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The Wrong Critiques: Why Internal Border Controls Don't Mean the End of Schengen

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Abstract: Since 2015, the collapse of the EU's Area of Freedom, Security and Justice has been widely discussed due to the re-impositions of internal border controls which seemingly undermine the premise of Schengen as a borderless area. Yet, three years later, Schengen is still alive. Employing Krasner's conceptualisation of sovereignty, this article offers a systematic analysis of why Schengen seems to be so resilient by addressing three common, yet inaccurate critiques. Firstly, it claims that re-impositions of internal controls cannot be seen as a violation of Schengen but, contrarily, as an inherent part of it. Secondly, states do not use re-impositions to selfishly regain their sovereignty. Rather, they follow the Schengen Acquis, and re-impositions are but a corrective to the legislation not being observed adequately. Indeed, what seems to define Schengen is the wish to follow the rules, not to change them. Thirdly, 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.

Keywords: Schengen, Border Control, Sovereignty, EU, Refugee Crisis

INTRODUCTION

Since Autumn 2015, the question of whether the Schengen agreement is reaching the end of its lifespan has been broadly discussed. Warnings about the 'end of Schengen' have been triggered by the re-impositions of internal border controls between the Schengen states, which seemingly undermine its premise as a 'borderless zone'. Whereas some journalists write explicitly about a coming end of Schengen (Grammaticas, 2016; Binyon, 2015; Cendrowicz, 2016; Kaminski, 2015), arguing that the "real weakness of Schengen [...] is that it runs counter to the growing mood in Europe" and therefore, its days are numbered (Binyon, 2015) and that "[a]s Sweden and Denmark demand ID to travel between their nations for the first time in 50 years and four other passport-free countries reintroduce checks, the EU's open border faces its biggest threat yet" (Cendrowicz, 2016), scholars have taken a more nuanced view in presenting the re-impositions as an unfortunate way to solve Schen-

gen's problems at the national rather than the EU level. The latter should be preferred according to them. Indeed, the lack of Schengen-wide solidarity and the resort to state-centered approaches is often cited as the main cause of the difficulties that the EU's Area of Freedom, Security and Justice (AFSJ) faces (Alkopher and Blanc, 2016; Börzel and Risse, 2017; Gasmı, Prlja and Lutovac, 2016; De Angelis, 2016). Moreover, this lack of solidarity and the return of traditional borders to the AFSJ, are seen to presage the end of the Schengen zone and thus of the type of free movement that has underpinned EU governance in recent times.

Yet, three years on, Schengen is alive. Indeed, the Schengen rules explicitly provide for the temporary re-imposition of border controls, and so it is possible to see the reports of the imminent death of Schengen as greatly exaggerated. Exploring this frequent misunderstanding and its consequences, the present article provides a more theoretically grounded and nuanced analysis of the Schengen zone, which, rather than seeing its impending collapse, illustrates its resilience.¹ Although the research into Schengen is quite rich, it fails to provide a systematic analysis of how it has managed to overcome all its problems. The notable exceptions are Zaiotti (2011b) and Fijnaut (2015), who claim that Schengen has faced problems since its very beginning and hence is used to dealing with crises. However, when internal borders are examined, whether in the sense of their re-introduction or police spot checks, they are usually introduced as an aspect contradicting the Schengen rules and values, and prioritising enhancing Member States'² sovereignty over the functioning of the EU's AFSJ (Apap and Carrera, 2003; Campesi, 2011; Nascimbene and Di Pascale, 2011; Phull and Sutcliffe, 2013; Cornelisse, 2014).

In general, scholars have acknowledged since the beginning of the Schengen co-operation that it is dominated by an executive culture (Curtin and Meijers, 1995; Karanja, 2008; Cornelisse, 2015), either by simply noting this fact (Guild, 2001; Zaiotti, 2007) or openly criticising it (Hobbing, 2011; Phull and Sutcliffe, 2013). In practice, there is a mix of state-centric and supranational decision-making in it (Trauner and Ripoll Servent, 2015) but it remains clear that the Schengen area cannot be perceived as simply an internal 'borderless zone' governed by the EU (e.g. Walters, 2006), as the first Schengen Agreement from 1985 would suggest – and some of the EU's own publicity material continues to claim (European Commission, 2017; European Commission, 2018). Nowadays, most scholars believe that the driver of the Schengen co-operation is security (Guild, 2001; Zaiotti, 2011; Bigo and Guiraudon in Paoli, 2016). In particular, Anderson et al. (2001), Guild and Bigo (2002, 2010) and Zaiotti (2007) claim that strengthening of external borders is a necessary precondition for borderless movements within Schengen. Overall, Schengen should be understood as a unique and complex set of new forms of control, common visa policies and shared databases with borderless movements being but one aspect of it where states still play a significant role. This raises questions over the

type of sovereignty they enact and how that contradicts or complements the EU-level Schengen governance and operation.

Employing Stephen Krasner's notion of sovereignty (Krasner, 1999), I aim to explore in a more nuanced manner the tension between the Member States which apparently act selfishly in order to remain sovereign while gradually shifting more power to the EU and actually following the rules, and the other Member States. Firstly, I claim that Schengen will remain attractive to states which seek to enhance their control capacities – since control, rather than authority (as in the Westphalian model), is the fundamental goal of sovereignty in Krasner's model, which takes greater account of the interdependence of states. This argument that Schengen boosts control is in line with the aforementioned premise that free, 'borderless' movement is merely one aspect of Schengen, and re-impositions of border controls are a legitimate instrument to be used if deficiencies in Schengen occur, typically at its territorial perimeter. Indeed, if the end of Schengen should come, it would most likely be because of insufficient external controls and thus also a loss of 'control' sovereignty as well as authority sovereignty. Secondly, Krasner's conceptualisation of sovereignty allows us to combine both legal and political aspects of the current problems, which go hand in hand but are rarely analysed simultaneously. Thus, using Krasner's theory as a lens allows us to look beyond the ostensible contradictions of the Schengen system to explain its continued survival – but also to point to what may indeed become existential threats to it over time.

The article opens by situating its argument in relation to existing research into Schengen, with an emphasis on the problematique of internal border controls. Building a point of departure for the later analysis, the second section introduces the theoretical (i.e. Krasner's concept of sovereignty) and methodological (the interpretative disciplinary study) background of this paper. The third section introduces the Schengen Acquis concerning border controls. Particularly, it addresses the 'wrong critique' of re-impositions as violations of Schengen and stresses the issue of sharing vs gaining sovereignty. In the fourth section, recent instances of re-impositions of border controls are also discussed by means of Krasner's theory. Finally, the findings are presented in light of the resilience of Schengen.

SCHENGEN IN CRISIS? A THEORETICAL PERSPECTIVE

In research, media and political discourse, Schengen is often cherished as one of the most precious achievements of European integration (Grabbe, 2000; Hurwitz, 2000; Hobbing, 2011; Cunha et al., 2015). Therefore, when France re-imposed its internal border controls in 2011, it caused a stir around Europe. In 2011, Italy enabled – and encouraged – some migrants from Morocco to travel freely around the EU rather than processing them and providing for their integration and stay in Italy, knowing that most wanted to reach France and would thus leave Italy if they had the chance

to get there. In response, France re-imposed border controls in Ventimiglia in order to prevent them from entering French territory. EU leaders condemned France for acting against the spirit of the Schengen co-operation, even though the AFSJ's rules – and the Schengen Acquis in particular – were not breached. Shortly after this dispute, scholars emphasised the apparent tension between the Schengen Acquis and its actual implementation. Nascimbene and Di Pascale (2011), Campesi (2011) Phull and Sutcliffe (2013) and Cornelisse (2014) argue that the problem of mistrust and lack of solidarity means an inevitable 'race to the bottom' as Carrera et al. (2011) famously call it. The gist of these articles is that the Schengen legislation must be defined more explicitly and the room for discretion must be eliminated. Otherwise, re-introductions of internal borders will continue to be overused. Later, Denmark, as a result of an inter-governmental dispute, also re-imposed its internal borders. This time, the scholarly criticism was in many aspects even harsher than in the previous case. Scuzzarello and Kinnvall (2013: 97), citing the European Commission, which condemned Denmark for not having justified the re-impositions sufficiently, argued that Denmark twisted the rules whereas Hobbing (2011: 1) openly stated that Denmark violated the law since it presented the re-impositions as permanent and not as temporary (as France did).

However, there is a long history of re-impositions of border controls in the Schengen zone, as Apap and Carrera (2003) and Groenendijk (2004) demonstrate, although they disagree about the frequency of such introductions. More recently, Zaiotti (2011b) and van der Woude and van Berlo (2015) showed that re-impositions of internal controls have been a part of Schengen since its very beginning. Importantly, according to van der Woude and van Berlo (2015), the predominant reason for why the internal controls are re-introduced is a major political or sporting event, not migration. However, this has changed recently and it seems that re-introductions based on migration flows have caused many more tensions than those based on sporting or political events, since the justification of the former is not so unambiguously in compliance with the Schengen Acquis and they can be disputed on the grounds of being against the 'spirit of Schengen'.

Indeed, the 'spirit of Schengen' appears to be the most interesting and least tangible aspect of re-introductions. In following up on how scholars evaluated the Franco-Italian row, it seems that their evaluations equated free movement and solidarity, both of which were disrupted by the re-impositions.³ In a similar vein, many scholars have written about a crisis in Schengen since 2015. Although there is no agreement on how serious the situation is and whether it will lead to an eventual end of Schengen, the contributions have something in common – they focus on re-impositions and, particularly, they do so in a way that focuses on the re-impositions allegedly showing a lack of solidarity and support for the Schengen zone, and which sees states as exercising (an overly generous degree of) discretion in order to pur-

sue their own interests by re-asserting their sovereignty. This re-assertion of sovereignty through the re-introduction of border controls is seen to go against the spirit of Schengen, even though the Schengen Acquis was not breached legally in these cases (Gasmi, Prlja and Lutovac, 2016; Börzel and Risse, 2017; Fijnaut, 2015).

The core problem is seen to be in the lack of mutual trust resulting in state-centric responses rather than EU-led action (Gasmi, Prlja and Lutovac, 2016; Dabrowski, 2016; De Angelis, 2016; Topping, 2016; Alkopher and Blanc, 2016). As Börzel and Risse (2017: 9) argue: "In the absence of a working European solution, governments took national measures tightening border controls." And although the Commission strived for a common EU response, it has "so far failed almost completely. Member States reverted to national solutions, non-compliance with EU policies during the Schengen crisis has been prevalent, and calls for changing the treaties to exempt asylum and immigration rules from common European policies grew louder" (*ibid.*). In a similar vein, Alkopher and Blanc (2016) argue that states refuse to share security risks on their respective territories and tend to prefer national actions.

A possible solution is seen in more detailed legislation and enforcement mechanisms which would make states follow the rules (Börzel and Risse, 2017; Fijnaut, 2015). As Fijnaut (2015: 329) claims: "The only real option is a well thought-out reform of Schengen and the vigorous enforcement of the renewed system." Although many scholars claim that using the term crisis in this case is an exaggeration and that Schengen will survive (Carrera et al., 2015; Guild et al., 2015; McCabe, 2016; Kaca, 2016), they also perceive the impact of internal re-impositions as the main problem and stress the need for an EU-based solution (De Angelis, 2016; Bendixsen, 2016; Alkopher and Blanc, 2016). According to Guild et al. (2015: 22–23), "[t]he Schengen system of control free movement of persons among the Schengen states is here to stay. The ruffled edges revealed by some Member States introducing minimal border controls at common borders are unlikely to be sufficient to disrupt or transform the system in any major way." Moreover, they stress that the "EU has been given competence (since 1999) for the creation of a Common European Asylum System and a common external border control system. Thus the reception of refugees is an EU matter [...]" (Guild et al., 2015: 22). As Kaca (2016: 6) aptly concludes, "[t]he worst case scenario is that the EU remains insufficiently responsive and fails to bring the crisis under control."

Overall, scholars see re-impositions as the main driver of the current problems in Schengen. However, as follows from my previous research (Novotná, 2017; Novotná, 2018; Votoupalová, forthcoming), both EU representatives and Member States perceive re-impositions as a justified corrective to insufficient external border controls, which is in line with the Schengen legislation. Indeed, the European Commission has deemed all the re-introductions carried out so far to be in compliance with the Schengen rules. The main problem seems to be at the external border, not within the

Schengen area. Therefore, drawing on Koselleck's work, it is necessary to explore not only whether a crisis in Schengen is presently occurring but also what it represents. In his seminal book on the notion of crisis, Koselleck (1973) argues that all crises have two sides to them – an objective one based on observable facts and a subjective critique.⁴

When this concept is applied to Schengen, scholars and politicians agree that the main trigger of the current problems lies in enhanced pressures at the external borders stemming from increased migrant flows, including refugees flows, and also from perceived security threats (of, e.g., terrorism) that have been linked to these flows, however questionably. These pressures were compounded by the failure to create a common system for processing, distributing and settling migrants, despite the existence of what was, in effect, a common border. However, the (subjective) gist of the crisis is perceived differently. While scholars see it in re-impositions, political elites see it in poor external border controls. This tension is crucial since without properly identifying the core of the problems, it is impossible to find a solution to them. Below, I argue that Krasner's conceptualisation of sovereignty helps us to better interpret these contradictions as to what the crisis represents and what its implications for the endurance of Schengen may be.

ANALYTICAL FRAMEWORK: SEEING SCHENGEN, AND SOVEREIGNTY, DIFFERENTLY

As the previous section implies, scholars often claim that Schengen suffers from a lack of solidarity, and the room for discretion in it is so great that further co-operation is unsustainable. The most notable exception to this trend is Ruben Zaiotti, who offers a detailed and theoretically robust clarification of why Schengen was adopted (Zaiotti, 2007, 2011a, 2015) and claims that Schengen is here to stay since its problems (e.g. internal re-impositions or the question of enlargement) are generally long-standing and have been present since its inception (Zaiotti, 2011b, 2013a). He even argues that disputes over the (il)legitimacy of re-impositions can strengthen the Schengen co-operation since they can be seen as 'cyclical adjustment mechanisms'. In this article, I build on Zaiotti by stating that the durability of Schengen can be interpreted via the concept of the Member States acting pragmatically. Additionally, I focus on the discursive construction of what the current crisis actually represents.

Theoretically, the analysis draws on Krasner's concept of state sovereignty (Krasner, 1999). This approach was identified as suitable since it helps reconcile the apparent contradiction that appears in research on re-introductions, namely the friction between states sharing or pooling their sovereignty through Schengen, and states simultaneously trying to regain this sovereignty by re-introducing internal controls. Apart from that, it allows for the inclusion of both the legislative and political aspects

into the analysis, by which it eventually helps us to understand why the Schengen project seems to be resilient despite all the occurring problems.⁵

Krasner's main argument is that the notion of sovereignty⁶ can be perceived in different ways. Particularly, he proposes to distinguish four types of sovereignty that complement each other but are not necessarily present all at the same time. It is quite possible that a state might be missing one type entirely while possessing the others fully, or that some of the aspects could be restricted (Krasner, 1999). Specifically this argument is crucial when it comes to the Schengen co-operation. Schengen, being an area with limited internal controls and shared external borders, may be perceived as a least-likely case where one would expect a strengthening of state sovereignty. However, as the following analysis will show, the opposite is true. Krasner's concept of sovereignty allows one to interpret Schengen as a process of surrendering one dimension of sovereignty while acquiring another. His four types of sovereignty are as follows:

- international legal sovereignty, which means that states mutually recognise each other as independent entities and have formal judicial independence;
- domestic sovereignty, which accounts for legitimate authority within a territory and the way it is exercised;
- Westphalian sovereignty, which refers to the possibility of excluding external actors from a given territory;
- interdependence sovereignty, which represents the ability to manage the flows across state borders (Krasner, 2001).

This article is based particularly on the last two types of sovereignty, which can be expressed, respectively, as authority (the right and ability of states to engage in specific activities) and control (the possible use of force without any need of authority or recognition, which is connected to pragmatic and instrumental reasons rather than to rules and norms). While Westphalian sovereignty is concerned with authority (shifts of authority from the state level towards external actors), interdependence sovereignty involves control (regulation of flows across borders) (Krasner, 1999: 10). Krasner (1999) claims that since states' capacity to carry out controls of transborder flows is diminished, they agree to compromise their Westphalian sovereignty or authority. Thus, they enter into voluntary agreements in order to strengthen their interdependence sovereignty (i.e. control capacities). In doing so, they constrain their Westphalian sovereignty (or authority). Moreover, according to Krasner, states only participate in these types of agreements if the situation is 'Pareto improving'.⁷

In line with this last argument, Krasner (1999) asserts that states tend to follow the logic of consequences rather than the logic of appropriateness. These two logics were originally developed by March and Olsen (1998) as two possible (albeit

not incompatible) ways in which actors can behave. While those who follow the logic of consequences act according to their interests and hence do what they consider to be advantageous to them, those in favour of the logic of appropriateness prefer to act according to rules and norms and do what they perceive to be right or legitimate. While Westphalian sovereignty has distinct features of the logic of appropriateness as it is based on rules, interdependence sovereignty is more about maximising preferences. Adding the distinction between these two logics of behaviour enriches the analysis of how states act within Schengen and what impact that has on the resilience of the Schengen zone as a whole.

Overall, Krasner's typology shows that the dichotomy between a national and an EU-led solution is artificial since one compensates for the other, and the two options are compatible with each other. Hence, it is more helpful to discuss particular aspects of sovereignty than sovereignty as a whole, as frequently happens in research (see above). Also, the logics of behaviour help link legislation and practice and help us to see how following the rules may influence the endurance of Schengen, as Krasner (2001: 233) argues that sovereignty refers both to rules and principles and to practice. Also, he famously calls sovereignty "organized hypocrisy", by which he means that there are always multiple norms to choose from and states tend to pick those that best suit them (Krasner, 2001: 242).

Drawing on the methodology of a disciplined interpretive study, which postulates that it is the theoretical framework that leads the case study, not the other way around (as it is in the case of instrumental case studies), the purpose of this article is not to test Krasner's conceptualisation itself but to shed light on the specific case study of Schengen. The selected theory is the basis and instrument that leads the case study and, simultaneously, the case study demonstrates how the theory can be employed to explore it (Odell, 2001; Eckstein, 2000). It follows from the choice of the methodology that the epistemological foundation of this paper is interpretative. Specifically, my aim is to use Krasner's theory to reconcile and make sense of various perceptions of the current Schengen crisis and interpret what its consequences for the resilience of the project may be.

LEGAL ANALYSIS: INTERNAL BORDERS AND THE MYTH OF THE BORDERLESS ZONE

In this section, the re-introduction of internal border controls within Schengen will be explored. When reading the Schengen legislation through the prism of the notion of crisis, it is striking that the term never occurs in it. The first Schengen Agreement (1985) does not even presume that there could be any situation in which emergency measures would be necessary. It is only the following Schengen Implementation Agreement (1995) that assumes that there could be a possible temporary reintroduction of internal controls if "public policy or national security so

require" (Article 2(2)). However, it took another 20 years to develop detailed rules about how to act in emergency situations. Currently, the fundamental piece of legislation which describes the conditions under which internal reintroductions are possible, is the Schengen Borders Code (hereinafter the SBC) that was adopted in 2006 and most significantly amended in 2013 and 2016. The SBC defines external and internal borders and regulates under which conditions internal border controls can be re-imposed, which is a crucial point with regard to the issues discussed in this article.

Internal borders are defined as common land borders (between the Schengen Member States), including river and lake borders, airports for internal flights, and internal sea, river and lake ports. External borders include "the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders" – and thus they also include the borders between Member States and non-Member States. In Title III, the SBC discusses internal borders in more detail. Article 20 says that there are no border checks at internal borders. Article 21 specifies that even though there are no internal border controls within the Schengen area, this shall not affect the exercise of police powers "insofar as the exercise of those powers does not have an effect equivalent to border checks". It is stressed that these activities shall be carried out as spot-checks.

According to the SBC, three possible situations exist in which the internal controls can be re-introduced. Article 23 regulates the re-introductions in general and states that "[w]here, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally re-introduce border control at all or specific parts of its internal borders for a limited period [...]" Also, it explicitly says that "[b]order control at internal borders shall only be re-introduced as a last resort [...]"

Article 24 regulates so-called foreseeable events, i.e. situations in which the re-imposition can be predicted. A typical example would be a sporting or political event whose date is known long beforehand – for example, internal border controls were re-introduced for the 2008 and 2012 UEFA European football championships. In such cases, the given Member State has to notify the other Member States and the Commission in advance and justify its decision. Such a re-introduction can be carried out for a maximum of 30 days and then prolonged for another period of up to 30 days. Nevertheless, the total period cannot exceed six months. If an event could not be foreseen and requires an immediate reaction in the form of a re-introduction, the re-introduction follows the rules defined in Article 25. This article applies to cases in which there is a serious threat to public security and the given Member State needs to act immediately to counter it. In such a situation, the internal controls can be re-introduced for up to 10 days. If the given state decides to re-impose

border controls, the notification about the re-imposition with a proper justification of it is sent to the other Member States and the Commission simultaneously. If need be, the controls can be prolonged for renewable periods of up to 20 days but the total period cannot exceed two months.

Article 26 focuses on situations in which the overall functioning of the Schengen area can be “put at risk as a result of persistent serious deficiencies relating to external border control [...]” and this can lead to serious public threats. In such a case, the internal border controls can be re-imposed for up to six months and prolonged up to three times. Thus, the total period of re-imposed border controls cannot exceed two years. According to this Article, it is not up to the Member States to decide about such a re-introduction. They can only propose a re-introduction to the Commission, which then submits this proposal to the Council. It is only the Council that can officially recommend the re-imposition. Before it does so, the Council has to assess the scope and impact of the re-introduction. If the Member State does not agree with the Council’s decision on this, it has to send a written explanation to the Commission, which will then evaluate whether the given reasons are justified.

In 2013, a major reform of the SBC was adopted – the Schengen Governance Package (hereinafter SGP).⁸ While it only amended Articles 23, 24 and 25, it newly developed Article 26. The SGP was adopted as a result of the long-lasting quarrels between France and Italy due to the incident in Lampedusa in 2011.⁹ The leaders of these two countries, Prime Minister Berlusconi and President Sarkozy, demanded some changes to the SBC. The discussion about possible amendments to it lasted two years and the result was highly disputed by both politicians and scholars. In its final version, the SGP demands more justification for internal borders to be re-imposed (i.e. Member States have to explain all possible re-introductions in more detail). It explicitly says that a re-imposition is only a last resort solution in a critical situation and also, it defines a completely new reason for a re-introduction to be carried out: namely it can be carried out when the overall functioning of the Schengen area is at risk (i.e. Article 26). Importantly, in light of the current events, paragraph 5 of the preamble of Regulation (EU) No 1051/2013 states that “[m]igration 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.” These circumstances of internal re-impositions are repeated also in the recent Regulation 2016/399, which replaces the SBC.

Although there is a broad agreement that the SGP shifted the authority with regard to internal border controls towards the EU institutions, particularly towards the Commission, which is something completely opposite to what Sarkozy and Berlusconi wanted,¹⁰ scholars disagree about how significant this shift of power is, or will be, in practice. Whereas Pascouau (2013) argues that the shift is a clear sign

of the communitisation of state competencies and the strengthening of the European dimension, Zaiotti (2013b) claims that the shift is rather symbolic and will have no practical impact. The opinions of Van der Woude and van Berlo (2015), Carrera (2012) and Peers (2013) are somewhere in between these two extremes in that they do not expect significant changes from the shift. Moreover, they stress another aspect of the SGP, namely that even if it does make it more difficult to justify any re-introduction, it also extends the possible cases in which Member States would be allowed to re-introduce internal border checks (cf. Article 26).

I argue that the SGP confirms and further develops the core of the Schengen Acquis. On the one hand, it shifts the authority towards the EU institutions,¹¹ and on the other, it claims that if Member States do not comply with the rules, their border controls will be re-imposed. Otherwise, the functioning of the Schengen area and the security of the other Member States would be threatened. Hence, the re-impositions in cases of serious deficiencies are not against Schengen but support its proper functioning. As suggested earlier, the whole Schengen idea can only work if all of its aspects work, including the external controls. The necessity of sufficient external controls is also mirrored in the current initiatives to deal with the refugees coming to the EU such as the new Regulation (EU) 2016/399 replacing the SBC or the new version of Frontex (the European Border and Coast Guard), which has more capacities and powers than its predecessor (Council of the EU, 2016; European Council, 2016).¹²

The False Dichotomy Between Sovereignty and Solidarity

All of the above-mentioned initiatives increase the control function of Schengen while at the same time enhancing the EU level of co-operation. Indeed, the setting and evolution of the Schengen border regulation imply that states are willing to divest themselves of their authority and share it with the EU institutions if their control capacities are ensured. Moreover, the Acquis, contrarily to what scholars insinuate, does not associate solidarity with internal re-impositions and the allegedly selfish behaviour of states which make use of them, but solely with controlling external borders. Only the first Schengen Agreement mentions enhancing solidarity between the peoples of the Schengen Member States as an implication of removing the internal borders. In all subsequent documents, including the Implementing Convention, the Schengen Borders Code and the Schengen Governance Package, solidarity is omitted completely or linked to external controls and understood as a necessary precondition to ensure security within Schengen. As mentioned above, the SGP consists of two regulations and it is illustrative that whereas the document regulating internal controls only mentions solidarity in the concluding statement (Regulation (EU) No 1051/2013), in the regulation on external controls (Regulation (EU) No 610/2013), solidarity appears already in the introduction.

The following table encapsulates the shifts of authority from the Member States towards the EU institutions and, on the other hand, the enhanced control capabilities. It uses the concepts of authority (or Westphalian sovereignty) and control (or interdependence sovereignty) as defined by Krasner (1999). It is obvious that both types of sovereignty play a crucial role in Schengen.

Table 1: Two types of sovereignty in Schengen

| Authority (Westphalian Sovereignty) | Control (Interdependence Sovereignty) |
|---|---|
| Commission supervises re-impositions | European Border and Coast Guard (Frontex) and Eurosur strengthen control capabilities of Member States |
| Member States have to explain/justify re-impositions in detail | If external borders are not controlled enough, Member States may re-impose internal controls |
| Member States comply with shifting border controls beyond their own territory | Member States utilise other forms of border control such as ad hoc/spot checks and databases (SIS, VIS, Eurodac...) |
| BUT: opt-outs, ¹³ re-impositions (significant discretion) | Member States are allowed to build fences at their external borders |

Source: Author's own work.

Overall, it follows from this brief overview that the Schengen Acquis has gradually offered very detailed rules for managing emergency situations, particularly internal re-impositions. There is a clear trend to emphasise security (e.g. Article 26 in the SGP) and simultaneously strengthen the EU monitoring and evaluation capacities. Hence, re-impositions are clearly linked to ensuring the overall functioning of Schengen, which is not about a dichotomy between the EU/Schengen integration and state sovereignty but rather about a balance between authority and control capabilities and the idea that the myth of Schengen as a borderless zone should be replaced by perceiving re-introductions of border checks and controls for a variety of reasons as an integral and inherent part of Schengen governance which reflects its security as well as mobility imperatives.

SCHENGEN WILL ENDURE IN PRACTICE

In following up on the discussion of the legislative background of the Schengen co-operation, this section will demonstrate how the Schengen Acquis is implemented in practice. As Anderson et al. (2001) stress, practical implementation of border controls is even more relevant than the Schengen Acquis per se. Indeed, the vague wording of the legislation and the room for discretion are very important aspects of the Schengen co-operation, as they enable states to respect the formal rules yet act against the spirit of Schengen. Many scholars argue that the discretion allowed by

Schengen is too large (Carrera, 2005; Zampagni, 2016), which is caused by overly fragmented and ambiguous legislation (Meijers, 1990; Curtin and Meijers, 1995; Staples, 2000; Fletcher, 2009; O'Neill, 2010). According to Apap and Carrera (2003), Nascimbene and di Pascale (2011), and Cunha et al. (2015), this allows states to overuse their right to re-introduce internal controls. They see more detailed legislation as the only solution which would prevent an eventual collapse of Schengen. However, as will be shown below, from Autumn 2015 until the end of 2017 internal border controls were only re-imposed sporadically and always in compliance with the Schengen Acquis.

The first country to re-introduce border controls in direct relation to the crisis was Germany. On 13 September 2015, it was announced that controls would be re-imposed on all of its borders, with a focus on the border between Germany and Austria, and that this would be carried out under Article 25. Hence, they could be re-imposed immediately. In October, there was a notification that the controls would be prolonged up to the total two months possible according to Article 25, and then for a further three months (from 13 November) according to Article 24. Also the controls in accordance with Article 24 were later prolonged to six months, i.e. until 13 May 2016, which was the maximum prolongation possible. The official justification states that Germany is the country that is most affected by the migration flows and is thus afraid that its internal security and public order may be threatened. Also, it mentions the lack of responsibility of the other Member States and the commitment of Germany to the Schengen co-operation (European Commission, 2016d; Guild et al., 2015).

Austria proceeded in a very similar way. At first, on 16 September 2015, it re-introduced border controls according to Article 25. Then it prolonged the period twice, and on 13 November, it renewed the controls based on Article 24 until 16 May 2016. Also Austria justified the controls by mentioning an unprecedented influx of persons seeking international protection. The controls covered all of its borders with a focus on those with Italy, Hungary, Slovenia and Slovakia. Slovenia and Hungary only re-imposed their border controls for a restricted period of time: Slovenia from 17 September to 16 October 2015 and Hungary from 17 to 26 October 2015. In both cases, the controls were re-imposed only on the border between these two countries, and again, the reasons given for them related to the big influx of persons seeking international protection.

Malta and France re-introduced border controls in November and December 2015 due to two political events that had been planned at the time (the Valletta Conference and the COP21 climate conference). Nevertheless, France prolonged its controls due to the terrorist attacks in Paris for a further period – from 14 December 2015 to 26 April 2016. These controls applied to both internal land borders and air borders. Sweden re-imposed its border controls as well – at first for

only ten days (from 12 November 2015) but then it prolonged them until 9 January 2016 (under Article 25). Later, the controls were renewed until 8 May (under Article 24). In both cases, the controls were justified by a significant influx of persons seeking international protection and the challenges these persons posed to internal security. The controls applied to all of Sweden's borders, with a special focus on the harbours in the Police Region South and West, and also to the Öresund Bridge. Norway proceeded very similarly, at first imposing internal controls from 26 November 2015 to 15 January 2016 based on unexpected migration flows and then prolonging the period based on Article 24 until 12 May (citing a continuous influx of persons). Also in this case, all borders were covered with a focus on ports with ferry connections.

Denmark re-imposed internal controls on 4 January 2016 for two months under Article 25 due to unexpected migratory flows and then prolonged them under Article 24 for a further two months, i.e. until 3 May 2016 (due to the continuous influx of persons seeking international protection). In the cases of Norway and Denmark, the controls applied to all borders with a focus on ferries from Germany and the land border with Germany. The last country that re-introduced internal controls was Belgium, which did so from 23 February to 22 April 2016 due to the planned closure of the refugee camp in Calais. The controls applied to the border between West-Vlaanderen and France (European Commission, 2016d; Guild et al., 2015).

The rest of the Schengen Member States did not re-impose their internal border controls but some of them used further measures to regulate migration flows across their borders, especially ad-hoc police checks. In Autumn 2015, the Netherlands, Belgium and the Czech Republic strengthened their police patrols on parts of their borders (Guild et al., 2015; ČT24, 2015). Although these police controls cannot have border control itself as their objective and can only have the form of spot-checks which cannot be more intense than those elsewhere on the given territory, the room for discretion in them is quite significant, and also the police controls can be perceived as a way to control internal borders.¹⁴

Even though frequently stretching the law to its limits, all the re-impositions have been considered to be adequate and in compliance with Articles 23–25 of the SBC by the Commission, and no Member State has officially complained about the procedure so far. As is shown in the previous paragraphs, most of the Member States that carried out re-impositions used both Article 24 and Article 25 to their maximum limits. Moreover, the conduct of the above mentioned states was not found to be in breach of the SBC even though according to the reform of the SBC in 2013, migration flows should not be the sole reason for re-introducing internal controls. It is true that the Member States mostly justified the re-impositions by citing security reasons that followed from the migration influx, which meant that migration was merely seen as a primary driver, and not as the reason per se, but still, this is another example of

how broadly the Schengen Acquis can be interpreted and how crisis politics can affect the enforcement of rules.

The Politics of Crisis in Practice: ‘Protecting Schengen by Applying Schengen’?

The subsequent events also confirm that the room for discretion of the Acquis is significant. At the beginning of May 2016, the Commission came up with a proposal suggesting that the states which had already re-imposed border controls could keep them for a further six months. Otherwise, as follows from the previous paragraphs, most of them would have to be abolished during that month (European Commission, 2016). Later on, in November 2016, the Commission proposed to prolong the internal controls in Germany, Austria, Denmark, Sweden and Norway for another three months. In both cases, the reasoning was based on deficiencies in external controls and fears of secondary movements of refugees in Greece. Also the implementation of Article 26 was discussed, which could theoretically extend the re-impositions by up to two years (Council of the EU-European Council, 2016). This eventually happened as internal controls were repeatedly prolonged in February, May and November 2017 (Council implementing decision (EU) 2017/818).

Simultaneously, the EU leaders stressed that these prolongations will also be limited in time and in full compliance with the Schengen Acquis. As Frans Timmermans said: “[...] we are protecting Schengen by applying Schengen” (European Commission, 2016a). This is a typical argumentation of the Commission, which insists that Schengen is not to be blamed for the current crisis but, contrarily, could contribute to its solution provided all the rules are followed (European Commission, 2015b). Here, it is essential to unpack what is meant by respecting the rules since the emphasis here, unlike in the scholarly literature, is on strengthening external controls rather than on abolishing internal borders, which are considered an appropriate measure for fighting the external migratory pressures (European Commission, 2015a).

Although the last few prolongations only apply to those states that already carry out internal controls and not to others, the message is quite telling. If the overall functioning of the Schengen area is under threat, the situation must be managed in order to keep Schengen working; and the idea to prolong the internal controls seems to be quite non-violent, as opposed to the proposal to exclude Greece from the Schengen area.¹⁵ Alternatively, the Netherlands suggested a so-called mini-Schengen which would only consist of countries that are reliable with regard to migration. In the eyes of the Dutch Presidency of the Council of the EU, these were only the three Benelux countries, Germany and Austria (Guild et al., 2015). However, these proposals were not adopted, which implies that even though security is stressed as a

necessary precondition to free movement it can only be enforced within the limits of Schengen. Indeed, both states and EU institutions argue that Schengen must be saved by fulfilling the rules or, using Krasner's terms, by complying with authority/Westphalian sovereignty.

Also, many politicians from countries that avoided re-impositions have threatened that they will not hesitate to resort to them if the external border controls are not carried out properly. Among others, Hungarian Prime Minister Viktor Orbán, Slovakia Minister of Interior Robert Kaliňák and Finnish Prime Minister Juha Sipilä expressed this view (Kaminski, 2015; Majerský, 2016). These politicians also perceive the re-impositions as a last resort reaction to the insufficient functioning of the Schengen area. A statement of the German government spokesperson Steffen Seibert illustrates the situation very well: "A free Schengen area and effective protection of the external borders are two sides of the same coin" (Denková, 2016). The former Austrian Chancellor Werner Faymann put it more bluntly but the core of his message is the same: "If the EU does not manage to secure the external borders, Schengen as a whole is put into question... Then each country must control its national borders" (Minns and Karnitschnig, 2016). These statements do not imply that the Schengen area should be abolished. On the contrary, they suggest that the Schengen co-operation must continue and the rules must be observed. This is in strong contrast to the general attitude in relation to asylum policy, especially the Dublin Regulation, which is currently subjected to demands for changes to it from both EU representatives and EU Member States.

... As Long as Control Gains Outweigh Authority Losses

Faymann's declaration also supports the argument that Member States are actually not opposed to shifting their authority (or Westphalian sovereignty) to the EU institutions. As opposed to the scholarly literature (see above), this seems to be evidence of a self-imposed restriction of Westphalian sovereignty with the aim to enhance the control capabilities, i.e. interdependence sovereignty. This argument can be supported by observing the initiatives and discourse within Schengen since 2015. Indeed, when one examines the results of the EU meetings from Autumn 2015 until the end of 2017, the focus on strengthening external borders is quite obvious, whereas the problematique of internal borders is virtually absent (Council of the EU, 2016; European Council, 2016). Specifically, it was suggested that the EU should enhance the capacities of FRONTEX and build a new European Border and Coast Guard, implement a passenger name record (PNR) and an EU Travel Information and Authorisation System (ETIAS), and extend the Schengen Information System (Ibid.).

Nor is the assumption that EU leaders will argue on the basis of European values in order to stress the importance of saving Schengen by any means certain.

Also their statements are rather interest-oriented. The Commissioner responsible for the area of migration and home affairs Dimitris Avramopoulos insists on enhancing external controls, as only then can internal border checks be abolished again (Baczynska and Taylor, 2016). He stresses that the “Commission is committed to safeguarding a Europe without internal border controls in the common interest of all European citizens” (European Commission, 2015c). The President of the Commission Jean-Claude Juncker linked the problems within Schengen to the euro crisis when he stated that the euro loses its meaning without Schengen (Macdonald, 2016). The most security-based statements in this regard were expressed by the President of the European Council Donald Tusk, who explicitly said: “The only way not to dismantle Schengen is to ensure proper management of EU external borders” (Strupczewski, 2015). Of course, declarations including an emphasis on the symbolic value of Schengen as a great achievement of European integration are to be found as well, but these are always accompanied by pragmatic reasoning (European Commission, 2016b). Overall, the need to return to the normal functioning of Schengen while respecting the existing rules is stressed in all the main initiatives.¹⁶

It follows from this section that although a significant amount of Member States’ sovereignty (especially Westphalian sovereignty) has been shifted to the EU institutions, states still have a broad room for discretion when it comes to control capabilities (i.e. interdependence sovereignty). It was shown that some of the re-impositions were based on quite a loose interpretation of the Schengen Acquis, particularly when migratory flows were used as the main justification, but none of them were assessed as disproportionate by the Commission. Furthermore, it must be stressed that only a minority of the states re-introduced internal border controls. Given the seriousness of the current situation, this is a clear sign that Member States are not prone to carry out re-impositions, and do not misuse them, as many scholars claim, and hence the end of Schengen is not inevitable.

Nevertheless, it is questionable whether Schengen’s durability is a consequence of a spirit of solidarity as Guild et al. (2015) argue. Rather, the Schengen project will stay alive as long as the control gain will outweigh the loss of authority. If security is not ensured, the border-free area may collapse since, as Krasner (1999) argues, states prefer to act according to the logic of consequences rather than that of appropriateness. It is mentioned above that many states apart from those that have already re-introduced border controls ponder over a possible re-imposition if the external border controls are not carried out properly, i.e. if their control capabilities are decreased and the Schengen co-operation is not in their interest any more or, to put it in Krasner’s terms, if the situation is not Pareto-improving. Hence, once again, the threat to the Schengen area is not too many re-impositions but insufficient external border checks. Only then do the

states feel the urge to compensate for this lack by re-imposing internal borders, as they continue to prioritise the logic of consequences over the logic of appropriateness.

CONCLUSION

Acknowledging the complexity of the Schengen co-operation, it is crucial to strive to understand its various aspects. This study contributes to the current research by arguing that the resilience of Schengen can be better understood through Krasner's approach to sovereignty as it helps reconcile the seeming contradiction in how scholars and politicians perceive the current problems. When one explores what the crisis actually represents, it becomes obvious that they employ different perspectives. While scholars focus on the dichotomy between states' selfish interests, which are represented by the re-impositions, and the EU approach and solidarity, the related legislation, practical initiatives and political discourse demand a more nuanced analysis, since sovereignty is a very complex phenomenon which can be strengthened and restricted simultaneously.

Specifically, three inaccurate critiques of Schengen were addressed in order to answer the question whether Schengen is here to stay and why. Firstly, the prevailing perception of the re-impositions of internal controls and lack of solidarity as threats to Schengen that must be dealt with for it to survive proved to be inadequate. It follows from the analysis that internal re-impositions are not a violation of the Schengen Acquis but rather a corrective to its poor functioning – when its different aspects and imperatives are considered more fully. The states tend to prefer the logic of consequences only if the situation is not Pareto-improving any more. Even in such a case, however, they remain within the Schengen rules.

Secondly, re-impositions are not simply an instrument with which states can regain their sovereignty. Member States proved to be willing to observe the legislation. Indeed, the emphasis on following the rules rather than on changing them seems to characterise Schengen behaviour and distinguishes it from the Dublin Regulation, which is required to be transformed completely. Moreover, as the new initiatives show, states search for a solution to the current crisis on the EU level and are not reluctant to shift more authority (Westphalian sovereignty) to the EU institutions if it leads to increased control capacities (interdependence sovereignty) in the Schengen area. Hence, no opposition between the state sovereignty and the Schengen integration can be identified as long as control capacities compensate for the loss of authority.

Last but not least, I argue that a more rational and pragmatic take on Schengen (the logic of consequences) seems to be more adequate than an emphasis on its symbolic value and solidarity (the logic of appropriateness). Moreover, as Coicaud and Wheeler (2008) and Tulmets (2012) aptly demonstrate, states' interests are an

inherent part of the notion of solidarity. In line with this, the Schengen legislation links solidarity to external border controls and not to borderless movements, as the scholarly literature suggests.¹⁷ Hence, Krasner's conceptualisation of sovereignty and states' behaviour is a useful way to understand the functioning and resilience of Schengen since it offers an alternative perspective on the crisis: the emphasis should not be on the dichotomy between the selfish states and a common EU approach, or between solidarity and national interests. The two sides in both dichotomies are compatible and if the Schengen area should end, it will probably be due to insufficient external border controls, and not due to re-impositions. Rather, it actually seems that re-impositions prevent Schengen from collapsing.

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ENDNOTES

¹ Throughout the article, resilience is understood as an overarching term designating how the Schengen cooperation has managed to survive all the difficulties it has experienced so far.

² In this article, by "Member States", I mean members of the Schengen co-operation, rather than members of the European Union.

³ Of course, since the Schengen co-operation began, researchers – as well as practitioners – have stressed that the abolishment of internal controls must be balanced by enhanced external controls and other compensatory measures (Schutte, 1991; Hailbronner and Thiery 1997; Grabbe, 2000; Samatas, 2003; Cornelisse, 2010; Mungianu, 2013; Cunha, 2015). Particularly the external controls and their common securing, i.e. sharing of competences between Member States and the EU level, are broadly covered in research (Schindlmayr, 2003; Neal, 2009; Hobbing, 2010; Mungianu, 2013; Call, 2014). Recently, the compensatory measures, mostly understood as *ad-hoc* police checks, have attracted scholarly attention as well (Darley, 2008; Schwell, 2009; Maguer, 2009; Casella-Colombeau and Vitale, 2015; Casella-Colombeau, 2015). However, in line with the critique of internal re-impositions, these articles also perceive the orientation on security rather than on human rights and freedoms as negative and as contradicting the EU/Schengen values (Atger, 2008; Schwell, 2009; De Capitani, 2014; Cunha et al., 2015).

⁴ This distinction is developed upon by many scholars from different fields of study such as the sociologist Cordero (2017), the political economist Samman (2015) or De Rycker and Mohd Don (2013), who focus on narratives and discourse across various disciplines.

⁵ Although the idea of states divesting themselves of a certain amount of sovereignty while winning back some powers is not entirely new and is mentioned, e.g., by Geddes (2001), Caviedes (2004) and Cornelisse (2010), these scholars refer to the problem of migration in general and introduce Schengen into their studies merely as an example of the related broader processes. In contrast, this article focuses specifically on how Schengen's resilience can be interpreted by means of a sound theoretical framework.

⁶ It would be beyond the scope of this paper to compare various approaches to sovereignty here. In this paper, I will understand sovereignty as Krasner (1999) does, i.e. as state sovereignty carried out by rulers or governments.

⁷ For more details about 'modalities of compromise', as Krasner calls them, please see Krasner (1999: 26–27).

⁸ The package consisted of two regulations: *Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary re-introduction of border control at internal borders in exceptional circumstances* and *Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen*.

⁹ Which was mentioned above.

¹⁰ For more details about the development of the SGP see Peers (2013), Zaoitti (2013) and/or Carrera (2012).

¹¹ Irrespective of how significant the impact is in practice, which will be discussed below, the SGP definitely does not decrease the role of the EU institutions and vice versa: it does not increase the room for discretion of the Member States.

¹² For more details on how the European Border and Coast Guard developed, see, e.g., Rosenfeld (2016).

¹³ Great Britain and Ireland decided voluntarily not to abolish their internal borders. Nevertheless, both countries co-operate on the security aspects of the Schengen co-operation.

¹⁴ For more discussion about the difference between border and police controls, see Guild et al. (2015).

¹⁵ For more information cf. the leaked document from December 2015 (Peers, 2015).

¹⁶ For a more detailed analysis of this, cf. Novotná (2017) and Votoupalová (forthcoming).

¹⁷ Indeed, it seems that the broadly accepted normative approach to solidarity that prioritises solidarity in dealing with migrants and their movements should be problematised and nuanced by also exploring solidarity for security – as demanded in the Schengen context.

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