit of all the persons travelling within that area, regardless of their nationality, transforms into a threat of mass migrant influx, the Union has to face a new challenge. The technical possibility for the Member States to temporarily reintroduce internal border controls becomes a reality not only invoked in relation to security considerations by high-profile political meetings or sport events, but also regarding the movement of migrants from the war in Syria. The Schengen area becomes the main focus

of policy makers and the discussions regarding the need to reinforce border controls, create a set of new measures or reforms, if necessary, to overcome the migrant crisis, have been set highly on their agenda.

### Schengen- factor for the integration of the European Union?

The Schengen Agreement came into force in 1995, and along with the Convention for its implementation, was formally codified in the law of the European Union with the Schengen Protocol to the Amsterdam Treaty.

The Schengen Area is comprised of 26 countries that have agreed to allow free movement of their citizens within this area as a single country. Of the 26 countries bound by the Schengen agreement, 22 are part of the EU [5] and the other 4 are part of the EFTA (Norway, Iceland, Liechtenstein and Switzerland). This agreement provides the abolition of passports or any other type of border control within the internal borders of the EU Schengen zone, which guarantees free movement and open borders as key features of the European integration that are complementary to the single market of the Union. Moreover, the Convention implementing the Schengen Agreement regulates the issue of standardization of the conditions of entry and residence, as well as issuing of visas for the territory of the Schengen zone. In that sense, this Convention regulates the issues of police and judicial cooperation and asylum for the countries in the Schengen zone. Also, the Schengen Agreement and the Convention allowed for enhanced control of the external border, closer cooperation between the judiciary and the police and well regulated visa policy. The Schengen system has been integrated into the legal and institutional framework of the European Union since 1999.

According to the Treaties of the Union, the issues concerning the Schengen area are subject to parliamentary and judicial control and as part of the *acquis*, they need to be adopted by the member states of the European Union.

According to Jorg Monar, the creation of the Area of Freedom, Security and Justice (AFSJ) has affected three key aspects. First, AFSJ touches upon essential functions and prerogatives of the modern nation-state. "Providing citizens with internal security, controlling external borders and access to national territory and administering justice have since the gradual emergence of the modern nation-state in the seventeenth to eighteenth century and its theoretical underpinning in the writings of Thomas Hobbes, John Locke, Montesquieu and Rousseau all belonged to the basic justification and legitimacy of the existence of the state." Second, the AFSJ touches upon a number of very sensitive political issues. "The fight against crime and illegal immigration, ensuring that asylum systems are both fair and protected against abuse, and facilitating access to justice are issues which matter for European citizens". Third, the AFSJ has by now not only become a fundamental integration and treaty objective, [6] but also one of the major areas of 'growth' of EU action [7].

### The migration crisis-challenge for the Schengen area

In recent years, the proper functioning of the Schengen area of free movement and its benefits to European citizens and the European economy has been under strong pressure due to the migrant crisis. Additionally, the need to strengthen the fight against terrorism has led several Member States to resort to reintroducing temporary internal border controls and to follow the movement not only of those entering Europe, but also the movement of persons within the Union [8].

The increase in the number of refugees in Europe has created a new challenge for the Schengen area of the EU, whereby part of border controls, albeit partially, were restored and the member states faced with increasing numbers of asylum seekers [9]. As main reasons for the movement of migrants are considered the war in Syria and the political and economic instability in countries like Pakistan, Afghanistan, whose citizens moved to Europe. Most affected by the wave of refugees were the countries in Western Europe, such as Germany, France and Austria, but no less affected are Scandinavian countries, such as Denmark and Sweden.

The migrant crisis has raised the question whether it is possible to establish a temporary and limited suspension of the Schengen agreement in order for the European Union to restore border controls for the flow of migrants. The legal framework allows termination of the Schengen Agreement, but this step is the least politically desirable because it would result with undermining the legal foundations of the community in times when "A stronger Union" is needed. Hence, Member States have decided to introduce permanent border controls, which, to some extent, has limited the application of the Schengen Agreement because open internal borders are considered as a key aspect of cross-border trade in the EU.

An article in the Financial Times points out: "If the Schengen accord finally buckles under the weight of Europe's migration and security crises, the world's biggest border-busting experiment will probably end as it began: with a long traffic jam [10] ". However, these gloomy predictions about the future of the Schengen zone may not happen, but they warn us that it is necessary to reform the legal framework of the Schengen agreement so as it becomes more responsive to the new challenges.

Historically, the Schengen *acquis* can be considered as a successful chapter, but also as a failure in the history of the European Union. The most visible results can be found in the good functioning of the Schengen area, which is based on removal of all border controls for EU citizens when they travel in some of the Member States of the Union. On the other hand, this important feature of the so-called European identity has come under pressure to criticism that not all member states have joined the Schengen area in good faith.

As professor Ester Herlin-Karnell [11] pointed out, Schengen is about more than just freedom from passports, queues and traffic jams. It has functioned as a means of regular exchange of information between Member States in order to counter terrorism, cross-border crime and illegal migration. The Schengen Information System (SIS) is the most widely used information-sharing instrument today. Competent national authorities can use it to check alerts on wanted or missing persons and objects, both inside the Union and at the external border. The SIS was upgraded in early 2015 to improve information exchange on terrorist suspects and to reinforce the efforts of Member States to invalidate the travel documents of persons suspected of wanting to join terrorist groups outside the EU.

Therefore, the *acquis* of the Area of Freedom, Security and Justice is considered as one of the fastest growing areas in the European Union that necessarily must respond to modern security challenges. The flow of migrants and the threat of terrorist attacks opened the discussion about the reforms that are necessary for the European Union.

### What reforms are needed for the Schengen system?

The Policy of open borders of the European Union resulted in serious threats. The string of terrorist attacks in Europe initiated the necessity to review the model of functioning of the Schengen area. The attacks by the Islamic State in November 2015 in Paris resulted in 130 deaths. It was thought that the killers had easily slipped into Paris from Belgium and that some had entered the European Union with crowds of migrants via Greece. The number of Syrian refugees, which exceeded a million, further increased the pressure on the Schengen agreement for an urgent rethink in 2015. The attack on the Christmas bazaar in Germany in December 2016, which resulted with twelve killed people, has reopened the debate on how terrorists enter the territories of the Western European countries without being detected and without being able to prevent their attacks. All these factors influenced the political elite of the European Union to take the necessary steps to reform the Schengen area. Schengen is often criticized by nationalists and Eurosceptics who say it is an open door for migrants, criminals and terrorists in particular.

In December 2015, this issue was opened by the European Commission, which adopted an important set of measures to manage the EU's external borders and protect the Schengen area without internal borders [12]. The proposals will help to manage migration more effectively, improve the internal security in the EU and safeguard the principle of free movement of persons. The Commission proposes to amend the Schengen Border Code in order to introduce, at the external borders of the EU, systematic checks against relevant databases for all people entering or exiting the Schengen area. In return, a uniform European travel document will facilitate effective return of illegally staying third country nationals. Practically, it means that most of the travelers who are not from the EU countries will be checked in police databases at the external borders of the Union. The change is that this rule will also apply to citizens of the European Union, which was not a case before. In addition, the non-EU citizens who have Schengen visas are not normally checked by the competent authorities when traveling within the Schengen area. These checks by the police applied more frequently after the terrorist attacks in Paris in 2015.

These steps for introduction of security measures and temporary reintroduction of border controls in some Member States of the Schengen have raised the question as to whether such restrictions may affect the common market, free movement of persons and European integration in general. In this context, few more issues were highlighted, such as the threat of limiting free movement of labor, reduced number of tourist trips and a decline in revenues from tourism, the stagnation of foreign direct investment and foreign capital.

On the other hand, the strengthening of security measures and border controls raised the issue of reforms in the Schengen area. In 2011, the former president of the European Commission, Jose Manuel Barroso, stressed that in order to avoid giving rise to the arguments of populists and extremists, the best way to avoid putting the Schengen at risk was to reinforce its governance and clarify some aspects of its operation. "We know that it is now fashionable in some quarters to be extremist or populist or even to wave sometimes the flags of xenophobia. This is not what we are going to do [13]".

At the beginning of 2016, seven of the twenty-six countries of the Schengen zone temporarily imposed border controls again. In February 2016, the Council adopted a recommendation on addressing serious deficiencies identified during an evaluation of Greece's application of the Schengen *acquis* in the area of external border management. The recommendation proposes to Greece remedial action to address these deficiencies. Where, after three months from the adoption of the Council recommendation, serious deficiencies persist and the measures taken have not proved sufficient, the Commission



may trigger the application of the procedure provided for in Article 26 of the Schengen Borders Code, under threat of suspension of the Schengen by two years.

As outlined in the document of the European Parliament [14], from a legal standpoint, any temporary border control falling outside the scope of Articles 23-26 of the SBC (as a last resort, in case of a foreseeable or unforeseeable event that poses a serious threat to public policy or internal security, or when a Member State is not able to control the Schengen area's external borders), is illegal and would be subject to infringement proceedings. Schengen Borders Code explicitly states that migration flows per se cannot be used as a reason to impose border controls. A longer-term reintroduction of temporary border controls or a temporary suspension would require amendment of the Schengen Borders Code or the Treaties.

On 7 February 2017, the Council adopted an implementing decision setting out a recommendation to prolong temporary internal border controls in exceptional circumstances. Starting from 11 February 2017, when the previous decision expires, Austria, Germany, Denmark, Sweden and Norway should prolong proportionate temporary border controls for a maximum period of three months. Before prolonging such controls, those member states concerned should exchange views with the relevant member states to ensure that internal border controls are carried out only where it is considered necessary and proportionate. They should also ensure that internal border controls are only carried out as a last resort when other alternative measures cannot achieve the same effect. Border controls should be targeted and limited in scope, frequency, location and time, to what is strictly necessary to respond to the serious threat and to safeguard public policy and internal security resulting from the continued risk of secondary movements of irregular migrants. The member states that carry out these controls should review each week whether they are still necessary and adjust them to the level of the threat, phasing them out wherever appropriate. They should report to the Commission and the Council every month [15]. Before the Balkan route was closed by the Member States of the European Union in March 2016, following the decision of Slovenia, Serbia and Croatia to accept no more refugees without valid passports and visas, and according to the decision to implement a new regime in the Schengen area, a debate was opened on one of the key issues posed by the refugee crisis: does the Schengen need reforms?

Member states were concerned that closing the borders can pose a new danger: closing internal borders may simply cause a redirection of migrant flows to new routes, rather than a reduction of entries. In fact, in May 2016, just two months after the Balkan route was closed, Macedonia prevented entry of 11,800 migrants in an illegal attempt to enter the Macedonian-Greek border, in order to continue to some of the western European countries.

The debate on reforms of the Schengen area has first opened the dilemma of whether the non-application of the Schengen rules and re-imposing border controls is a suitable response to the refugee influx in the European Union. Notably, Article 3 of the Schengen Borders Code stipulates that asylum-seekers are expressly exempted from the Schengen rules on unauthorized entry across the borders, and on the other hand the EU Asylum Procedures Directive requires Member States to process asylum applications made at the borders, which reflects the collision of the legal norms in the EU legislation.

Another way to affect the level of security of the European Union caused by massive migrants influx is a reform of the Dublin system, rather than reform of the Schengen system. The Dublin Regulation establishes the Member State responsible for the examination of the asylum application [16]. Every single asylum application lodged within

EU territory needs to be examined - each EU country must be able to determine if and when it is responsible for handling an asylum claim. The objective of the Dublin Regulation is to ensure quick access to asylum procedures and the examination of an application on the merits by a single, clearly determined Member State.

In this regard, the EU Court of Justice has made it clear that in applying the Dublin System (which aims to ensure that one Member State is responsible for the examination of an asylum application, to prevent multiple asylum claims), a Member State cannot assume that the asylum seeker's fundamental rights will be respected in another Member State [17].

This leads towards a conclusion that strengthening of the common asylum system in the EU and better-coordinated management of the external borders of the European Union would be a more appropriate response to the migrant crisis, than non-application of the Schengen rules.

Reforms towards enhanced cooperation and information exchange between Member States of the Union might be undertaken in another area- the Prum Treaty for cross-border cooperation [18]. It provides an opportunity for automatic comparison of data such as DNA, fingerprints, vehicle registration data, which are crucial in the fight against crime in the process of gathering evidence and prosecuting the perpetrators. This framework applies only to a very small number of Member States that meet the legal and technical conditions for its implementation [19], although it may give very good results in fighting organized crime and terrorism.

## CONCLUSIONS

The benefits of the Schengen system began to receive the same dimensions as its abuses, so the reforms that will not jeopardize the rights of citizens guaranteed in the Charter of Fundamental Rights of the European Union, but will penalize the perpetrators of crimes, ensuring freedom, security and justice, have become necessary.

Schengen is one of the most significant achievements of the European Union which provides police and judicial cooperation on issues like terrorism or organized crime, facilitating trade within the Union and free movement of goods and services of immense value [20]. Abolition of or limitations on the Schengen might bring a loss of these benefits acquired through many years of common building of the EU.

The Schengen system is facing numerous legal and economic challenges under the pressure of mass migration movements and the threat of terrorism. They affect the relativization of its success, although it is one of the greatest achievements of European integration. Despite the strong pressure, the EU heads remain strongly committed to the concept of "EU without borders" and its benefits, and retention of the principle of free movement and stronger Schengen aimed at enhanced economic cooperation. They also strongly believe in collective security achieved through cross-border cooperation.

In these circumstances, the Union faces a new challenge today, i.e. how to restore the full functionality of the Schengen after lifting the temporary border controls. The threat of refugee crisis and terrorist attacks raises the level of caution and security in the Member States and creates fear of the idea of completely free border zones, a principle which is grounded in the idea of free movement in the European Union. In this case, when the level of distrust in restoring the full functionality of the security system of the EU is high, a comprehensive debate of the EU leadership is necessary and it should lead towards new reforms of the Schengen system.

One of the biggest threats of today, terrorism, allies with open borders and the free

movement of persons, goods and services. Open market of the European Union means open borders for cooperation, but also a challenge for the authorities to reform the Schengen system towards early warning and detection, instead of lifting the Schengen regulations and reintroducing border controls. The best solution towards which the Union should focus is a sophisticated intelligence system that would detect the criminal activities of potential perpetrators.

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