THE LIFE AND DEATH OF THE SCHENGEN AGREEMENT: IS THE ABOLITION OF INTERNAL BORDERS A REALISTIC GOAL?*

*Marie Gautier***

Abstract

The Schengen System is currently going through a radical shift. As we observe its relative failure, the inadequacy of our models (especially legal) as well as the possibility of an area composed by States without internal borders, have to be put in question. The paper argues that if ever the borders controls were to be definitely reintroduced, that would not mean that Schengen would completely disappear.

TABLE OF CONTENTS

1. Introduction

In may 2016, in the French Conseil d'Etat, in a conference about the European legal melting pot concerning foreign national law, professor Cassese underlined how the three constitutive elements of the State (territory, population, sovereignty) are currently going through a radical shift[1]. The Schengen System

* This essay was delivered at the 2016 ICON-S Conference *Borders, Otherness and Public Law – Berlin*, June 17th-19th, 2016.

** Agrégée de droit public, Maître des requêtes au Conseil d'Etat.

perfectly illustrates these shifts. As we observe its relative failure, the inadequacy of our models (especially legal) as well as the possibility of an area composed by States without internal borders, have to be put in question.

Implementing the Schengen agreement of the 14th June 1985 and 1990 convention[2] set a particularly ambitious target, aiming to create a European area without internal borders for individuals[3]. It does not merely ensure E.U nationals, now European Citizens, the right to enter and stay in the territory of another member state. This was the object of the free movement of persons provided by the Treaty of Rome. Even if it took a few decades[4], it was put into effect within that framework –with a few limits that will be addressed later. With Schengen, they will exercise this right without any formality, that is to say border control. But to reach such a target, not only the applicable rules regarding the movement of EU citizens have to be defined : it is also necessary to agree on the applicable rules for foreigners. This latter issue is relevant as entering one of the Schengen area territories allows entry to any other Member State's territory. The movement of Europeans, free of any control, triggers an increase of cross-country legal issues and consequently enhances the need for harmonisation.

Clearly, such an agenda is deeply destructive for the three constitutive elements of the State. For the *Territory* it is destructive,

---

[1] http://www.conseil-etat.fr/Actualites/Le-Conseil-d-Etat-vous-ouvre-ses-portes/Les-colloques-en-videos/Le-creuset-normatif-europeen-l-exemple-du-droit-des-etrangers

[2] OJEC, n° L 239, 22 Sept. 2000

[3] Even if it is one the European Community's goal since the Single Act (see art. 7 A), it was necessary to make a detour with an international agreement beside the European community because of the opposition of some member States (see J. C. Gautron, *Droit et politique: le cas de Schengen*, in E. Bort, R. Keat (eds.), *The Boundaries of Understanding. Essays in Honour of Malcom Anderson,* 155 (1999) However, since the incorporation of Schengen in the Community framework with the treaty of Amsterdam, the goal and the means to achieve it belong to the same legal order.

[4] One can assume that the main principles of the free movement of persons as it was conceived in the treaty of Rome was globally achieved with the three directives of 1990 about the free movement of the inactive (directives 90/364/EEC, 90/365/EEC and 93/96/EEC), even if the implementation of those principles is still very discussed (EUCJ, 11 November 2014, Elisabeta Dano and Florin Dano v Jobcenter Leipzig, Case C‑333/13).

as what physically defines its limits partly disappears. This occurs as it no longer appears as a valid element to judge the territorial validity of administrative acts, particularly for foreigners. It is also destructive for the *Sovereignty*, since the State transfers at least part of its competency in order to unilaterally state who can or cannot enter its territory. Lastly, it is destructive for the *People*, since the State is no longer competent to define who foreigners are and what rights they are entitled to.

In light of the above challenges, the success of Schengen might be surprising. No matter how tedious the beginnings were (with 5 years to negotiate the convention, 5 more on the implementation of technical elements such as Schengen Information System and 2-3 years of full-scale tests), the Member States managed to set up a space without internal borders -at least seemingly, making the Schengen Area one of the greatest achievements of the EU.

The discrepancy between todays situation is therefore striking. Recently, Austria, Germany, France, Denmark, Norway and Sweden notified the European Commission about their reintroduction of borders controls [5]. France claimed the reintroduction was linked to the UEFA European Champions and the Tour de France. And then because of the emergency state as introduced further to the Nice attack. However, the risk of massive arrivals of refugees is the main cause of the reintroduction of border controls. The countries concerned with the reintroduction got in May the authorization to extend it until the end of the year[6]. It is slowly drifting from a temporary situation to a permanent one.

[5] Which is possible pursuant article 23 of the Schengen Borders code (regulation n° 562/2006) but for a short period (30 days) that may be prolonged with a special procedure. See Commission opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of regulation n° 562/2006, C (2015) 7100 final.

[6] Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, 12 may 2016 and the full list available on the European commission website (http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm).

Reintroduction of border controls comes alongside direct and indirect reconsiderations of the system itself by the States Members, as well as proposals aiming to «save» the system – but not without radical modifications (such as Netherlands' idea to create a «mini Schengen» with fewer states). Even the Commission's communication «Back to Schengen - a Roadmap»[7] issued last March does not give a very hopeful impression, admitting that the reintroduction of borders controls was necessary to face systemic failures, notably Greek ones. It is not the first time that the Schengen system has been strongly criticized and put into question, but this time might be the last.

In view of the unique situation Europe is facing today, with what we refer to as the "migrant crisis", one could say that the Schengen system is crumbling down under the effect of difficult circumstances.

However, it seems to me that Schengen has been weakened by structural factors as well as the current inability to create a space composed by States, but without internal borders. This systemic weakness is twofold. On the one hand, the States were reluctant to the idea of being deprived from any attributes of sovereignty, which triggered an incomplete transfer of competency. Schengen seems condemned to be a patchy system. On the other hand, the functioning of the system was inspired by the free movement of goods, which turned out to be inadequate when it came to the free movement of people. New legal instruments need to be invented.

2. Incomplete transfers of powers

Schengen's main agenda, setting up an area without internal border, was never fully accepted by the Member States. I am not referring here to the States that refused the principle as a whole and thus were granted opt-outs such as United Kingdom and Ireland (even if, in fact, the two countries take part in some of the repressive actions of Schengen[8]). For all the other members of

[7] COM(2016) 120 final, 4.3.2016. The title itself implies that we are not in Schengen anymore...

[8] According to article 4 of the Protocol n° 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, "The United Kingdom or Ireland may at any time after the adoption of a

the Schengen area (that is to say EU Member States, Norway and Iceland), transfers of power have been left incomplete. This exists because parts of the prerogative remained in the hands of States. Alongside this, the powers that were actually transferred are still under the influence of the national governments.

2.1. Powers that were not transferred.

Schengen was never an area within which foreigner-related issues were tackled together. The transfer of power took place only regarding the entrance and short-term stay of aliens (i.e. external borders control and visas policy)[9]. Concerning long-term legal immigration, common legal dispositions are scarce and deficient. The directive concerning the status of third-country national who are long-term residents[10] or the directive on the right to family reunification[11] are, at least for now, much more a juxtaposition of national legal provisions than a downright alignment.

It is quite easy to explain. Despite a relative consensus between the States on a very restrictive policy regarding entrance to the territory, there is no such unity when it comes to reliance on immigration and the fate of all foreigners that are legally resident.

---

measure by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union notify its intention to the Council and to the Commission that it wishes to accept that measure". In pursuant to these provisions, the United Kingdom operates for example the SIS within the context of law enforcement cooperation, and both the United Kingdom and Ireland are bind by Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJEU, n° L 149, 2.6.2001).

[9] In those areas, the legal framework is however impressive, especially with the Schengen Borders Code (Regulation (EC) N° 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, modified several time since, consolidated version of March 2016 : OJ L 77, 23.3.2016), the common list of countries whose citizens must have a visa when crossing the external borders and a list of countries whose citizens are exempt from that requirement and the Visas Code (Regulation (EC) n. 810/2009 of the European Parliament and of the Council of 13 July 2009, OJ L 243, 15.9.2009 ; amended the last time with Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, OJ L 182, 29.6.2013).

[10] Council Directive 2003/109/EC of 25 November 2003, OJEU L16, 23.1.2004.

[11] Council Directive 2003/86/EC of 22 September 2003, OJEU L 251 , 03.10.2003

The demographics of the European states, their level of attractiveness for foreigners, their need for workforce as well as the public opinion within their borders are too contrasting to envision a real common immigration policy beyond a few dispositions about immigration of third-country nationals for the purposes of highly qualified employment[12].

This distortion between an almost complete alignment of short-term entry policies and a state-owned competence over long-term residence cannot work if there is no common agenda between the States, that is zero immigration. Any deviation from this -inexplicit- target will lead to tensions and further reconsideration of the idea of a space without internal borders. This is how the regularisation policies implemented by Italy and Spain (even though they would not have translated into a wave of immigrants, since their resident permit was solely valid in these two countries)[13] lead to a temporary reintroduction of borders control in France. Likewise, Germanys' unilateral announcement to welcome Syrian refugees led to deadlock in the European arena.

Incomplete transfer of competency regarding migratory matters is a first factor of weakness. A second one is the way those powers are exercised.

2.2. Transferred competencies retained by Member States

In order to set up a legal area that is unified, yet composed by separate states, a minimal centralization of the decision-taking process seems necessary. The monitoring of its proper implementation should complement this. Within the EU, two institutions build a solid foundation for centralization. Firstly, the European Commission, 'Guardian of the treaties' and initiator of the legal process. Secondly, the European Court of Justice, for the benefit of which Member States have waived to dispense justice on their own behalf. It is known that states originally built Schengen outside of the EU, not only because of the oppositions of some of the co-members, but also to avoid the usual constraints of the normal functioning of the Union. Also known is the fact that

[12] Council directive /50/EC of 25 May 2009 on the "blue card", OJEU L 155 18.6.2009

[13] See H. Delzangles, *Des voies à harmoniser? Les politiques de régularisation,* in C. Gauthier, M. Gautier (eds.), *L'immigration légale: aspects de droits européens*, 68 (2011).

the integration into the European Union happened gradually through the 'third pillar' channel. The uptake of the 'normal' institutional framework took place at the expense of a new kind of opt-out, invented for Denmark (It belongs to the Schengen area but the legal dispositions within the system are considered as norms of international law - which the country has to ratify and can unilaterally oppose).

Today, Schengen is no longer different from an ordinary EU policy. However, the core of the system still relies on both unilateral decisions by the states and collective mechanisms, instead of transfer of competency towards integrated authorities. Two examples illustrate how many competencies are retained by the Member States.

The first one is the reintroduction of border controls. Although it seems logical that the creation of a common spaces would come along with safeguard clauses to allow the States to pull out when facing urgencies. This is how the Internal Market includes safeguard clauses in all its aspects. However, these ones have a very restrictive definitions and the Commission strictly regulates their application. One might say that the clauses concerning free movement of persons (as the right to move around freely for EU citizens) have been battered in the last years. The 'public order' clause has not soften since the mid-seventies and seems even less protective today when applied by the States to European citizens such as Romanians and Bulgarians [14]. Likewise, the « Social Security and Sufficient Resources » clause is at the heart of Great Britain's concerns and debates around the Brexit.

Within Schengen, the safeguard clause is in fact maintaining the States' unilateral power, unknown in the Internal Market functioning. Despite its initial will, the Commission hasn't managed to monitor the use of these clauses when the Schengen Border Code was adopted. This is true both in substance (the articles 23 to 30 could not be more lax) and in terms of process (only a notification to the Commission is needed). The latter can even be bypassed without any legal proceeding. For instance, when facing a massive flow of foreigners (especially from Tunisia) in April 2011, Italy decided to grant residence permits for

[14] CE, 1er octobre 2014, Mme D., n° 365054, publié au Receuil.

humanitarian reasons. In response to that, France took the decision to reintroduce controls at its borders with Italy, since the flow of migrant was making its way towards the French territory[15]. In addition, it seems that the Tour de France is now a legitimate reason for reintroducing borders controls. Here it is, a space without internal borders but within which controls could be reinstated yearly, for France's tour in July, Italy's Giro in May or Spain's vuelta in September.

The second example shows how the transfer of competency was never fully accomplished and address the evaluation of the correct implementation by the Member States of the Schengen Agreements. The control of the EC acquis relies on the Commission and the ECJ, which can both be referred to by the Member States. The centralisation of control is, therefore, quite proficient. But Schengen is not like so. Monitoring for compliance of Applicant and Member States to the rules from the EC acquis is entrusted to teams composed by both Commission and Member States representatives[16]. Therefore, they all take an active role in mutual surveillance. In addition, reviewing the mechanism in 2013 did not deeply modify it. Its principle is, besides, laid down in the article 70 of the treaty. The control shows that there is no environment of mutual trust. On the contrary, mutual suspicion cripples the usual legal tools of the Union law.

3. Inadequate legal tools?

Beyond the States' reluctances and admitting that a further transfer of the necessary competencies is possible, there is still an obstacle to be overcame: find the adequate legal tools to manage a space without internal borders for people.

---

[15] See M.-L. Basilien-Gainche, *La remise en cause des accords de Schengen,* http://ceriscope.sciences-po.fr/content/part2/la-remise-en-cause-des-accords-de-schengen.

[16] Council regulation (EU) n° 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, OJEU L 295 6.11.2013.

3.1. A precedent: free movement of goods.

At first glance, it seems like we have the know-how. In fact, there is such an area without internal borders when it comes to free flow of goods, an area completed in 1992. This space legally relies on one principal : mutual recognition. It gave birth to what the German Doctrine calls transnational administrative actions. Pr Schmidt-Aβman defines it as so :«based on a 'uniform law' (a Community Regulation, a national legislation implementing a directive or a directly applicable directive) and enacted par a national authority, it has binding legal effects determined by this uniform law, in every member states, without the need of an act of recognition»[17]. The transnational administrative act brings to light a process de-territorialization in law. It disrupts the functioning of government systems by redefining the territorial scope of what epitomizes the State's sovereignty: unilateral administrative acts.

Concerning the free movement of goods, this unilateral act is the basic unit of the construction of the Community, since EJC's «Cassis de Dijon» ruling. It displaced the need for harmonisation by the existence of mutual trust, which made transnational administrative acts legally and politically acceptable[18].

Even if it does not apply solely in the EU, the combination of mutual recognition / transnational administrative acts finds its best expression in Europe, where it effectively filled the void left by no overhanging federal construction. Logically, the construction of the Schengen area relied on the same ways and means.

3.2. Managing people : Success and impasses

At first sight, Schengen illustrates the success of the instruments just described. It is, in fact, based on the mutual recognition principle. It also relies on legal acts adopted by a Member State, with legal effects in other States, based on an authorization given by the EU law. This is how short-term visas (or Schengen visas) delivered by each members states accounts for

[17] E. Schmidt-Aβman, *Les influences réciproques entre les droits administratifs nationaux et le droit administratif européen*, n° spécial du 20 juin 1996, AJDA, 196 (1996).

[18] See M. Gautier, *Acte administratif transnational et droit communautaire,* in J. B. Auby, J. Dutheil de la Rochère (eds.), *Droit administratif européen*, 1069-1083 (2007).

a permission to enter the territory of all the others. They are delivered through common process and conditions. As for long-term visa (for which the issuance process has not been standardized), they account for short-time visa in other Member States territories [19]. They are a perfect example of mutual recognition. Likewise, when a government decides to register an undesirable alien in the SIS, the decisions binds on all the other Member States, which are then bound to deny them a visa and entry into the national territory [20]. It is, therefore, a truly transnational act.

In some respects, the system Schengen generates an unconventional kind of transnational act, one where the execution itself is transnational. In his attempt to classify transnational acts, Prof. Mattias Ruffert underlined the right of hot pursuit provided by the Schengen convention[21]. Another example would be the possibility to organise joint flights in order to keep away undesirable aliens. Set up by one of the States, it enforces the others' removal orders[22].

Nonetheless, these undeniable successes barely hide the obstacles that Immigration Law is facing when it comes to applying those principles. First of all, people are not merchandise: their behaviour after crossing the border is hard to anticipate. They will move again, study, work, get married, have children, maybe kill or steal. Then, unlike merchandise, people have basic rights. They cannot be handled like goods, which puts their management at stake. This is why the level of harmonisation needed to insure mutual trust, essential to the well functioning of the system, is immeasurably higher. Mutual trust is what asylum policy and European Arrest Warrant recently stumbled over : despite the adoption of several legislative measures harmonising common minimum standards for the treatment of asylum seekers,

[19] Council Regulation (EC) n° 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa, OJEU L 150, 6.6.2001.

[20] According to the Schengen Border code and the Visa code (see note 9).

[21] M. Ruffert, *The transnational administrative act*, in O. Jansen, B. Schöndorf-Haubold (eds.), *The European composite administration*, 277-306 (2011).

[22] Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, n° 2004/573/EC, OJEU L 261 du 6.8.2004.

the corner stone of the European asylum policy – the Dublin mechanism to determine the member State responsible for asylum application – is ruined by the M.S.S./ N.S. case law[23]; despite its huge success, the European Arrest Warrant is both undermined by the German federal constitutional court case law[24] and, even if it is with less force, by the EUCJ case law itself[25].

This is why, undoubtedly, new mechanisms are to be invented. For instance, preliminary ruling between national courts could, in some cases, turn out useful. In fact, when controlling an act implementing an administrative act adopted by another Member State (such as a visa refusal based on a registration on the SIS made by another State), the National court cannot examine the latter, for sovereignty reasons[26]. And maybe, as the Commission seems to think, perhaps the Schengen Space will only exist alongside with integrated border police corps.

In any case, Schengen does not seem to have the legal and political means to build anything better than a space with intermittent internal borders.

4. Conclusion: What will be left from Schengen?

If ever the borders controls were to be definitely reintroduced, would that mean that Schengen completely disappeared? No, as some components of the system will endure and will give the illusion of Schengen's survival. It is particularly true for repressive instruments such as SIS or police and judicial cooperation. SIS has gradually become a data base with multiple

[23] ECtHR, 21 January 2011, M.S.S. vs. Belgium and Greece, application n° 30696/09 ; EUCJ, 21 December 2011, N. S., C-411/10 and C-493/10.

[24] See the press release of the *Bundesverfassungsgericht* about the 15 December case (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html) and A. Gaillet, *Confiance et méfiance autour du mandat d'arrêt européen,* AJDA, 1112 (2016).

[25] EUCJ, 5 avril 2016, Pál Aranyosi (C‑404/15) et Robert Căldăraru (C‑659/15 PPU).

[26] CE, 9 juin 1999, F. (Rec. CE 1999, p. 170 ; AJDA 1999, p. 725-728, concl. B. Martin Laprade; LPA 4 janv. 2000, p. 13, note E. Aubin) ; CE, 23 mai 2003, n° 237934, C. (AJDA 2003, p. 1576). See M. Gautier, *Le dispositif Schengen, vecteur d'une nouvelle forme d'intégration juridictionnelle* in *Les dynamiques du droit européen en début de siècle. Études en l'honneur de J. Cl. Gautron*, 69 (2004).

uses, where undesirable aliens, stolen objects, missing people and terrorists mingle - which is questionable from a civil liberties point of view but fits the expectations of the States their services. Beside, taking part in the SIS is now disconnected from the Schengen membership. This is how the United Kingdom gets to engage in SIS, as well as its evaluation and monitoring mechanism. At least, for the time being…

Beyond all of this, a whole part of immigration law, especially regarding short-term visas, will endure, as long as the European States will keep a very restrictive view on their award. But then, one essential element would be missing. The abolition of borders, alone, justified a repressive cooperation such as this. However it does not, at this stage, appears as a fully realistic objective.