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Competing Visions and Constitutional Limits of Schengen Reform: Securitization, Gradual Supranationalization and the Undoing of Schengen as an Identity-Creating Project

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Abstract

Schengen integration has been home to different visions from the outset. In this vein, it owes much of its success to the fact that it has been both practical and symbolic in nature. However, this equilibrium of different visions has been upset following a series of crises. By prioritizing security considerations over alternative visions of Schengen, some Member States have reintroduced internal border controls on a quasi-permanent basis. Current reform proposals seek to address this situation but may be unable to revive the co-existence of the different visions underpinning the earlier phases of Schengen integration. Rather, as this investigation suggests, the reform that is currently being discussed would reaffirm the nature of Schengen integration as a pan-European security project. While this goes hand-in-hand with elements of supranational governance and coordination, it may impair the role of Schengen as an identity-creating project. This investigation analyzes the elements of the reforms discussed, presents them in the light of different visions of Schengen, and draws attention to possible constitutional limits of its reform.

Keywords: Schengen; crisis; securitization; borders; identity

A. Introduction

Different visions underlay Schengen integration from the outset.¹ While the history of European integration places the abolition of internal border controls in close contextual relation to the economic rationale of completing the internal market, Schengen has always served as an identity-creating project.² To citizens, it epitomizes a spatial experience that adds symbolic weight to the practical benefits of abolishing internal border controls.³ In addition, other motives may have driven the evolution of the Schengen acquis, such as the ambitions of security actors utilizing the emerging forms of transnational cooperation to expand their field of competences.⁴ But, the

¹See already Galina Cornelisse, *What's Wrong With Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders*, 51 COMMON MARKET LAW REVIEW 1, 4 (2014).

²See Stefan Salomon & Jorrit Rijpma, *A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship*, GERMAN LAW JOURNAL 1, 8 et seq. (2021).

³See generally Estelle Evrard, Birte Nienaber & Adolfo Sommaribas, *The Temporary Reintroduction of Border Controls Inside the Schengen Area: Towards a Spatial Perspective*, 35 JOURNAL OF BORDERLANDS STUDIES 369 (2020).

⁴See RUBEN ZAIOTTI, CULTURES OF BORDER CONTROL: SCHENGEN AND THE EVOLUTION OF EUROPEAN FRONTIERS 121–159 (2008).

co-existence of different Schengen visions never hampered its success. On the contrary, for quite some time, the fact that Schengen's legal framework married different interests was part of its charms, ensuring that border controls remained an exceptional phenomenon in practice.

More recently, however, the pluralism of visions that originally enabled Schengen's success may be the cause of its sorry state. Following a series of crises, several Member States prioritized their security concerns over other visions of Schengen.⁵ National practices of reintroduced and repeatedly prolonged internal border controls bear testament to that effect, calling into question the principle of unchecked travel to which Schengen lends its name. As argued in the following, these crisis experiences were consolidated by the latest attempts to reform the Schengen acquis. By asserting Schengen as a pan-European security project, these changes would upset the equilibrium of different visions characterizing earlier phases of Schengen integration. The reform will particularly call into question the function of Schengen as an identity-creating project for EU citizens.

This is not just problematic in terms of symbolism. The proposed reform may exceed the limits of what is acceptable under EU constitutional law. As will be argued in the following, these reforms will frustrate the constitutionally warranted balance that needs to be struck between different rationales of Schengen integration. To substantiate that argument, current attempts at reform will be assessed in the light of the constitutional foundations of the Schengen acquis and the European Court of Justice's (ECJ's) interpretation thereof. In this vein, it can be shown that the latest reform efforts assert Schengen as a pan-European security project. Whereas this need not amount to disintegration, the following investigation suggests that it would nonetheless impair Schengen's identity-creating dimension for citizens.

The following analysis will focus on the reintroduction of internal border controls and measures that may be equivalent to such controls in their effects. The latter category refers particularly to police control measures in border regions as well as monitoring and surveillance practices based on modern technologies. This analytical focus will allow for an assessment of some of the central pieces of reform, excluding other aspects, such as the proposed changes to combat the so-called instrumentalization of migrants.⁶ While the investigation will primarily focus on the Commission's proposal amending the Schengen Borders Code, it will likewise examine other elements of reform that have already become binding law, such as the recently amended Schengen Evaluation mechanism or those that are of a political nature, such as the Commission's "Schengen strategy."⁷ In addition, it will consider the co-legislator's responses to the proposed changes insofar as they are available at the time of writing. On the one hand, this applies to the Council's "general approach" to the proposed reform of the Schengen Borders Code and, on the other hand, to the European Parliament rapporteur's draft report. However, the respective committee has not yet debated the latter and it will, therefore, merely serve as a first tentative indication of the Parliament's position.⁸

This investigation will examine Court of Justice case law, including judgments rendered after the Commission's reform proposal had been tabled.⁹ It will abstain from criticizing the Commission's reform proposal because of that jurisprudence, given that these verdicts were

⁵See Elspeth Guild, *Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19*, 23 EUROPEAN JOURNAL OF MIGRATION AND LAW 385, at 397 et seq. (2021).

⁶European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final of Dec. 14, 2021, at 3; in the meantime, the corresponding proposal for a migration instrumentalization Regulation failed to garner the support of the co-legislature and was thus withdrawn.

⁷Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013; and, respectively, European Commission, Communication from the Commission to the European Parliament and the Council "A strategy towards a fully functioning and resilient Schengen area", COM(2021) 277 final of June 2, 2021.

⁸Council, General Approach, no. 9937/22 of June 9, 2022; and European Parliament, Draft Report by Sylvie Guillaume, no. 2021/0428, of 8 November, 2022.

⁹Specifically, Joined Cases C-368/20 and C-369/20, Landespolizeidirektion Steiermark, ECLI:EU:C:2022:298, the judgment of April 26, 2022; and C-817/19, Ligue des droits humains, ECLI:EU:C:2022:491, judgment of June 21, 2022.

unknown to the Commission when the proposal was drafted. Nevertheless, it will be argued that the Council took up certain elements of the Commission's proposal that conflicted with the Court's interpretation, even after the latter had pronounced itself on the matter. Accordingly, the view will be put forward that the Commission's proposal encouraged the Council to endorse a reform that would conflict with the constitutionally warranted balance of visions of Schengen.

The investigation proceeds in three steps. It will, first, assess those elements of the Commission's reform proposal that would reaffirm the nature of Schengen as a pan-European security project (B.). While national security actors' concerns drive this development, it should not be mistaken for a renationalization of Schengen. Instead, as the following investigation will suggest, second, this reform is complemented by elements of gradual supranationalization of Schengen governance (C.). Politically, such a combination of reform measures may be promising for the Commission, but, as will be argued in the third section, it is likely to undermine the constitutional balance that needs to be struck between competing visions of Schengen integration, particularly by compromising its identity-creating dimension (D.).

B. Schengen as a Pan-European Security Project

Historically, the emergence of Schengen is closely linked to the completion of the internal market. Abolishing internal border controls reduced border waiting times and allowed smooth cross-border travel. However, as political science research suggests, the establishment and evolution of Schengen may be strongly driven by other rationales.¹⁰ An oft-overlooked case in point relates to the motives of security actors at sub-national, national, and European levels who utilize the emerging "security field" to play out their expertise.¹¹ As has been convincingly argued, Schengen integration has paved the way for establishing a veritable border control community comprised of delegates from national ministries (routinely of the interior) and the European Commission.¹² From this perspective, Schengen integration presents itself as a pan-European security project that enables collective action to advance border security objectives.¹³

The Commission's latest reform proposal would reaffirm the notion of Schengen as a security project. It does so by prominently endorsing the security concerns put forward by some Member State governments and by proposing to amend the Schengen Borders Code accordingly. This assertion of Schengen as a security project can be witnessed in relation to three reform elements. First, it features in the normalization of exceptions that follow from the acknowledgment of new grounds to justify the reintroduction of internal border controls (*I*). Second, the proposal appears to endorse the argument put forward by national security actors that threats may last indefinitely and that the maximum periods of permitted internal border control should be adjusted to this end (*II*). Third, the reaffirmation of Schengen as a security project features in the context of conventional and new forms of security checks in border regions (*III*).

I. Normalizing Exceptions: New Grounds for the Reintroduction of Internal Border Controls

It is not unreasonable to label the existence of reintroduced and repeatedly prolonged internal border controls the "new normal" in the Schengen area.¹⁴ Although the significant differences between Member States should not be ignored, the number of instances in which internal border

¹⁰See generally Ramona Coman, *Values and Power Conflicts in Framing Borders and Borderlands: The 2013 Reform of EU Schengen Governance*, 34 JOURNAL OF BORDERLANDS STUDIES 685 (2019).

¹¹As insightfully observed as early as 1994 by Bigo, who – by way of reliance on Bourdieu's work – conceives of Schengen as a "security field," see Didier Bigo, *The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention*, in POLICING ACROSS NATIONAL BOUNDARIES 161 (Malcolm Anderson & Monica Den Boer eds., 1994).

¹²See ZAIOTTI, *supra* note 4 at 155 et seq.

¹³See Michela Ceccorulli, *Back to Schengen: The collective securitisation of the EU free-border area*, 42 WEST EUROPEAN POLITICS 302, at 303 (2019).

¹⁴Aptly, Marie De Somer, *Schengen: Quo Vadis?*, 22 EUROPEAN JOURNAL OF MIGRATION AND LAW 178, at 181 (2020).

controls have been reinstated has skyrocketed in recent years.¹⁵ Accordingly, some national governments may have grown accustomed to the idea that internal border controls may constitute a viable option to combat threats of various kinds.¹⁶ In this sense, it may be a legacy of a series of crises that otherwise exceptional internal border controls have become a relatively frequent phenomenon in Schengen.

To some extent, the normalization of reintroduced and repeatedly prolonged internal border controls is reflected in the Commission's reform proposal. On several occasions, the proposed changes would codify previous crisis practices. However, such a codification exercise risks reshaping the Schengen acquis along the lines of a nationally determined security paradigm. By pandering to the Member States that reintroduced and perpetually prolonged internal border controls in the past, the Commission's proposal would "legalise existing practices" likely to conflict with the Schengen acquis in its current form – as the European Parliament aptly put it.¹⁷

A rather uncontentious example concerns the affirmation that threats to public health may justify the reintroduction of internal border controls. This reflects the practices of many Member States during the pandemic. The Schengen Borders Code does not explicitly permit the reintroduction of border controls to combat threats to public health. During the first phase of the pandemic, however, many Member States justified the reinstatement of border controls by arguing that a global health crisis may likewise give rise to a serious threat to public policy, provided it attains a certain degree of severity and affects one of the fundamental interests of society.¹⁸ In this vein, public health emergencies were conceptualized as a sub-category of threats to public policy. Admittedly purposive in nature,¹⁹ such an interpretation allowed national authorities to reintroduce border controls in their response to Covid 19.²⁰

In the Commission's latest reform proposal, the legality of this course of action would be verified.²¹ However, the proposal does not mention public health as a standalone condition. Instead, it sticks to a conceptualization of public health emergencies as a specific embodiment of threats to public policy or internal security, thereby reproducing the interpretation underpinning Member States' practices during the first phase of the pandemic. In the interest of orderly legal drafting, it may have been preferable to include public health threats as a standalone ground for the reintroduction of internal border controls. This would align the Schengen Borders Code with other provisions of EU law, especially rules regarding the free movement of citizens.²²

More controversially, however, the proposed reform would specify that "large scale unauthorized movements of third-country nationals" could justify the reintroduction of internal

¹⁵See Sandra Mantu, *Schengen, Free Movement and Crises: Links, Effects and Challenges*, 23 EUROPEAN JOURNAL OF MIGRATION AND LAW 377, at 378 (2021).

¹⁶See generally Fabian Gülzau, *A "New Normal" for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls?*, JOURNAL OF BORDERLANDS STUDIES 1 (2021) and Sarah Wolff, Ariadna Ripoll Servent & Agathe Piquet, *Framing immobility: Schengen governance in times of pandemics*, 42 JOURNAL OF EUROPEAN INTEGRATION 1127 (2020).

¹⁷This criticism was voiced already with a view to the previous reform proposal; Draft European Parliament Legislative Resolution on COM(2017) 571 of October 29, 2018, explanatory statement.

¹⁸See Daniel Thym & Jonas Bornemann, *Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics*, 5 EUROPEAN PAPERS 1143, at 1148 (2020).

¹⁹See Hanneke Van Eijken & Jorrit Rijpma, *Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona*, 17 UTRECHT LAW REVIEW 34, at 40 (2021).

²⁰The question of whether this is a correct interpretation of the public order clause has been brought to the attention of the ECJ in a preliminary reference procedure filed by the Court of First Instance of Brussels, which is currently pending. Request for a preliminary ruling from the Nederlandse rechtbank van eerste aanleg Brussel (Belgium) lodged on February 23, 2022, *NORDIC INFO v Belgische Staat* (Case C-128/22) [2022]); for an overview of the case, see Léa Schumacker, *Proportionality of Internal Border Controls: From the Covid-19 Pandemic to the 2021 Proposal*, 18 CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY 1, 13 et seq. (2022).

²¹European Commission, COM(2021) 891 final, Art 25 (1) lit. b.

²²For such a view, see Sarah Progin-Theuerkauf, *Mit Kanonen auf Spatzen: Die geplante Reform des Schengen-Systems*, 8 ZEITSCHRIFT FÜR EUROPARECHT 1, at 19 (2022).

border controls.²³ This amendment has attracted a fair share of criticism on account of its ambiguity, including from the European Parliament’s rapporteur for the file.²⁴ It appears to open floodgates to practices of reintroduced internal border controls. In the light of its wording, it is not inconceivable that Member States impose internal border controls to reduce secondary movements that do not reasonably amount to a “serious threat to public policy or internal security.”²⁵ While the Commission’s proposal tries to feather this vague wording through strict procedural requirements, particularly the duty to substantiate the existence of such a threat through objective and reliable information obtained, *inter alia*, from EU agencies,²⁶ it may still be questionable whether Member States will feel bound to respect procedural safeguards of this nature.²⁷

At an intermediate level of analysis, this new ground for reintroducing internal border control may be viewed as a case in point for reaffirming Schengen as a security project. Ever since the culmination of the so-called refugee crisis, national governments have put forward the argument that a high number of entries of third-country nationals would justify the reintroduction of internal border controls.²⁸ In the literature, this justificatory practice has been criticized as a political attempt to normalize the continued existence of internal border controls.²⁹ In this respect, it is submitted that public order or security threats do not merely exist in impending situations of danger but may emerge from less imminent situations of risk.³⁰ By including a new ground for reintroducing internal border controls to that end, the Commission’s recent reform proposal may be said to endorse such a risk-based justification. This illustrates how the security concerns of a small group of national governments made their way into the Commission’s proposal, potentially shaping the future evolution of the Schengen area.

II. Perpetuating Temporariness – What Limits to the EU Legislature’s Discretion?

The Commission’s proposal relaxes the pertinent time limits for reintroducing border controls. This may be viewed as another element of reform reaffirming the nature of Schengen as a security project. While maximum time limits used to be highly contentious,³¹ the Commission nowadays endorses the view that certain threats may persist for a considerable amount of time and that time limits for internal border controls should be adjusted accordingly. Besides minor changes in the context of unforeseeable threats, this effect can be witnessed particularly in relation to the maximum duration of border controls to combat foreseeable threats. The proposal suggests that “the possibility to prolong border control... is extended to a maximum period of two years.”³²

Upon closer reading of the proposal, however, the question can be raised as to whether the Commission’s reform would in fact even do away with the binding time limit for unilaterally introduced border controls altogether. The proposal is curiously ambiguous in this regard. It is not entirely clear whether the renewed Schengen Borders Code would allow Member States to keep internal border controls in place beyond that two-year limit in situations where there are

²³European Commission, COM(2021) 891 final, Article 25 (1) lit. c.

²⁴European Parliament, draft report no. 2021/0428, at 48.

²⁵For this criticism, see MEIJERS COMMITTEE, *Commentary on the Commission Proposal Amending the Schengen Borders Code (COM(2021) 891*, 1 at 4 (2022).

²⁶European Commission, COM(2021) 891 final, recital 29.

²⁷For previous examples of the “nonchalant” handling of procedural safeguards during crisis moments by some Member States, Thym and Bornemann, *supra* note 18 at 1148.

²⁸See Guild, *supra* note 5 at 390 et seq.

²⁹See generally Lena Karamanidou & Bernd Kasperek, *From Exceptional Threats to Normalized Risks: Border Controls in the Schengen Area and the Governance of Secondary Movements of Migration*, 37 JOURNAL OF BORDERLANDS STUDIES 623 (2022).

³⁰See *Id.*, at 627 et seq.

³¹For the practice of switching legal bases to that end, see Schumacker, *supra* note 20 at 19 et seq.

³²European Commission, COM(2021) 891 final, at 7.

persisting threats.³³ While Progin-Theuerkauf suggests that the two-year maximum duration should be imperative, Schumacker begs to differ, arguing that the proposal proposes a legal framework that may allow for the continuation of internal border controls indefinitely.³⁴

Given the ambiguity in the Commission's reform proposal, both views could be merited. On the one hand, the proposal stresses the maximum two-year time limit several times. On the other hand, the proposal adds that Member States are obliged to notify the Commission if they consider that certain exceptional situations justify the continuation of internal border controls "in excess of the maximum period referred to in Article 25(5)."³⁵ Apart from the fact that there is no Article 25(5) in the proposed amended Schengen Borders Code,³⁶ doubts may be harbored as to how this provision should be understood. Does it merely oblige Member States to inform the Commission that a threat persists? Or does the proposal insinuate that national authorities could, in such a situation, move beyond the two-year maximum period?

At first glance, the former interpretation appears to be more plausible. There would be no point in instituting a two-year time limit if Member States could exceed that period whenever they deemed it necessary. Nevertheless, an interpretation that would effectively undo the two-year period may find support in the Commission's explanations. The proposal "recognises that Member States may see the need to maintain internal border controls beyond this timeframe."³⁷ Admittedly, the proposed reform does not explicate whether, in such a situation, the Member State is to merely notify its view to the Commission, hoping for the activation of a new supranational procedure,³⁸ or whether this notification would go hand-in-hand with a prolongation of internal border controls. However, under the current and prospectively reformed Schengen Borders Code, such a notification would accompany the Member States' decision to reintroduce internal border controls.³⁹ All this suggests that the Commission's reform proposal yields to the argument of national governments that security threats may last for an indefinite period and proposes an amendment of secondary law to that end.

In any case, the Court of Justice had rendered its judgment in *Landespolizeidirektion Steiermark* in the meantime.⁴⁰ To be sure, this judgment primarily concerned the question under which circumstances Member States may unilaterally decide to reintroduce internal border controls *de lege lata*. As such, it is evident that the Court did not principally address the question in how far the EU legislature may be free to change the legal framework.⁴¹ However, the question may be raised whether guidance can be inferred from the Court's jurisprudence for the future design of the Schengen Borders Code. Does the ECJ's jurisprudence limit the discretion of the EU legislature?

Curiously, both the Council and the European Parliament's rapporteur seem to acknowledge that the judgment has implications for the reform of the Schengen Borders Code. They disagree, however, on its precise ramifications. On the one hand, the European Parliament's rapporteur considers that the absence of a maximum time limit for reintroducing internal border controls conflicts with the Court's jurisprudence.⁴² On the other hand, the Council has been more than willing to endorse an interpretation of the Commission's proposal that Member States could, in

³³This ambiguity may be deliberate, constituting an example of "conscious incompleteness in agreements and regulation" as a means to broker compromise at the supranational level, see Maartje Van der Woude, *A Patchwork of Intra-Schengen Policing: Border Games over National Identity and National Sovereignty*, 24 THEORETICAL CRIMINOLOGY 110, 114 et seq. (2020).

³⁴Cf. Progin-Theuerkauf, *supra* note 22 at 17; and Schumacker, *supra* note 20 at 35.

³⁵European Commission, COM(2021) 891 final, Article 27(a)(5).

³⁶Instead, this reference should be read as Article 25(a)(5) of the reformed Schengen Borders Code, corrected in the Council's General Approach, no. 9937/22.

³⁷European Commission, COM(2021) 891 final, at 7.

³⁸For this new avenue to reintroduce internal border controls with no maximum time period, see *infra* at C.I.

³⁹European Commission, COM(2021) 891 final, Articles 27 and Article 25(a)(2).

⁴⁰*Landespolizeidirektion Steiermark*, Joined Cases C-368/20 & C-369/20.

⁴¹A mode of interpretation that may pervade the Courts' jurisprudence of EU migration law more broadly, see generally Daniel Thym, *Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy*, 44 EUROPEAN LAW REVIEW 139 (2019).

⁴²European Parliament, draft report no. 2021/0428, comments on Art 27(a)(5).

principle, keep intact border controls indefinitely.⁴³ Although the Council Presidency, in light of the judgment in *Landespolizeidirektion Steiermark*, suggests limiting these instances to “major exceptional situations,” it does not challenge the premise that Member States may unilaterally decide to keep internal border controls intact beyond the two-year maximum period.

While the Court’s judgment is not entirely clear on this point, some indications rally against the interpretation put forward by the Council. It may be possible to infer from the Court’s reasoning certain constitutional limits to the EU legislature’s discretion, specifically those that follow from the need to properly reconcile two potentially conflicting norms in primary law. On the one hand, the ECJ acknowledges that the absence of internal border controls constitutes “one of the main achievements of the European Union in accordance with Article 3 (2) TEU” and that, consequently, any reintroduction of internal border controls should remain an exception.⁴⁴ On the other hand, Member States are responsible, pursuant to Article 72 TFEU, for safeguarding law and order and internal security. By including provisions limiting the periods of temporarily reintroduced internal border controls, the ECJ held that the Schengen Borders Code reconciles the two provisions, effectively striking a “fair balance” between them.⁴⁵

Against this backdrop, an argument can be put forward that any prospective reform of the Schengen Borders Code would equally have to meet a such “fair balance” test. Admittedly, the ECJ’s judgment in *Landespolizeidirektion Steiermark* refers to the Code *de lege lata*, namely the fact that, in the current version thereof, the EU legislature duly reconciled the objective of abolishing internal border controls and Member States’ responsibilities for safeguarding public order and security. It is not unreasonable to presume that this standard would apply to any future reform of Schengen as well. In this vein, the Court’s constitutional interpretation may impose limits on the EU legislature when drafting reforms to the Schengen area.

A requirement to strike a “fair balance” between primary law provisions does not prescribe in positive terms how such a balance would have to be attained. Instead, the EU legislature retains a relatively wide margin of discretion to decide how the two constitutional provisions should be reconciled.⁴⁶ However, this discretion would not be without limits. A legal arrangement that unduly disregards the Treaty’s objective of abolishing internal border controls or, respectively, Member States’ responsibilities to maintain public order and security would likely defy the idea of a “fair” balance. An interpretation that would effectively do away with a maximum period for unilaterally reintroduced controls would be a case in point. In *Landespolizeidirektion Steiermark*, the ECJ specifically took issue with an interpretation that would have allowed Member States to keep internal border controls in place for an unlimited period. In the view of the Court, this would compromise some of the foundational objectives of the EU, especially the principled abolition of internal border controls and the free movement of persons.⁴⁷ Against this backdrop, there is a good case to be made that a legal arrangement, such as the one proposed by the Commission and supported by the Council, would be incompatible with the constitutional underpinnings of Schengen law.

III. Security Checks and New Forms of Controls in Border Regions

An important role in the formation of Schengen as a security project is attributed to police checks in border regions.⁴⁸ Such checks are permitted under the Schengen acquis, provided they do not

⁴³Council, general approach, no. 9937/22, at 4.

⁴⁴ECJ, C-368/20 & C-369/20, para. 65.

⁴⁵*Id.*, para. 88.

⁴⁶The ECJ may be respectful, to the democratic processes underlying the (ordinary) legislative procedure; see Koen Lenaerts, *The Principle of Democracy in the Case Law of the European Court of Justice*, 62 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 271 (2013).

⁴⁷On this point, see already generally Salomon and Rijpma, *supra* note 2.

⁴⁸See seminally and generally Cyrille Fijnaut, *The Schengen Treaties and European Police Co-operation*, 1 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 37 (1993).

create an effect equivalent to border control.⁴⁹ The Schengen Borders Code non-exhaustively lists aspects that indicate whether a measure may be viewed as lawful or not. For example, police checks that do not have border control as their objective and those based on general police information and experience – carried out in a manner clearly distinct from systemic checks on persons at external borders and taking the form of spot-checks – can safely be presumed to be compatible with the Schengen Borders Code.⁵⁰ While the Court of Justice insisted that such measures must be governed by a regulatory framework that is “sufficiently precise and detailed,”⁵¹ there can be no doubt that the Schengen *acquis* leaves Member States (and, by extension, national police authorities) a wide measure of discretion.⁵²

The Commission has promoted the active use of this discretion as an alternative to reinstating internal border controls.⁵³ Police checks in border regions are thus conceived of as a compensatory measure that makes amends for the security risks that would perceptibly follow from the abolition of internal border controls.⁵⁴ However, the success of this strategy is questionable. So far, it did not ultimately motivate Member States to lift reinstated border controls.⁵⁵ Instead, the Commission’s advocacy in favor of police checks in the border region falls neatly in line with a more general change in the governance of border control in Europe.⁵⁶ While Schengen integration may have contributed to a decline of border control as a phenomenon of static interception at state lines, it impels the increased use of flexible spot checks by police forces that extend into border regions.⁵⁷

The emergence of a “patchwork of intra-Schengen policing” can be presented as an epiphenomenon of Schengen integration.⁵⁸ However, its exact contours remain difficult to sketch. The legal mandates of border police vary widely, investigations documenting their practices are hard to come by, and where they exist, they only relate to specific border regions.⁵⁹ While extended police measures in border regions may reasonably be presumed to exist in many national legal systems, these practices have only been brought to the attention of the Court of Justice in a small number of cases. In its jurisprudence, the Court accepted police checks at motorways⁶⁰ and trains but indicated that it would not accept any national legal arrangement on that point without a passing thought.⁶¹ In *Touring Tours*, for instance, the Court decided that a German law requiring coach companies to check passenger’s passports and residence permits before crossing internal borders did not meet the standard of setting sufficiently precise boundaries to these checks, thus amounting to an “effect equivalent to border controls” incompatible with the Schengen Borders Code.⁶²

⁴⁹Article 23 Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁵⁰Case C-278/12 PPU, *Adil*, ECLI:EU:C:2012:508, July 19, 2012, paras 57 et seq.

⁵¹Case C-9/16, *A*, ECLI:EU:C:2017:483, June 21, 2017, paras 38 et seq., 59.

⁵²See Jonas Bornemann, *Mitgliedstaatliche Gestaltungsspielräume im Schengener Grenzkodex – Folgen für einen Raum ohne Kontrollen an Binnengrenzen*, 41 *INTEGRATION* 194, 201–202 (2018).

⁵³European Commission, Recommendation (EU) 2017/820.

⁵⁴See De Somer, *supra* note 14 at 187 et seq.

⁵⁵See *supra* at B.I.

⁵⁶See already generally Kees Groenendijk, *New Borders Behind Old Ones: Post-Schengen Controls Behind the Internal Borders and Inside the Netherlands and Germany*, in *IN SEARCH OF EUROPE’S BORDERS* 131 (Kees Groenendijk, Elspeth Guild & Paul Minderhoud eds., 2002).

⁵⁷See Galina Cornelisse, *Reinstatement of Internal Border Controls in the Schengen Area: Conflict, Symbolism and Institutional Dynamics*, in *20 YEARS ANNIVERSARY OF THE TAMPERE PROGRAMME: EUROPEANISATION DYNAMICS OF THE EU AREA OF FREEDOM, SECURITY AND JUSTICE*, 83 (Sergio Carrera, Deirdre Curtin & Andrew Geddes eds., 2020).

⁵⁸Van der Woude, *supra* note 33.

⁵⁹See Sara Casella Colombeau, *Policing the internal Schengen borders – Managing the double bind between free movement and migration control*, 27 *POLICING AND SOCIETY* 480 (2017).

⁶⁰ECJ, C-278/12 PPU, *Adil*, ECLI:EU:C:2012:508.

⁶¹See De Somer (n 13) 188, with reference to Jorrit Rijpma, *A rose by any other name: Het Hof van Justitie stelt grenzen aan controles binnen het Schengengebied*, 5–6 *NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT* 128 (2019).

⁶²ECJ, C-412/17 & C-474/17, *Touring Tours*, ECLI:EU:C:2018:1005, para. 71.

1. A Differentiated Regime for Third Country Nationals: “Secondary Movement” as a Threat

Cross-border travel of persons unauthorized to do so has been a constant concern of national security actors ever since the inception of the Schengen area.⁶³ In recent years, however, this phenomenon has been prominently associated with the cross-border mobility of third-country nationals, specifically the so-called “secondary movement.” The fact that third-country nationals may irregularly move across Schengen’s internal borders attracted the better part of attention, serving, *inter alia*, as a frequent justification for the introduction of internal border controls by Member States.⁶⁴ Even though the Commission endorsed these concerns in principle, it submits that alternatives to reintroducing internal border controls are available under EU law and that these measures are more efficient in tackling the (perceived) threats emanating from unauthorized cross-border mobility of third-country nationals.⁶⁵ Besides the option of Member States to adopt bilateral readmission agreements, this strategy is primarily aimed at promoting the use of police controls in border regions.⁶⁶

The Commission’s latest reform proposal would codify attempts to afford greater prominence to police checks in border regions to counter “secondary movement.” The proposal would include a procedure for specifically transferring third-country nationals apprehended near an internal border. This new procedure would apply exclusively to third country nationals. This is remarkable in and of itself, given that EU citizens may equally (although exceptionally) be excluded from legal entry or stay in another Member State.⁶⁷ Where a third-country national is apprehended as a result of a joint police operation close to an internal border without fulfilling the conditions for lawful entry, and there are clear indications that the person entered from another Member State, the person concerned should be transferred to the Member State from which s/he had presumably entered. The procedural rules to this end are spelled out in Annex XII, explicating, *inter alia*, that the person concerned has the right to appeal to national laws without creating a suspensive effect.⁶⁸

The limited procedural guarantees enshrined in this fast-track procedure raise serious doubts regarding its conformity with other EU migration law instruments and the Charter of Fundamental Rights. First, the Commission’s proposal appears to address all third-country nationals alike, irrespective of their legal status. Accordingly, the question may be raised whether the fast-track procedure would apply to international protection seekers. If it does, how would such a direct transfer be construed in the light of the Dublin III Regulation?⁶⁹ Does it imply that Member States could, in such a situation, decide to disapply the rules on transfers laid down in the Dublin system?⁷⁰ The Commission’s reform proposal remains silent on this point. There are thus several conceivable options on how to conceptualize the interplay of the two instruments. It is not entirely unreasonable, for instance, to qualify the fast-track transfer procedure as an activation of the discretionary clause in Article 17 of the Dublin III Regulation. If this was the legal solution envisioned by the Commission, it would require protection seekers to have lodged their application in the Member State to which they are being transferred⁷¹ – a factual requirement that will often not be fulfilled in practice.

Second, pronounced criticism has been leveled at the proposed fast-track transfer procedure from a fundamental rights perspective. There are doubts as to whether such an arrangement would be

⁶³Despite the contested empirical validity of such claims, one should add, see De Somer, *supra* note 14 at 180.

⁶⁴See Karamanidou and Kasparek, *supra* note 29 at 633 et seq.

⁶⁵Commission, Recommendation (EU) 2017/820.

⁶⁶See *supra* at B.III. and Vasiliki Apatzidou, *Schengen Reform: ‘Alternatives’ to Border Controls to Curb ‘Secondary Movements’* 7 EUROPEAN PAPERS INSIGHT 573, at 576 et seq. (2022).

⁶⁷See Ioana Vrăbescu, *Deportation, smart borders and mobile citizens: Using digital methods and traditional police activities to deport EU citizens*, 48 JOURNAL OF ETHNIC AND MIGRATION STUDIES 1891 (2022).

⁶⁸European Commission, COM(2021) 891 final, Annex XII, Part A, 5. In the same reform package, the Commission clarified that this provision would not prejudice Member States’ ability to return a person in the context of a bilateral agreement under Article 6 (3) of the Return Directive.

⁶⁹See similarly Meijers Committee, *supra* note 25

⁷⁰For such an interpretation, see Apatzidou, *supra* note 68 at 578.

⁷¹ECJ, C-213/17, X, ECLI:EU:C:2018:538, para. 60.

compatible with the prohibition of refoulement and the jurisprudence of the ECtHR.⁷² Moreover, the feasibility of such a practice has likewise been questioned from the perspective of Article 21 of the Charter of Fundamental Rights, which spells out a prohibition of discrimination based, *inter alia*, on race, color, ethnic or social origin, or genetic features. It is submitted that it is doubtful how such a fast-track transfer procedure could be operated without racial profiling practices.⁷³

In any case, the Commission's efforts to incentivize bilateral cooperation between national (police) authorities in border regions can be seen as another element of reform reaffirming the nature of Schengen as a security project.⁷⁴ However, it is important to acknowledge that the new fast-track procedure would be aimed exclusively at third-country nationals, thus establishing a differentiated regime at internal borders.⁷⁵ This would incentivize national police authorities to check third-country nationals in border regions while keeping disruption to cross-border mobility to a bare minimum for anyone else. Such a reform would make amends for the (perceived) threat of "secondary movement" caused by unauthorized border crossings of third-country nationals.

2. Collecting and Processing Data on Intra-Schengen Travel

In addition to a differentiated regime of police controls in border regions, the governance of internal borders changed remarkably following the emergence of new technologies.⁷⁶ For quite some time, it has been questionable whether the use of surveillance and monitoring technologies at internal borders could be viewed as compatible with the Schengen acquis. The Court of Justice sticks to a traditional conception of border control, namely the one that views only tangible interceptions at states' territorial fault lines as such.⁷⁷ Accordingly, the legality of using technologies of such a nature centers the question on whether they create an effect equivalent to border control.⁷⁸ On the one hand, monitoring and surveillance technologies allow for a relatively uninterrupted flow of travel and may, therefore, be preferable to static interceptions at borders properly. On the other hand, following the ECJ's jurisprudence on alternative measures in border regions, these technologies would have to be governed by a legal framework in national law that ensures that controls of that nature do not amount to an effect equivalent to border control.⁷⁹

The Commission's proposed reform would explicitly emphasize that the Schengen Borders Code does not prevent Member States from using passenger data for monitoring and surveillance, even at intra-Schengen borders.⁸⁰ This amendment could have far-reaching implications. It must be read in conjunction with proposed changes to related EU instruments on the gathering of personal data of cross-border travellers.⁸¹ The combined effects of these reforms beg the question of whether Member States would ultimately be authorized to collect, store, and process the personal data of those who cross Schengen's internal borders.⁸²

⁷²See Apatzidou, *supra* note 68 at 579 et seq.

⁷³See *Id.* at 580 and Progin-Theuerkauf, *supra* note 22 at 20.

⁷⁴Even though transnational cooperation between national administrations is certainly no peculiarity of the Schengen acquis, see generally Jürgen Bast, *Transnationale Verwaltung des Europäischen Migrationsraums: Zur horizontalen Öffnung der EU-Mitgliedstaaten*, 46 DER STAAT 1 (2007).

⁷⁵See Monika Weissensteiner, *Cross-Border Police Cooperation and 'Secondary Movements.'* On Reconfigurations in Enforcing Differential Mobility Rights within the Spatial-Legal Schengen Space, 17 UTRECHT LAW REVIEW 73, 83 et seq. (2021).

⁷⁶See generally Julien Jeandesboz, *Ceci n'est pas un contrôle: PNR Data Processing and the Reshaping of Borderless Travel in the Schengen Area*, 23 EUROPEAN JOURNAL OF MIGRATION AND LAW 431 (2021).

⁷⁷See Cornelisse, *supra* note 57 at 83.

⁷⁸See Progin-Theuerkauf, *supra* note 22 at 20.

⁷⁹See De Somer, *supra* note 14 at 189.

⁸⁰European Commission, COM(2021) 891 final, Article 23 (e).

⁸¹Specifically, the so-called Advance Passenger Information Directive, Council Directive 2004/82/EC.

⁸²For this fear, see Leon Züllig, *Evolution and Mutation in the EU's DNA. The Proposal for a Reform of the Schengen Borders Code*, VERFASSUNGSBLOG (2022), <https://verfassungsblog.de/evolution-and-mutation-in-the-eus-dna/>.

This scenario is not hypothetical. Emboldened by the fact that the Passenger Name Record (PNR) Directive allows Member States to collect and process information at selected intra-EU flights,⁸³ Belgium adopted a legal framework that applied the Passenger Name Record (PNR) data collection regime in a sweeping fashion to all internal Schengen border crossings. This national legal arrangement did not just apply to air travel but extended to rail, road, and sea border crossings. In *Ligues des droits humains*, the Court of Justice had the chance to pronounce itself on the compatibility of such a legal arrangement with EU law.⁸⁴

The Court acknowledged the far-reaching implications that practices of monitoring and storing personal data may have on the free movement of persons in the EU and, by extension, for establishing an area without internal border controls. In its judgment, it emphasized that national legislation that places certain nationals at a disadvantage simply because they have exercised their right to free movement constitutes a restriction on Article 45 of the Charter of Fundamental Rights.⁸⁵ While such restrictions can, in principle, be justified, the Court did not explicitly answer the question whether the Belgian national legal arrangement could be justified under EU constitutional law. Instead, it highlighted that the secondary law provisions in the PNR Directive indicate that the collection of data for the purpose of improving border controls and combatting illegal immigration conflicted with the said Directive because the latter did not mention these purposes of data collection.⁸⁶ Moreover, the storage of data of persons travelling across intra-Schengen borders, either by virtue of the PNR or by so-called advanced passenger information (gathered in line with the API Directive),⁸⁷ would allow Member State authorities to systematically ensure that those passengers were authorized to enter its territory or leave it.

This suggests that the Court's jurisprudence ultimately hinges on secondary law *de lege lata* interpretations. The limits imposed on Member States to collect and process data for intra-Schengen travel derive from the Court's interpretation of the PNR Directive, specifically the exhaustively listed purposes for which this data can be collected.⁸⁸ Under the current legal framework, improving border controls and combating illegal immigration are no acceptable options. Conversely, the Court's jurisprudence appears not to forestall any reforms of the said instruments.

C. Towards a Gradual Supranationalization of Schengen Governance

Decision-making on borders is traditionally viewed as the gem in the crown of national sovereignty.⁸⁹ Perhaps it is therefore not surprising that Schengen never ultimately called into question the authority of national decision makers to reintroduce internal border controls. Rather, when the Commission proposed to assume delegated decision-making authority itself in this regard in 2011, many Member States signalled their fierce opposition, emphasizing that the decision to reinstate internal border controls should remain a national prerogative.⁹⁰ At the same time, the evolution of the Schengen acquis can reasonably be described in terms of gradual supranationalization. Following a series of reforms, Member States' latitude to reintroducing internal border controls has become increasingly limited, both procedurally and substantively.

⁸³Directive (EU) 2016/681, Article 2.

⁸⁴*Ligue des droits humains*, Case C-817/19.

⁸⁵*Id.*, paras 279 et seq.

⁸⁶*Id.*, para. 288.

⁸⁷Council Directive 2004/82/EC, and the Commission's proposal to amend that instrument, European Commission, Proposal for a Regulation of the European Parliament and the Council. On the collection and transfer of advance passenger information (API) for enhancing and facilitating external border controls, amending Regulation (EU) 2019/817 and Regulation (EU) 2018/1726, and repealing Council Directive 2004/82/EC, COM (2022) 729 final, Dec. 13, 2022.

⁸⁸*Id.*, para. 288.

⁸⁹See Cornelisse, *supra* note 1 at 743.

⁹⁰See Coman, *supra* note 10 at 692.

Besides time limits that ensure the temporary nature of reintroduced internal border controls, substantive instructions and limits in supranational law follow from successive refinements to the proportionality principle in the Schengen Borders Code.⁹¹

Nonetheless, the question of who gets to decide on reintroducing internal border controls has not been resolved. For most of its existence, the Schengen acquis strived for a “subtle balance”⁹² between supranationalization and national decision-making latitude. This balance may have been upset lately. As a corollary to a perpetuated state of crisis in the Schengen area, it is not unreasonable to argue that some national governments have grown accustomed to treating their borders as a quasi-sovereign domain.⁹³ The practice of repeated prolongations of internal border controls suggests as much, indicating that – in a field so intimately linked to sovereignty – Member States may find ways to disregard procedural safeguards, including maximum time periods.

For supranational actors, this may be problematic. Schengen serves a legitimizing function for the European project itself. As Zaiotti insightfully argued, the EU institutions’ mantra-like depiction of Schengen as one of the most outstanding achievements of European integration aims to legitimize the supranational project *vis-à-vis* growingly skeptical audiences.⁹⁴ Failure to deliver on a promise vital to supranational law, such as ensuring the absence of internal border controls, may undermine the authority of supranational actors. Against this backdrop, it may be understandable that the European Parliament has voiced its discontent with the fact that a “truly European governance of the Schengen area” is still missing.⁹⁵

In its latest reform proposal, the Commission responded to calls of this nature. It suggested introducing a new supranationalized procedure for the reintroduction of border controls. However, this procedure would complement existing ones, forming an additional avenue for border controls (*I*). One of the most tangible legacies of vertical power conflicts surrounding the reintroduction of border controls relates to enforcement practices. Despite serious doubts about the compatibility of these practices with the Schengen Borders Code, there is a well-documented reluctance in the Commission to file infringement procedures over a national decision to reintroduce or prolong internal border controls.⁹⁶ As will be argued, the Commission’s reform would sound out avenues for alternative forms of enforcement without indicating whether it may be complemented by more active use of binding enforcement measures (*II*).

1. Supranationalization at the Expense of the Abolition of Internal Border Control?

The reintroduction of internal border controls has been a focal point of vertical power conflicts.⁹⁷ Ever since the infamous Franco-Italian affair over border crossings in Ventimiglia, national actors have made clear that they would not accept a legal framework that ultimately stripped them of the power to introduce internal border controls.⁹⁸ For Member States, the security functions of internal border controls and the possibility of reintroducing such controls unilaterally remain vital.⁹⁹

⁹¹See generally Schumacker, *supra* note 20.

⁹²This expression is borrowed from Yves Pascouau, *The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach*, EPC DISCUSSION PAPER 1 (2013).

⁹³For this phenomenon during the initial phases of the pandemic, see Thym and Bornemann, *supra* note 18 at 1147 et seq.

⁹⁴See Ruben Zaiotti, *Performing Schengen: myths, rituals and the making of European territoriality beyond Europe*, 37 *REVIEW OF INTERNATIONAL STUDIES* 537, at 538 et seq. (2010).

⁹⁵European Parliament Resolution P9_TA(2020)0175, at para. 17.

⁹⁶See De Somer, *supra* note 14 at 185.

⁹⁷See Coman, *supra* note 10 at 691 et seq.

⁹⁸See Ruben Zaiotti, *The Italo-French row over Schengen, critical junctures, and the future of Europe’s border regime*, 28 *JOURNAL OF BORDERLANDS STUDIES* 337 (2013).

⁹⁹See Evrard, Nienaber, and Sommaribas, *supra* note 3 at 381.

Against this backdrop, the Commission's latest reform proposal attempts the impossible. On the one hand, it genuinely leaves the Member States' decision-making powers over the reintroduction of internal border controls intact. On the other hand, it proposes a clarification of existing procedures for reintroducing internal border controls and adds a new, more Europeanized procedure to that end.¹⁰⁰ In this vein, it can be interpreted as an attempt to garner support from national governments in the Council, given that the proposed reform does not strip Member States of procedures to introduce internal border controls unilaterally. By complementing these procedures with one that involves both the Commission and the Council, the proposal responds to calls by the European Parliament rallying for a "truly European governance of the Schengen area."¹⁰¹

If the Commission's reform proposal were to become law, this would make four procedures to reintroduce internal border controls in total. The first two relate to instances in which Member States decide to do so unilaterally. These procedures can be found in Article 25a, aimed at situations where immediate action is needed in light of foreseeable and unforeseeable events.¹⁰² In addition, two procedures authorize the reintroduction of internal border controls collectively. An already existing procedure to that end is enshrined in Article 29, which may be activated once the overall functioning of the Schengen area is put at risk due to "persistent serious deficiencies relating to external border control." In such a situation, the Commission would propose the Council to adopt a recommendation to that end. This may have served as a blueprint for a newly proposed fourth procedure.

To activate this new procedure, the Commission would similarly propose that the Council adopts an implementing decision – a legally binding measure – to determine a coordinated approach for reintroducing internal border controls, which would replace national measures. It applies to situations where a threat to public policy or internal security is said to imperil the overall functioning of the area without internal borders. The insertion of this new procedure would constitute a genuine novelty in the Schengen acquis. It spells out a supranationalized and legally binding avenue for reintroducing internal border controls. In this respect, the Commission's proposal would allow EU institutions to determine which situations justified a collective reinstatement of temporary border controls in the Schengen area. In addition, it would not be subject to any maximum time limit, thereby allowing the controls to be maintained beyond the two-year period,¹⁰³ arguably limiting unilaterally reintroduced controls.

From a pro-integrationist perspective, this new procedure may be hailed as a first tentative step towards supranationalized governance of the Schengen regime of internal border controls. This should not, however, gloss over the fact that this amendment would constitute an additional avenue for reintroducing and continuing border controls. Supranationalization, in this sense, would come at the expense of yet another avenue for departing from the principled abolition of internal border controls. Against that backdrop, it may be concluded that recent efforts to reform Schengen, including the one currently proposed, propagate avenues for reintroducing internal border controls.

II. Varieties of Enforcement – Part of the Problem or Part of the Solution?

It may be remarkable to note that Member States' decisions to reintroduce internal border controls have never been subject to direct scrutiny by the ECJ.¹⁰⁴ Although the Court had

¹⁰⁰See Jonas Bornemann, *Of coordinated approaches and fair-weather arrangements: The EU crisis response to COVID-19 mobility restrictions*, in PANDEMISCHES VIRUS - NATIONALES HANDELN. COVID-19 UND DIE EUROPÄISCHE IDEE, 97 (Dominik Brodowski, Jonas Nesselhauf & Florian Weber eds., 2023).

¹⁰¹European Parliament Resolution P9_TA(2020)0175, at para. 17.

¹⁰²European Commission, COM(2021) 891 final, Art 25a (4).

¹⁰³For doubts on this point, see *supra* at B.II.

¹⁰⁴See Cornelisse, *supra* note 57 at 89.

interpreted the relevant provisions in the Schengen Borders Code on several occasions, its jurisprudence results exclusively from indirect challenges in the context of the preliminary reference procedure.¹⁰⁵ Given the prevalence and persistence of reintroduced internal border controls, the absence of direct challenges to Member States' reintroduction of internal border controls may raise eyebrows. It speaks to the principled reluctance of the Commission to initiate infringement procedures.¹⁰⁶ It may be correct to note that the Commission acts as a "mediator" between Member States rather than a true advocate of compliance with EU law, including the primary law objective of border-control free travel.¹⁰⁷

The extremely reticent role of the Commission in enforcing the applicable legal framework can be presented as one of the causes of the dire straits in which the Schengen area finds itself. Such a damning conclusion, however, does not grasp the complete picture of enforcement in the context of the Schengen *acquis*. It ignores the fact that supranational enforcement strategies may assume different degrees of formality and visibility, with the judicial phase of the infringement procedure being the most visible embodiment of centralized enforcement.¹⁰⁸ There is a spectrum of different means of enforcement, several of which can be detected in the governance of the Schengen area and decision-making in the context of reintroduced internal border controls specifically. This effect can prominently be exemplified with a view to the Schengen Evaluation and Monitoring Mechanism (1) and increased efforts to inspire a mode of transnational coordination and consultation (2).

1. Schengen Evaluation Mechanism and the Absence of Infringement Procedures

The Schengen *acquis* is home to a specific peer-to-peer monitoring arrangement, the so-called Schengen Evaluation and Monitoring Mechanism (SEMM). This mechanism includes Member State experts who work with the Commission to assess the implementation of practices on the ground.¹⁰⁹ Following recent reforms,¹¹⁰ this collaboration draws heavily from on-site visits and indicates the steps to be taken if it detects shortcomings.¹¹¹ Substantively, the SEMM allows for monitoring of all matters relating to the Schengen *acquis*, including the oversight of external borders, visa policies, and measures at internal borders. A peer-to-peer evaluation of such nature does not produce legally binding effects, but its practical outcome should not be understated.¹¹² Such a mechanism may often pressure national authorities to bring back in line practices that conflict with EU law, even in the absence of litigation before the Court of Justice.¹¹³

¹⁰⁵Joined Cases C-188/10 and C-189/10, Melki & Abdeli, ECLI:EU:C:2010:363; *Adil*, Case C-278/12 PPU; A., Case C-9/16, Case C-444/17, Arib, ECLI:EU:C:2019:220 and *Landespolizeidirektion Steiermark*, Joined Cases C-368/20 & C-369/20.

¹⁰⁶See Salomon and Rijpma, *supra* note 2 at 6 and, aptly, Pola Cebulak & Marta Morvillo, *The Guardian is Absent. Legality of Border Controls within Schengen before the European Court of Justice*, VERFASSUNGSBLOG (2021), <https://verfassungsblog.de/the-guardian-is-absent/> (accessed Feb. 10, 2023).

¹⁰⁷Elspeth Guild et al., *Internal border controls in the Schengen area: Is Schengen crisis-proof?*, STUDY FOR THE LIBE COMMITTEE, 72 (2016).

¹⁰⁸See generally Melanie Smith, *The Visible, the Invisible and the Impenetrable: Innovations or Rebranding in Centralized Enforcement of EU Law? in* NEW DIRECTIONS IN THE EFFECTIVE ENFORCEMENT OF EU LAW AND POLICY at 45–76 (Sara Drake & Melanie Smith (eds), Edward Elgar 2016).

¹⁰⁹For an overview of the mechanism and its role in enforcement, see Stine Andersen, *Non-Binding Peer Evaluation within an Area of Freedom, Security and Justice*, in FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION. INTERNAL AND EXTERNAL DIMENSIONS OF INCREASED COOPERATION AFTER THE LISBON TREATY 29, 31 et seq. (Ronald Holzacker & Paul Luif eds., 2014).

¹¹⁰Council Regulation (EU) 2022/922.

¹¹¹See European Commission, COM(2021) 277 final, at 20.

¹¹²For empirical insights, see Martin Wagner et al., *The state of play of Schengen Governance: An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme*, STUDY FOR THE LIBE COMMITTEE 1 at 47–59 (2020). Regarding the case of Norway, see generally STEIN ULRICH, MARTIN NÖKLEBERG & HELENE GUNDHUS, SCHENGEN EVALUATION - AN EDUCATIONAL EXPERIENCE. THE EXAMPLE OF NORWAY at 196–199 (2020).

¹¹³See Daniel Schade, *Crisis-proof Schengen and freedom of movement: Lessons from the Covid-19 pandemic*, JACQUES DELORS CENTRE POLICY PAPER 1, 13 (2021).

Formally (and evidently), the Schengen Evaluation and Monitoring Mechanism does not preclude the initiation of infringement procedures by the Commission. In legal terms, the two are independent mechanisms.¹¹⁴ As Article 70 TFEU – the legal basis for the Council Regulation establishing the SEMM – clearly indicates, such an evaluation mechanism will exist “[w]ithout prejudice to Articles 258, 259 and 260 [TFEU].” Politically, however, the Commission’s reluctance to initiate infringement procedures may be explained, at least in part, by the existence of the SEMM. As De Somer elucidates, in matters intimately linked to sovereignty, such as the reintroduction of border controls, the Commission may feel naturally inclined to favor peer-to-peer reviews over legally binding centralized enforcement.¹¹⁵ Accordingly, it may not be surprising that the Commission eschewed the initiation of infringement procedures and looked to peer-to-peer evaluations instead.

However, a gradual change of heart can be detected more recently. In its 2021 Schengen strategy, the Commission indicated that it was willing to “make a more systematic use of the synergies between the Schengen Evaluation and Monitoring Mechanism and infringement procedures.”¹¹⁶ Accordingly, the assessment of whether to initiate an infringement procedure against a Member State will, prospectively, be informed by the outcome of the SEMM, effectively linking the two. This signals a growing willingness within the Commission to utilize the infringement procedure in relation to Member States’ decisions to reintroduce internal border controls. On a strategic level, this would approximate the Commission’s approach in the Schengen acquis to its general policy on infringement procedures.¹¹⁷ Nonetheless, it should be noted that the Commission’s Schengen strategy is cautiously worded. There can be no foregone conclusion that the Commission would initiate an infringement procedure once the SEMM furnishes proof of shortcomings, nor does the Schengen strategy outline which misconduct would give rise to an infringement procedure.¹¹⁸ Instead, it merely sketches in broad strokes that a “systematic” failure to follow recommendations or “persistent deficiencies” may bear these consequences without indicating which instances may qualify as such.¹¹⁹

The Commission’s proposal may potentially allow for a more active use of the infringement procedure, nonetheless. The strengthening of the obligation to notify any reintroduction or prolongation of internal border controls may form a useful prerequisite in this regard. Following this limb of reform, Member States must clearly spell out the reasons underlying their decision, substantiate their conclusion with relevant data, and – where border controls have been in place for six months – carry out a risk assessment.¹²⁰ This may be viewed as an attempt to improve previous practices of half-hearted justifications for the reintroduction of internal border controls.¹²¹ While this need not impel the Commission to initiate infringement procedures, it allows for a clearer appraisal of the reasons that underlie internal border control measures, informing the Commission’s assessment of their proportionality and necessity.

2. Coordination and Consultation

Against the backdrop of the Commission’s hesitance to initiate infringement procedures, recent developments in the governance of the Schengen area focus on less formalized enforcement methods. This reflects a general trend in the Commission’s political strategy – to reduce the legal layer of enforcement and look for other ways of exerting pressure on non-conforming Member

¹¹⁴See Andersen, *supra* note 111 at 33.

¹¹⁵See De Somer, *supra* note 14 at 185 et seq.

¹¹⁶European Commission, COM(2021) 277 final, at 21.

¹¹⁷European Commission, Communication, EU law: Better results through better application, 2017/C 18/02, Jan. 19, 2017.

¹¹⁸See generally Jonas Bornemann, *The Commission’s proposed reform of the Schengen area – stronger enforcement or conflict aversion?*, EU LAW ENFORCEMENT (2022), <https://eulawenforcement.com/?p=8157> (last visited Feb 16, 2023).

¹¹⁹European Commission, COM(2021) 277 final, at 21.

¹²⁰European Commission, COM(2021) 891 final, Article 27.

¹²¹See De Somer, *supra* note 14 at 180 and Sergio Carrera et al., *The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016*, STUDY FOR THE LIBE COMMITTEE 1, at 11 et seq. (2018).

States.¹²² The establishment of the Schengen Forum may serve as a case in point. It centers on the idea of creating an *esprit de corps* among national and supranational stakeholders. Through biannual meetings, the Commission, Members of the European Parliament, national ministers of justice and home affairs, representatives of the competent EU agencies, and national authorities tasked with the practical implementation of the Schengen *acquis* are encouraged to exchange views on a regular basis. This may have the effect that national decision-makers become more aware of the transnational implications of unilateral decisions in this field of law and – above all – in the context of reinstated internal border controls.¹²³

From a purely legal perspective, such forms of coordination and political steering may often be overlooked or discredited as desperate attempts to revive the principled absence of internal border controls in the Schengen area. However, as experiences from the first phase of the COVID-19 pandemic illustrate, the effects of such a coordination should not be ignored.¹²⁴ As a form of “coordinative Europeanization,” it may create significant repercussions in practice.¹²⁵ First, as the Commission highlights, the discussions in the Schengen Forum fed into its Schengen Strategy and may, by extension, have left a mark on the proposed reform of the Schengen Borders Code.¹²⁶ Second, the effects of such coordination, in conjunction with other factors, may explain the reluctance of several Member States to reintroduce internal border controls in the face of a new COVID-19 variant in December 2021.¹²⁷

To some extent, the proposed reform of the Schengen Borders Code would formalize the practice of coordination. Once a Member State considers reinstating or prolonging internal border controls, the new legal framework would allow the Commission to initiate a consultation process and to call for joint meetings of the relevant stakeholders.¹²⁸ While the representatives of the Member State contemplating such a measure are prompted to take “utmost account of the results of such consultation,” there is no legal obligation to lift internal border controls. Rather, the effects of this form of coordination materialize in the absence of legal enforcement. The Commission may thereby be able to exert pressure on national decision-makers without having to utilize the infringement procedure.

D. Risking Schengen as a Citizenship Project?

The proposed changes to the Schengen *acquis* are a prime example of “cooperative re-bordering.”¹²⁹ The combination of amendments pandering to national security concerns, elements of gradual supranationalization, and forms of cooperation illustrates that reaffirming Member States’ discretion to adopt unilateral decisions need not necessarily amount to disintegration. To the contrary, the Commission’s reform proposal incentivizes transnational cooperation, for instance, of police authorities in border regions or formalizes supranational cooperation, in so-called Schengen fora and elsewhere.

This re-bordering does not exclusively relate to border controls proper. Although the Commission’s reform expands Member States’ latitude to formally reintroduce border controls, one of its main foci concerns the propagation of alternative measures that would reduce the perceived need for formally reintroduced internal border controls. As the preceding analysis

¹²²For a quantitative overview illustrating this effect, see Andreas Hofmann, *Is the Commission levelling the playing field? Rights enforcement in the European Union*, 40 JOURNAL OF EUROPEAN INTEGRATION 737, 739 (2018).

¹²³European Commission, COM(2021) 277 final, at 16.

¹²⁴See Thym and Bornemann, *supra* note 18 at 1151 et seq.

¹²⁵Stella Ladi & Sarah Wolff, *The EU Institutional Architecture in the Covid-19 Response: Coordinative Europeanization in Times of Permanent Emergency*, 59 JOURNAL OF COMMON MARKET STUDIES 32 (2021).

¹²⁶European Commission, COM(2021) 277 final, at 3.

¹²⁷See Bornemann, *supra* note 103 at 104 et seq.

¹²⁸The Council proposes to make this consultation process mandatory; see Council, General approach, no. 9937/22, at 4.

¹²⁹A term borrowed from Johanna Pettersson Fürst, *Defensive integration through cooperative re-bordering? How member states use internal border controls in Schengen*, JOURNAL OF EUROPEAN PUBLIC POLICY 1 at 1 (2023).

suggests, the reform proposal particularly promotes (police) spot-checks in border regions and practices of monitoring and surveillance through automatized data collection and processing. This alludes to the fact that the nature of border controls inside the Schengen area is continuously changing. Static checks at borders are gradually (but not ultimately) lifted in favor of more flexible and targeted measures in border regions and may be complemented by a relatively intangible mode of control that centers on the collection of data on cross-border travels.

This reconceptualization of internal border controls has significant advantages in practice. It allows national authorities to safeguard internal security and public order while limiting disturbances to traffic and nuisance for cross-border travellers to a minimum. However, it may risk the spatial experience to which Schengen lends its name, thereby undermining the identity-creating dimension of Schengen integration. The Commission's reform proposal puts forward a logic of Schengen integration that focuses primarily on reducing waiting times and disruptions to cross-border travel rather than maintaining an area in which controls at borders are largely absent (*I*). This raises the question of how far such a reconceptualization of border controls could be compatible with the constitutional foundations of the Schengen acquis, especially in light of the Court's recent jurisprudence (*II*).

I. Competing Logics of Schengen: Reducing Waiting Times or a Genuine Abolition of Controls?

As the preceding analysis suggests, the Commission's latest Schengen reform proposal advocates in favor of measures that keep the security functions of borders largely intact while limiting obstacles to cross-border mobility to a minimum. Arguing for increased use of alternative measures – such as spot-checks in border regions or automatized data collection and processing – prioritizes relatively flexible forms of control over the static and sweeping reintroduction of border controls. On an intermediate level of abstraction, however, this alludes to a conflict of logics that underlie Schengen integration. It raises the question of whether Schengen should be viewed as a project that principally does away with controls at borders or whether it is, in the alternative, primarily aimed at reducing waiting times and removing obstacles to cross-border mobility.

This question is no trifle. As Salomon and Rijpma forcefully argued, Schengen integration has been an identity-creating project from the outset, epitomizing a spatial experience of unchecked cross-border mobility.¹³⁰ It served the political vision of eradicating borders as a “concrete reminder to the ordinary citizen that the construction of a real European Community is far from complete” – as the Commission's seminal White Paper on the completion of the internal market famously put it.¹³¹ However, the Commission's reform proposals risk tainting that vision. Due to the propagation of new avenues for reintroducing internal border controls, coupled with a reluctance to initiate infringement proceedings, it is questionable whether this reform would discourage Member States from reintroducing internal border controls.¹³² In addition, it incentivizes forms of control that may be lawful under the Schengen acquis but may disturb the political vision of an area where crossing borders has become largely imperceptible. While control rarely occurs at borders, checks in trains, buses, and roadsides will become more frequent following current reforms of the Schengen acquis. In this vein, the changed nature of border control, particularly its territorial expansion into border regions, may call into question the spatial experience to which Schengen lends its name.

By enabling data collection and processing practices, reforms would consolidate the transformation of Schengen's internal borders into so-called “smart borders.”¹³³ Since such a form of control features imperceptibly, it may be viewed as preferential to conventional modes of

¹³⁰See Salomon and Rijpma, *supra* note 2 at 8 et seq.

¹³¹European Commission, White Paper “Completing the Internal Market,” COM(85) 310 final, para. 47.

¹³²For a similar conclusion, see Schumacker, *supra* note 20 at 36 et seq.

¹³³See Frédérique Berrod, *The Schengen Crisis and the EU's Internal and External Borders: A Step Backwards for Security-Oriented Migration Policy?*, 1 BORDERS IN GLOBALIZATION REVIEW 53, at 61 (2020).

control, given its limited effect on the spatial experience to which Schengen lends its name as an identity-creating project. Such practices of collecting and processing data on cross-border mobility may be said to create a chilling effect on free movement and should not be ignored. Against this backdrop, the Court was correct to note that applying such intangible forms of control may constitute restrictions to the fundamental right to free movement, as enshrined in Article 45 of the Charter.¹³⁴ Restrictions of that nature may be justified, provided they pursue a legitimate objective and satisfy the requirements of necessity and proportionality. This may not, however, be read as a blanket check to automate the collection and processing of travellers' data at internal borders.¹³⁵

II. Pitfalls of Decentralized Enforcement and the ECJ's "Administrative Mindset"

The Commission's reluctance to initiate infringement procedures in the context of reintroduced and perpetually prolonged internal border controls is partly mitigated by increased efforts of decentralized enforcement. In the absence of direct actions, indirect challenges have presented themselves as a promising avenue for bringing national practices in line with the requirements of EU law.¹³⁶ The judgment in *Landespolizeidirektion Steiermark* is a case in point. Owing to the *erga omnes* effect of the Court's jurisprudence, the resulting interpretation creates binding effects on all Member States.¹³⁷

Whereas such a strategy can be promising in an individual case, it may not stop other Member States' practices from going untoned. This effect is rooted in the traditional separation of tasks in the preliminary reference procedure. While the Court of Justice leaves the application of its interpretation in the individual case to the referring national court, there are different degrees of instructing the latter.¹³⁸ In *Landespolizeidirektion Steiermark*, for instance, the ECJ got as close as it possibly gets to dictating the outcome of the assessment, emphasizing that the files before it suggested that Austria's decision to keep in place internal border controls was incompatible with Schengen law. It added that this question was ultimately for the referring national court to determine.¹³⁹ For the other Member States who had kept in place internal border controls on a quasi-permanent basis, this left ajar a window of deniability, supporting the argument that the situation at their internal border differed from the factual situation at the Austrian-Slovenian border that gave rise to the Court's judgment in *Landespolizeidirektion Steiermark*.

This may explain why all potential culprits – including Austria – kept internal border controls in place after the ECJ's judgment had been rendered.¹⁴⁰ This indicates that the preliminary reference procedure may be structurally ill fit for responding to *de facto* fragmentations where supranational rules largely reaffirm national executive discretion.¹⁴¹ This is the case under the current legal framework and is unlikely to change following the reform of Schengen. The latitude afforded to national decision-makers allows them to argue that the factual preconditions for reintroducing border controls vary from those in *Landespolizeidirektion Steiermark*. Rather, the currently discussed reform would undermine efforts toward decentralized enforcement by doing away with some of the most tangible standards limiting Member States' discretion, particularly the procedural time limits for reintroducing border control.

¹³⁴*Ligue des droits humains*, Case C-817/19, para. 277.

¹³⁵The same can be said about the restrictions to other fundamental rights, particularly those enshrined in Articles 7 and 8 of the Charter of Fundamental Rights, see *Ligue des droits humains*, Case C-817/19, paras 92 et seq.

¹³⁶Discussed *supra* at B.II.

¹³⁷For that effect, see Morten Broberg, *Judicial Coherence and the Preliminary Reference Procedure*, 8 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 9, at 9 et seq. (2015).

¹³⁸See Takis Tridimas, *Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction*, 9 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 737, at 739 et seq. (2011).

¹³⁹*Landespolizeidirektion Steiermark*, Joined Cases C-368/20 & C-369/20, para. 82.

¹⁴⁰Currently, the list includes six countries, namely Germany, Denmark, Norway, Austria, Sweden, and France. An updated version of which is available at: https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en (accessed Feb. 15, 2023).

¹⁴¹Cornelisse insightfully raised this point already, see *supra* note 1, at 28.

Moreover, the Court's jurisprudence may display a general unwillingness to infer constitutional limits for Schengen reform. This aligns with its earlier jurisprudence regarding abolishing internal border controls, where the Court had been reluctant to upset the political compromise brokered in negotiations regarding the Treaty of Amsterdam.¹⁴² More recently, the same impetus may be detected in the Court's relative silence as regards potential constitutional limits to Schengen reform. Admittedly, the preceding investigation puts forward the view that some constitutional limits may be inferred from the Court's jurisprudence, specifically the requirement to strike a "fair balance" between competing provisions of primary law. Analytical precision, however, merits the acknowledgment that the Court's jurisprudence is related to the legal framework *de lege lata*. It is far from evident that it would apply the same standard as a constitutional limit to the EU legislature's discretion in future cases.¹⁴³ With respect to potential constitutional limits to the sweeping collection and processing of cross-border mobility at internal borders, it may be worth noting that the Court centers its reasoning on an interpretation of secondary law instruments, *in casu* of the PNR Directive, and less so on constitutional guarantees limiting the adoption of such instruments.¹⁴⁴

The reluctance to spell out constitutional limits to the reform of Schengen may thus bear testament to the "administrative mindset" underpinning the Court's jurisprudence in the field of EU migration law.¹⁴⁵ Following this mode of reasoning, the Court's focus rests primarily on interpreting secondary law and verifying the intentions of the EU legislature. For the Court, reasoning of such nature has significant advantages. It allows judges to tap into the "external legitimacy" it derives from its relationship with political institutions.¹⁴⁶ However, with respect to the currently discussed reform of the Schengen area, such a strategy is risky. It appears to disregard the nature of Schengen as an identity-creating project. In the absence of a constitutional corrective to the currently discussed Schengen reform, chances are that the proposed amendments would betray the notion of a "fair balance" between different constitutional specifications, particularly Member States' responsibilities to safeguard national security and the abolition of internal border controls. By prioritizing the security concerns of national decision-makers and propagating new supranationalized avenues to reintroduce internal border controls, the constitutionally warranted objective of abolishing internal border controls may be upset.

E. Conclusion

The case for reforming the Schengen *acquis* has become increasingly cogent in recent years. Following a series of crises, several Member States have reintroduced internal border controls on a quasi-permanent basis. As the preceding investigation suggests, the latest attempt to reform Schengen would not revive the equilibrium of the different visions that enabled Schengen's successes during earlier phases of its evolution. Rather, by endorsing the security concerns of national actors, it reaffirms the vision of Schengen as a security project. This effect can be detected in several reform elements, including the incorporation of new grounds for reintroducing internal border controls, the relaxation (and possibly eradication) of time limits for the duration of these controls, and the propagation of alternative control measures in border regions.

Whereas this would consolidate Member States' broad discretion in safeguarding internal security and public order, the latest reforms of Schengen should not be mistaken for renationalization. Rather, these discretionary powers are increasingly embedded in supranational

¹⁴²See Salomon and Rijpma, *supra* note 2 at 16 et seq., concerning Case C-378/97, *Wijzenbeek*, E.C.R. I-06207.

¹⁴³On this point, see already *supra* at B.II.

¹⁴⁴For this effect, see *supra* at B.III.2.

¹⁴⁵Thym, *supra* note 41.

¹⁴⁶For this phenomenon, see Koen Lenaerts, *How the ECJ Thinks: A Study on Judicial Legitimacy*, 36 *FORDHAM INTERNATIONAL LAW JOURNAL* 1302, at 1310 et seq. (2013).

governance structures. The Commission's latest reform attempts to promote this development, *inter alia*, by establishing the Schengen Forum or spelling out a new supranational procedure to collectively reintroduce internal border controls. This suggests that current reform efforts may genuinely bring about a gradual supranationalization without reducing the national decision makers' discretion to adopt measures aimed at safeguarding internal security.

On the flip side, these elements of innovation should not gloss over the fact that the proposed reforms would call into question the political vision of Schengen as an identity-creating project. Schengen's success may be rooted, *inter alia*, in the fact that abolishing border controls removed a "concrete reminder to the ordinary citizen that the construction of a real European Community is far from complete."¹⁴⁷ The currently discussed reform would undo this political vision of Schengen. First, it cannot be a foregone conclusion that Member States will lift internal border controls as a corollary thereof. Rather, the Commission's reform proposes to significantly extend national decision makers' discretion, thereby relaxing those standards that have imposed effective limits to the reintroduction of internal border controls on a quasi-permanent basis in the past.¹⁴⁸

Moreover, the reassertion of Schengen as a pan-European security project coincides with the emergence of new forms of control. Besides collecting data on cross-border mobility, which features in a relatively intangible fashion, the currently proposed reform of Schengen incentivizes police checks in the border regions. As a corollary, it is not unreasonable to presume that police authorities will resort to spot checks in trains and elsewhere as standard practice. In this sense, citizens will likely be reminded of the incomplete construction of the Union, even if they are not, as a matter of principle, personally interrogated or stopped. While the reform of Schengen may not necessarily impair the economic rationale of uninterrupted cross-border mobility, it betrays the idea of an area where controls are abolished as a political project.

The preceding investigation argues that this criticism finds support in EU constitutional law. Whereas the Court displays a certain reluctance to infer limits to the EU legislature's discretion to reform the Schengen acquis, its recent jurisprudence may indicate that the EU legislature is obliged to strike a fair balance between competing provisions of primary law when drafting a reform of Schengen; namely, the objective of abolishing internal border controls and Member States' responsibility to safeguard national security and law and order. Presuming that conclusion is correct, this constitutional requirement does not forego political choices. On the contrary, the EU legislature would retain broad discretion to amend the relevant legal framework. However, this discretion is not without limits: an interpretation that would effectively do away with any safeguards ensuring the temporary nature of reintroduced internal border controls, such as maximum time periods, would exceed what is permissible under EU constitutional law. In that respect, the currently proposed reforms may be said to conflict with the constitutionally warranted balance of Schengen's different visions.

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¹⁴⁷This quote is borrowed from the Commission's seminal white paper "Completing the Internal Market," which lies at the origins of Schengen integration, COM(85) 310 final, para. 47

¹⁴⁸*Landespolizeidirektion Steiermark*, Joined Cases C-368/20 & C-369/20, para. 78.