

Elspeth Guild

Movement of Persons, Security and Asylum in the Schengen Area 2015-16

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Movement of Persons, Security and Asylum in the Schengen Area 2015-16

by

Elsbeth Guild*

Abstract

The 2015-16 turbulence in the Schengen area of border control free movement of persons has astonished many observers. Germany began the move to close borders with its neighbors in early September 2015 triggering a similar move in Austria, all based on the movement of refugees across the so-called Balkan route from Turkey to Germany and beyond. The Nordic states, with a long tradition of no border controls on persons among themselves, joined the rush to re-introduce (temporarily) border controls in the face of refugees seeking a welcome. This paper examines the law and events of the Schengen border control crisis over 2015-16 in light of the Member States obligations under European Union law.

Keywords: Schengen area, border controls, asylum, security, refugee crisis 2015-2016

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Movement of Persons, Security and Asylum in the Schengen Area 2015-16

Over the period 2015-16 the EU has been focused on a number of issues thrown up by the articulation of the Area of Freedom, Security and Justice and the refugee obligations of the Member States under the Refugee Convention 1951 and its 1967 Protocol. The arrival of approximately 1.2 million refugees in the EU in 2015 was variously seen as an opportunity, a threat and an inevitability of the ongoing regional war in Syria, Iraq and Afghanistan. However, the transformation of the arrival and trajectories of refugees from Turkey into Greece and then through the so-called Balkan route to more northern Member States into a challenge for the Schengen system of abolition of border controls among the participating states came as something of a surprise. The so-called refugee crisis became a Schengen crisis and following the attacks in Paris of 13 November 2015 and the appearance of a Syrian passport in a crucial venue, became tangled up in terrorism and counter-terrorism crisis 2015-16.

The whole of Europe has been caught up in the refugee crisis which has been building up throughout 2015 and taken over headlines towards the end of 2015 and 2016. The arrival of about one million people, mainly asylum seekers into the EU first through the southern Mediterranean primarily from north Africa to Italy and then from the summer onwards mainly from Turkey to the Greek islands, has galvanized public opinion and policy makers. The first part of what has been called a crisis but is increasingly being transformed into the new normal, has been the numbers. Mainly Syrian, Iraqi and Afghan asylum seekers have arrived over the year outstripping other nationalities, in particular the Western Balkan nationals who had been a focus of concern.

The routes of arrival of refugees into the EU and their trajectories across Europe have fixated the EU external border agency, FRONTEX and many media outlets. The Schengen border control free area, a major success of the EU has been put under strain as refugees have travelled into the Schengen area from Turkey into Greece, out of the Schengen area into Macedonia and other non EU Member States and EU non-Schengen Member States (Bulgaria, Croatia, Cyprus and Romania in the region) and then back into the Schengen area across the borders into Austria and Hungary. Many refugees make their way north to the more hospitable countries of northern Europe, Germany, Hungary and Sweden. According

to the EU statistical agency EUROSTAT “Of the 138 000 Syrians who applied for the first time for asylum in the EU in the third quarter of 2015, more than three quarters were registered in three Member States: Germany (53 100), Hungary (35 800) and Sweden (18 100).”¹ As refugees move, they run into border controls and various obstacles to the continuation of the journeys such as the cutting of train services. Yet, mainly they end up where they appear to want to be. The so-called Dublin system of allocating responsibility for caring for refugees and determining their claims is supposed to fall on the first EU country through which they arrive. Obviously it is not realistic that all these refugees should be the responsibility of Greece as the EU policy and legislation requires. But no one seems to have a better plan for the moment. The European Commission and the Council are very keen on the idea of relocation where Member States offer places to refugees in Greece and Italy – in September 2015 it was agreed that 160,000 places would be opened in this relocation scheme. But according to the Commission only 4,582 places have been offered by Member States and only 218 people moved as of 8 February 2016.² So in the meantime refugees continue to ‘self-relocate’ around the EU not always to the satisfaction of the authorities of the Member States.³

Throughout the refugee crisis, the issue of security, terrorism and potential terrorism has been present. This concern has fuelled resistance to relocation, calls for more and better registration and investigation of refugees arriving in the EU. Further, the fear of refugees as possible sources of security risks and terrorism has been a concern expressed by a number of Schengen states which have used the exception in the EU border code to reintroduce intra-Schengen border controls on persons when states are faced with a crisis. This contribution examines how the Schengen Member States have used the argument of the risk of terrorism/security threat in the context of the emergency temporary, reintroduction of intra-Schengen state border controls. The discovery of a Syrian passport near the venue of a terror attack in Paris on 13 November 2015 has heighten these worries.⁴

Since 13 September 2015 the following Member States have introduced intra-Schengen border controls under emergency measures (in order of appearance) on the basis of the arrival of refugees on their territory (see Annex I below for a short analysis of the latest EUROSTAT information of arrivals of refugees in the Member States): Germany, Austria, Slovenia,⁵ Sweden, Norway and Denmark. Malta and France had already notified the EU authorities that they would reintroduce border controls temporarily for the purposes of the Valletta migration conference and Commonwealth Heads of State meeting (Malta) and

¹ EUROSTAT 9 December 2015, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report.

² COM(2016)85 Annex 4.

³ COM(2016)85.

⁴ See for instance <http://www.theguardian.com/world/2015/nov/15/why-syrian-refugee-passport-found-at-paris-attack-scene-must-be-treated-with-caution>

⁵ Apparently Hungary also temporarily introduce intra-Schengen border controls but the relevant notification is not available on the Council registry.

COP 21 (France). Both states subsequently extended the temporary border controls on the basis of refugees and terrorism (Malta) and terrorism (France).

Background

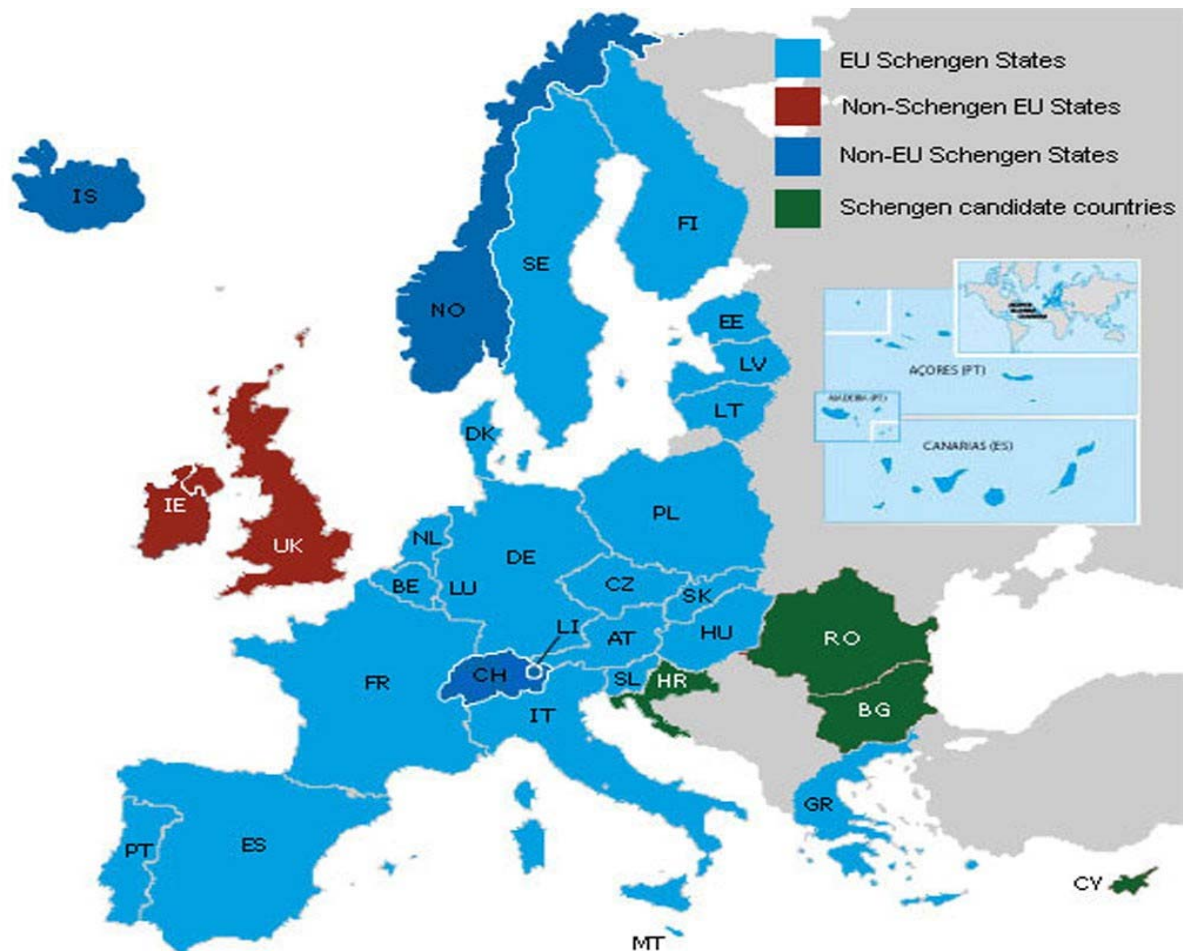
The Schengen area is made up of the Schengen states, all EU Member States except Bulgaria, Croatia, Cyprus, Ireland, Romania and the UK plus the EFTA states, Iceland, Liechtenstein, Norway and Switzerland.⁶ Since 13 September 2015 when Germany notified the Council, Commission and Member States that it would be reintroducing selective border controls with Austria at specified places, there has been much media speculation that the Schengen area without border controls on the movement of persons moving among them is falling apart. The Anglo-American press has been particularly gleeful in its presentation of the ‘collapse’. Only the existence of the euro is more irritating than the Schengen area to the Anglo-American press thus in one year to have the possibility to herald the demise of both was a real bonanza.

Before we participate in this Schengen bashing, it may be worth looking carefully at what has been happening to the Schengen area as regards the re-introduction of intra-Schengen states border controls and in particular the reasons for this reintroduction of border controls. But first a little history. The Schengen border control free area was first contained in the Schengen Agreement 1985 between the three Benelux countries (Belgium, Luxembourg and the Netherlands – which already had their own free travel area dating from the 1950s) France and Germany. All other Member States and Schengen states joined after 1985 and by 1999 the frame was set. In 1987 the Single European Act contained for the first time the objective of abolition of border controls among the EU Member States but not much happened except a lot of infighting among the Member States about what the abolition of border controls meant, inspired and sustained by the UK (not least by inflaming Spanish authorities over the states of Gibraltar). The Schengen states moved forward and in 1990 adopted the nuts and bolts treaty – the Schengen Implementing Agreement (referred to by the CJEU as CISA) which included all the principles of the Dublin Agreement on the allocation of responsibility for asylum seekers. The Dublin Agreement was signed a few weeks after CISA.

The Schengen states first abolished intra state border controls on persons on 25 March 1990. The whole system was incorporated into the EU in 1999 (by the Amsterdam Treaty) with opt outs only for Denmark, Ireland and the UK. All acceding states are required to join Schengen as soon as the Schengen states consider that they are ready. For the 2004 Member States (except Cyprus which remains outside because of its messy Green Border

⁶ Switzerland has had a number of referenda where the people have voted to leave the free movement of workers area but stay in the Schengen area.

issue) entry took place on 21 December 2007 (in time for everyone to do their Christmas shopping in another Member State). Schengen now looks like this:



There was turbulence in the Schengen area at the commencement of the Arab Spring when a number of Tunisians arrived in Italy in 2011. The President of France accused the Italian authorities of issuing short residence permits to the Tunisians which permitted them to travel lawfully to France (when presumably the French President preferred for them to remain irregularly in Italy). Border controls were introduced briefly between two of the founding Member States of the EU. This was a sufficient shock to the system that the Commission proposed far reaching amendments to the Schengen Borders Code (the regulation covering the crossing of internal and external borders) which require the Member States to notify the Council, Commission and Member States if they seek to reintroduce border controls among themselves and to justify the reintroduction of such border controls on the basis of limited grounds (which specifically exclude a large number of third country

nationals crossing the borders).⁷ The grounds for exceptional reintroduction of border controls are now contained in Article 25 SBC. Where there is a serious threat to public policy or internal security which requires immediate action a state may, exceptionally, reintroduce controls for a period of up to ten days. It must notify the other Member States and the Commission (and the Commission the Parliament) and supply the Article 24 justifications and justify the use of the Article 25 emergency procedure. The Commission may consult other states on receipt of the notification. Where the serious threat continues beyond the initial ten days, the state can prolong the border controls for a period of up to 20 days. Again, the state must take into account the Article 23 criteria in an assessment of necessity, proportionality and any new elements. Consultations and opinion are permitted here too. The Article 25 procedure can only be renewed for a total of two months.

The Article 24 justifications set out the procedure for temporary introduction of border controls. The first step is that the state must inform the other Schengen states, the Commission, the European Parliament and the Council – for ‘normal’ foreseen threats the latest four weeks before the introduction of the border controls. A shorter period is permitted where the circumstances become known less than four weeks before the planned reintroduction of controls. The notification must include five elements:

- (a) The reason for the proposed introduction including all relevant data detailing the events that constitute a serious threat to public policy or internal security;
- (b) The scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced;
- (c) The names of the affected crossing points;
- (d) The date and duration of the planned reintroduction.

The Commission is entitled to request further information. The state can classify as confidential parts of the information but this cannot deprive the Commission and European Parliament of the totality of the information. When a state makes a notification, the Commission and the Member States are entitled to issue opinions. For the Commission this means that if it has concerns regarding the necessity or proportionality of the measure or if it considers that consultation is appropriate, it should issue such an opinion. Article 24 also provides for consultation including joint meetings among Member States on reintroduction of controls. These should take place at least 10 days before the reintroduction.

The ‘normal’ procedure is contained in Article 23. It provides the general framework for the temporary reintroduction of border controls at internal borders (those between

⁷ Pursuant to Recital 5 of Regulation No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 'Migration and the crossing of external borders by a large number of third - country nationals should not, per se, be considered to be a threat to public policy or internal security.

Schengen participating states). The first requirement is that there is a serious threat to public policy or internal security in a Member State. Where there is such an emergency, the state may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its extension exceeds 30 days. But the scope and duration of the temporary reintroduction of border controls must not exceed what is strictly necessary to respond to the serious threat. Further, border controls can only be reintroduced as a last resort and in accordance with the procedure set out in Articles 24, 25 and 26.

If the serious threat to public policy or internal security persists beyond the period provided, it may be prolonged subject to further criteria (see below) but all new elements must be taken into account and the renewal must be for 20 and 30 day periods or the foreseeable duration of the serious threat. The total period of the reintroduction of border controls must not exceed 8 months (two months under Article 25 and six months under Article 23) unless there is a Commission recommendation and Council resolution to reintroduce border controls (Articles 19 and 26). The Article 23(a) criteria require that a Member State decide that the measure is a last resort and that the reintroduction of border controls is temporary. On prolonging the internal border controls, the state must assess whether the measure is likely to adequately remedy the threat and the proportionality of the measure in relation to the specific threat. In doing so the state must take into account the following:

- (a) The likely impact of any threats to its public policy or internal security including following terrorist incidents or threats including those posed by organised crime;
- (b) The likely impacts of the measure on free movement of persons within the Schengen area.

Article 26 provides for exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control. This is not the basis for any of the measures taken by Schengen states since the critical 13 September notification by Germany invoking an Article 25 border control with Austria, however, it is increasingly likely that it may be invoked as the Commission has reported that there are serious deficiencies in Greek external border controls (contested by Greece).⁸ However, it is worth remembering that Schengen states have frequently reintroduced temporary border controls with one another, usually under the normal procedure for the purposes of safeguarding international events taking place in their countries, as a response to serious health scares and similar circumstances. Groenendijk undertook an excellent analysis of these activities in his 2003 publication.⁹

⁸ Council Document 5877/1/16 REV 1.

⁹ Groenendijk, Kees. "New borders behind old ones: post-Schengen controls behind the internal borders and inside the Netherlands and Germany", In *search of Europe's borders*, The Hague: Kluwer Law International (2003).

The ground of security threat in the Schengen States' notifications on emergency reintroduction of border controls

In this section I will examine the use of the ground of terrorism/security threat for the reintroduction of Schengen border controls among those Member States where the principal reason is the refugee crisis.

Germany: notification 13 September 2015: "Further arrivals [of refugees] would endanger public order and internal security."¹⁰ 12 October (the 22 September notification is not available): "temporary internal security checks will be limited to the level required by actual security needs"; 30 October: "This influx seriously affects Germany's public order and internal security in various ways [unspecified]".

Austria: notification 15 September 2015: "in view of the security situation caused by the huge migration flows to and via Austria..."¹¹; 15 October [24 September document not available]: "In view of the massive influx of third country nationals, such measure continues to be necessary for maintaining law and order, safeguarding internal security and avoiding continuous overstressing of police force..". 18 November: "This is the only way to prevent security deficits." "This further measure is inevitable to prevent a threat to public order and internal security."

Slovenia: notification 17 September 2015: "uncontrollable migration flows... coupled with the measures adopted by the neighbouring countries... presents a serious threat to Slovenia's national security."¹² Extended once then lifted.

Sweden: notification 12 November 2015: "due to the serious threat to public policy and internal security" posed by the arrival of refugees "now lead to extreme and increasing challenges regarding the functionality of the Swedish society which is one of the three goals of Swedish security", "challenges for a range of important services in Swedish society ... strictly necessary to respond to the threat to public policy and internal security"¹³. Extended 18 December and moved to Article 23 controls.

Norway: notification 25 November 2015: "due to a serious threat to public policy and internal security posed by the consequences of the unpredictable migratory pressure and ensuing challenges to the functioning of the Norwegian society..."¹⁴ and on 18 December: "Although there has been a significant decrease in the number of migrants applying for

¹⁰ Council Document 11986/15.

¹¹ Council Document 1210/15.

¹² Council Document 12111/15.

¹³ Council Document 1404/15.

¹⁴ Council Document 14633/15.

asylum in Norway, we fear that the situation may change rapidly again if we abolish the introduced internal border controls.” The exceptional controls were moved to Article 24.

Denmark: On 12 October Denmark notified the Council it would be exercising its right under the Danish Protocol TFEU and TEU to reintroduce temporary border controls. Then it opted into the amendments to the SBC.¹⁵ Then on 4 January 2016 it introduced emergency border controls under Articles 23 and 25. The notification states “Denmark is of now faced with a serious risk to public order and internal security because a very large number of illegal immigrants may be stranded in the Copenhagen area within a short period of time.” The reason for this seems to be the wholesale break down of the Nordic Union. The Danish authorities blame the Swedes and Norwegians (and Germans) for the border control introduction. They also complain that the Swedes, Norwegians and Finns (who are applying the rule apparently to Finnline) have all applied carrier sanctions requiring passengers entering to be checked by the transporters that they have passports or IDs and any other necessary documents.

The ground of terrorism in the Schengen States’ notifications on emergency reintroduction of border controls

Only two Member States specifically use the ground of a terrorism threat for their reintroduction of Schengen border controls on persons – France and Malta.

Malta: The 25 November 2015 notification states “In view of the current situation with regard to the global terrorist threat...” the controls already in place for other purposes would be extended on the basis of Article 23 “in view of the serious threat to public policy and internal security that is currently considered to exist.”

France: The 7 December 2015 notification states “The terrorist attacks that took place in Paris on 13 November 2015 led the government to declare a state of emergency throughout the country...owing to the imminent danger resulting from serious breaches of public order.” The controls are introduced with Belgium, Luxembourg, Germany, Switzerland, Italy and Spain.

The Commission’s Assessment¹⁶

As required under the SBC provisions, the Commission is required to make assessments of the Member States’ use of Article 25. The assessment for Germany, Austria and Slovenia was published on 23 October 2015. On 15 December the Commission issued its 8th biannual report on the functioning of the Schengen area 1 May – 10 December 2015 which

¹⁵ Council Document 13214/15.

¹⁶ C(2015)7100 final.

covers some of the same ground as set out above. The Commission has also issued an assessment of the Maltese reintroduction of border controls but this is not public. According to the Commission's assessment of Germany and Austria's use of Article 25, the Commission is very forgiving. On the question of terrorism it states:

"14. Many of these persons have not been registered and screened in any other European country. While there is no direct evidence so far that jihadist group have exploited the movement of refugees with the specific aim of infiltrating Germany, in view of the large number of people entering the country, it is possible that among these persons there could also be people with links to crime, members of militant groups or lone extremists."

"30. As to the possibility advanced by the German authorities that also radicalised persons might be hiding among the bona fide asylum seekers entailing risks related to organised crime and terrorist threats, the Commission considers that this would need to be further substantiated to be considered in itself as constituting a serious threat to public policy and internal security e.g. by quantifying the warnings on persons who may have had contacts to or fought with militant groups in crisis regions. This possibility does nevertheless underscore the need to register all the persons concerned, something which could not otherwise be achieved in the current, extraordinary situation."

However, the Commission accepts the necessity of the re-introduction of controls. This seems quite exceptional considering the lack of detailed information regarding the nature of the threat which the Member States produced.

A Legal Assessment of the Justifications

At this point it is worth repeating the criteria against which any justification by a Schengen state to reintroduce border controls must be assessed. In Article 25 these are:

- (a) The reason for the proposed introduction including all relevant data detailing the events that constitute a serious threat to public policy or internal security;
- (b) The scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced;
- (c) The names of the affected crossing points;
- (d) The date and duration of the planned reintroduction.

To these must be added the Article 23(a) criteria:

- (a) The likely impact of any threats to its public policy or internal security including following terrorist incidents or threats including those posed by organised crime;

- (b) The likely impacts of the measure on free movement of persons within the Schengen area.

On an examination of the notifications made by the Member States under Article 25 (and repeated in their move to Article 23-24), there seems to be a noticeable shortage of detail on the reasons for the reintroduction of border controls. The German notification seems to be motivated by exasperation with the Italian and Greek authorities management of their external borders. The references, necessary according to the Article, to public order and internal security are without any specific detail. The same is true for the Austrian notification which seems to have been premised on the German one. The Austrian authorities sought to bolster their public security argument in their 18 November 2015 notification by mentioning security deficits but again there is no detail. However, the overstressing of the police is proposed in the 15 October notification. This is an interesting ground as it suggests that the public security threat is the shortage of Austrian law and order personnel not the nature of the people arriving in Austria. Slovenia was in and out very quickly though it is clear that their authorities did not examine too carefully the requirements as regards the grounds for an Article 25 reintroduction of border controls.

The Nordic Union countries appear to have their own specificities regarding the public security threat. The Swedish notification provides a very interesting argument regarding the functionality of Swedish society as one of three goals of Swedish security. This probably makes sense in a Swedish context but it is difficult to unpick from a distance. Norway is concerned about the unpredictability of arrivals as a security threat. Denmark's public security threat appears to be that people might not move on as quickly as the Danish authorities would like because the neighbours have imposed carrier sanctions requiring travel companies to check ID documents.

Malta suggests that the global terrorist threat is sufficient which if accepted would mean that Malta will never lift intra-Schengen border controls again as the global terrorist threat is something so nebulous that it is unquantifiable.

France justifies its reintroduction of border controls on the basis of its national state of emergency. As the object of all three substantial terrorist attacks in the EU in 2015 (January, July and November) at least one can understand the perspective of the French authorities that they have a problem. Whether border controls are the solution is another question. However, for the moment the Commission does not appear likely to challenge the French choice of border controls as a counter-terrorism measure.

Turning to the scope of the border controls, here the notifications are more precise. All the Member States (except Malta) provide details of where they plan to carry out the border controls, usually including details about the exact border crossing points at which these will

be conducted. This includes for all except Malta the names of the affected crossing points. There is less specificity on the date and duration of the reintroduction of border controls. The need to re-notify the institutions every 20/30 days or for the foreseeable duration means that there are quite a lot of notifications on the Council registry though it would seem that some are missing.

None of the notifications deal with the additional justifications required under Article 23(a). The impact of the reintroduced border controls on the public policy treat is missing. No State seems willing to indicate how border controls at a small number of border crossing points with a few neighbours is going to solve their security deficits. It is also worth remembering that these controls only apply to those border crossing points which the Member States themselves have notified to the Commission under the SBC as places where the Code applies. So they do not automatically apply to green field border crossings (a matter of national law).

Further none of the notifications address the issue of the impacts on free movement of persons within the Schengen area though this is something which the Commission addresses in its assessment of the Austrian/German reintroduction of border controls (it notes that no EU citizens have complained to them so apparently the controls are not annoying EU citizens).

The Visegrad States

The only 2004 Member State to introduce border controls under Article 25 SBC was Slovenia¹⁷ and it dropped the controls quickly. On 17 December in the margins of the Council meeting the Visegrad states (Czech Republic, Hungary, Poland and Slovak Republic) issued a statement regarding emergency introduction of intra- Schengen border controls. It is something of a warning to those states which have reintroduced border controls: “A common resolute and united action is needed to improve, support and preserve Schengen as one of the cornerstones of the European integration project. We call on all true friends of Schengen to join this effort towards a conclusive debate on the key proposals tabled by the European Commission in this respect.”¹⁸ Yet, these are also the states which have been least accommodating regarding any relocation of asylum seekers from the southern Member States where they arrive to other Member States to spread out the responsibility.

¹⁷ The situation of Hungary is not available in the Council registry through the Commission states that it reintroduced intra-Schengen controls for a short period but lifted them – COM(2016)85.

¹⁸ <http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151221-1>.

Conclusions

The Schengen area of no border controls on the movement of persons has been under substantial strain over 2015-16. A surprising number of Member States have re-introduced border controls on persons among themselves primarily on grounds of the so-called uncontrolled movement of people but mixed into those grounds have been issues of the threat to national security, not always well explained either as regards the security interest of the state or regarding the security threat of the arrival of people on the territory. These countries can be classed in two groups – those which claim a general security threat on account of the arrival of refugees – Austria, Germany, Denmark, Norway and Sweden and those which claim a specific threat on the basis of terrorism – France and Malta. One of the noticeable aspects of the use of emergency intra-Schengen border controls is that they are most popular in the Nordic states which have had a passport union dating from 1957 which allowed movement without identity documents across the region. This was subsumed into the Schengen area as all the relevant states joined. That this very long standing free travel area which is, geographically, as far as one can get from the south-eastern EU external borders through which refugees are arriving is astonishing. The two countries through which most refugees are arriving – Greece and Italy – appear to have no interest in the re-introduction of Schengen border controls.

It is also worth noting, as the Commission does in its opinion on Austria and Germany that the recital to the Schengen Borders Code provisions which create the emergency procedures specifically state that “migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security.” So the reasons which all relevant Member States but France and Malta give for the reintroduction of intra-Schengen border controls are directly foreseen as inadmissible reasons by the legislator when they were adopted in 2013. Only two years later it was exactly these reasons which supposedly had been excluded which were claimed by the Member States.

Security and terrorism have once again become tangled up with refugees and movement of persons. The justification for this on the basis of security and terrorism seems rather slim and not defined. If there are good grounds these are not apparently being published either to the Council, Commission and Parliament or to the public. Instead there are general statements of threat which ring rather hollow. The Schengen area without border controls on persons was supposed to have put an end to this sort of reasoning within the area. Its reappearance is somewhat disappointing for scholars and those who champion the Schengen area free of intra-state border controls. Yet, it is worth remembering that for the moment the damage to the area is fairly limited – involving a restricted number of Member States most of which are applying the controls only at some land and sea borders in practice. It

would seem that there is substantial political will to ensure that measures which are designed around controlling the movement of refugees and even those taken on the grounds of national security and the threat of terrorism do not intervene with the daily travel across borders of EU citizens and third country nationals who have been classified as tourists. Even in the most mediatised situations such as after the November attacks in Paris and the introduction of controls between Belgium and France, most travelers were unaffected except for baggage checks at the Paris train station Gare du Nord. Between the political imperative to respond to events and the practicalities of movement of persons in Europe it would seem that for the moment, the later takes priority.

* * *

ANNEXE**EUROSTAT 9 December 2015 on the Refugee crisis**

On 9 December 2015 Eurostat issued its latest Asylum quarterly report which covers the third quarter 2015 (July – end of September 2015). This period covers a very active period in the EU crisis of movement of persons – commonly called a Refugee Crisis or a Migration Crisis or more recently a Schengen border crisis.¹⁹ Now we have the official figures and they are surprising in many ways.

First, the total number of first time asylum applications in Q3 2015 was 413'815 compared to 62'780 in Q3 2014. Of the new asylum applications 137'935 were made by Syrian nationals, 56'670 by Afghans and 44'425 by Iraqis. For the 12 month period ending in Q3 2015 the total number of new asylum applications was: 997'125²⁰ for the whole of the EU (population: 508 million).

Most asylum applicants applied for asylum in one of five Member States which account for over 75% of the total number of asylum applications in the preceding 12 months. These are:

Country	Asylum	% of total	Applicants per 1 million population
Germany:	317'670	(26% of total)	1'335
Hungary:	201'495	(26% of total though there is some doubt about whether these applicants stay in Hungary or move on)	10'975
Sweden:	87'595	(10% of total)	4'360
Italy:	79'820	(7% of total)	465
Austria:	65'260	(7% of total)	3'215
UK:	35'045	(4% of total)	185

At the other end of the spectre, the Member States with the lowest number of first time asylum applications were:

¹⁹ For an analysis of the Schengen border 'crisis' is ILPA European Update, December 2015.

²⁰ The figure for all applicants – both first claims and subsequent claims was 1'066'210. This leaves a difference of 69'085 who are second or subsequent applicants – presumably people who applied for asylum in one Member State (e.g. Hungary) but travelled on to a second Member State (e.g. Germany) where they wanted their claim determined.

Country	Asylum	Applicants per 1 million population
Croatia	175	10
Slovakia	180	5
Estonia	230	55
Slovenia	250	35

There are still large differences in main countries of origin of asylum seekers in different EU Member States. In the UK, at the top of the list are Sudan, Eritrea, Iran, Afghanistan and Pakistan. But for Germany the list is Syria, Albania, Afghanistan, Iraq and Serbia. For Italy the list is even more different: Nigeria, Pakistan, Bangladesh, Gambia and Senegal (clear the Syrians do not stop in Italy).

As regards outcomes, 75% of Syrians are granted refugee status and a further 23% subsidiary protection. For Iraqis, 80% are recognised as refugees and 7% are granted subsidiary protection. 62% of Eritreans get refugee status and 24% subsidiary protection.²¹

However, outcomes continue to vary greatly from Member State to Member State. The EU average of recognition (including refugee status and subsidiary protection) is 48%. But in the UK, the average is 37%. In France recognition is running at 26% but in the Netherlands it is 71%. Of course, this also reflects the differences in top five nationalities of origin in the different Member States. However, that justification only goes so far.

UNHCR has published its Statistical Yearbook 2014 which includes recognition rates by nationality and country.²² From this source we find that new asylum claims by Afghans made in the UK have a 44% success rate. But in Italy they have a 95% recognition rate. In Germany the rate is 67% and in neighbouring Austria 98%. If one looks at Syrian asylum claims – a group which is generally accepted as being in need of international protection there are still variations across EU Member States. The recognition rate in the UK for new Syrian asylum applications is 93% but in Romania it is only 77%. In Belgium the rate is 98% but in Hungary it is 65%. What these figures tell us is that asylum seekers do not have equivalent outcomes to their asylum claims irrespective of the Member State where they make their application.

The whole argument of the justice of the Common European Asylum System is that there are common rules on the definition of a refugee and beneficiary of subsidiary protection, there are common procedural rules and the European Asylum Support Office produces common country of origin information. With so much convergence and harmonisation, the argument goes, it is justified to allow an asylum seeker only one chance to present his

²¹ As regards decision making in the UK on Eritreans see the extensive article in the Economist 12 December 2015 on the reversal of refusal decisions in respect of Eritrean asylum seekers before the Tribunal: <http://www.economist.com/news/britain/21679843-thin-evidence-britain-declares-its-biggest-source-refugees-safe-after-all-turned-away>.

²² <http://www.unhcr.org/566584fc9.html>.

or her asylum application and if it is rejected, no other Member State is required to consider the evidence and claim again. But even with so much convergence and harmonisation, the outcomes are still far too different for asylum seekers from the same countries of origin in different EU Member States for this assumption to be valid.



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