EUROPEAN POLICY CENTRE

Odysseus Network — Academic Network for Legal Studies on Immigration and Asylum in Europe — ULB

DISCUSSION PAPER

EUROPEAN MIGRATION AND DIVERSITY PROGRAMME

11 JULY 2024

Reinvigorating Schengen amid legal changes and secondary movements

Daniel Thym

Credit: FEPS

Table of contents

Executive summary 3

Introduction 4

Hallmarks of the legislative reform package 4

Conclusion and forward-looking reflections 8

Endnotes 11

ABOUT THE AUTHOR

Daniel Thym, LL.M. is Professor at the Chair of Public, European and International Law at the Department of Law at the University of Konstanz and a member of the Odysseus Academic Network.

ACKNOWLEDGEMENTS / DISCLAIMER

The support the EPC receives for its ongoing operations, or specifically for its publications, does not constitute an endorsement of their contents, which reflect the views of the authors only. Supporters and partners cannot be held responsible for any use that may be made of the information contained therein.

This publication was developed as part of the project “What next for the EU’s migration and asylum system after the New Pact?” which involves a collaboration between the European Policy Centre (EPC) and the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe (Odysseus Network).

Executive summary

The repeated reintroduction of internal border controls within the Schengen area in response to secondary movements of asylum applicants has given rise to political controversy in EU member states. This is the case notably in the North, while Southern states have criticised the unfair 'Dublin' criteria and lack of solidarity amid high arrivals. Over time, the inability to reduce secondary movements became a key point of contention, one that policymakers have been hard-pressed to resolve. New rules in the revised Schengen Borders Code Regulation (SBCR) respond to these concerns about secondary movements. In conjunction with the reformed Dublin criteria in the Asylum and Migration Management Regulation (AMMR), these provisions amount to an agglomeration of half-hearted structural reforms, complex legislative prescriptions, deference to state preferences, and procedural safeguards whose robustness remains to be tested. At the same time, it is unlikely that they will help to significantly reduce secondary movements.

Three amendments epitomise the direction of the latest reform. First, the revised SBCR authorises member states to unilaterally reintroduce 'temporary' internal border controls for up to 2,5 years – instead of the current six-month time limit. While the reforms could lead to a renewed impetus to avoid misuse by the member states, it remains doubtful, in light of the experience with similar provisions in the past years, whether oversight by the EU institutions will effectively reign in excessive state practices. Second, neighbouring member states can introduce a swift and cooperative return procedure in situations of irregular movements across internal borders. It remains to be seen whether a statutory exception for asylum applicants is respected in practice. Third, the AMMR retains the option of multiple asylum applications and the transfer of jurisdiction, unlike the Commission's 2016 proposal. In practice, this means that Northern member states will have to perform regular asylum procedures when the country responsible does not cooperate in the take-back procedure. This transfer of jurisdiction is the flipside of the failure to fundamentally reform the previously applicable criteria on asylum jurisdiction established in the now repealed Dublin III Regulation. Notwithstanding the absence of deep structural reform, this Discussion Paper argues that EU institutions and member states may succeed in delinking internal border controls from secondary movements. Doing so requires reinforced efforts to implement the new rules as well as rebuilding inter-state trust.

Introduction

The resilience of the Schengen area has been shaken in recent years by terrorism, the COVID-19 pandemic, and migratory movements. High numbers of irregular arrivals have given rise to a linkage between the revitalisation of Schengen and the reform of EU asylum policies. However, despite their comprehensive nature, the New Pact on Migration and Asylum and the Schengen Borders Code reform needed to go further in addressing the core issues troubling the area of free movement. Rather, the changes amount to an agglomeration of half-hearted structural reforms, complex legislative prescriptions, deference to state preferences, and procedural safeguards whose robustness remains to be tested. Overall, this combination of diverse measures represents a typical supranational compromise.

The underlying reason for the linkage between Schengen and Dublin is the breakdown of mutual trust between Northern and Southern member states, as demonstrated by the repeated reintroduction of internal border controls, among others. This has led to two contrasting narratives about the underlying problem. The dilemma is that both are correct and can reinforce each other. While Southern states would point to the unfair Dublin criteria and lack of solidarity amid high arrivals, politicians further North have lamented the weak asylum systems in the South and the failure of Dublin transfers to the responsible member state. The inability to reduce or prevent secondary movements became a key point of contention that policymakers have been hard-pressed to resolve.

Returning to a more stable Schengen system is rendered no less complicated by the fact the Dublin and Schengen systems remain intertwined, which could give rise to further politicisation in the future. Romania and Bulgaria's full accession to the Schengen area outside seaports and airports, for example, remains blocked for fear of increased numbers of asylum applicants due to weak external border controls. For this reason, the amended SBCR must be read in conjunction with the new Asylum and Migration Management Regulation (AMMR), which replaces the Dublin III Regulation.[1] A small but critical element in this discussion concerns the transformation of Eurodac into a more detailed database tracking individuals on the move, rather than being used solely to count applications. Provided that individuals are registered upon first entry, this change could help to achieve a better understanding of the secondary movements taking place.

Returning to a more stable Schengen system is rendered no less complicated by the fact the Dublin and Schengen systems remain intertwined, which could give rise to further politicisation in the future.

Nevertheless, there is a danger that the reform package adopted in the first half of 2024 will prove insufficient for overcoming the deep-seated deficiencies in the legislative design and administrative implementation that underlie the breakdown of mutual trust between member states. Were this to happen, the widespread relief about a 'historic' political agreement on the new legislation could turn out to be short-lived. In the absence of structural reform, the risk of 'more of the same' is real. To prevent that outcome, stakeholders should acknowledge the added value, but also the limitations of the new legislation in terms of countering extended periods of internal border controls and secondary movements. On that basis, EU institutions and member states should focus on administrative implementation and rebuilding inter-state trust through a combination of enforcement, practical initiatives, and political trust-building.

Hallmarks of the legislative reform package

Two overarching aspects stand out when examining the impact of the adopted reforms on the functioning of the Schengen system: the complexity of the reformed SBCR and the essential linkages between the SBCR and other New Pact reforms, particularly the AMMR, which replaces but only marginally amends the so-called Dublin system of responsibility allocation.

As to the former, the new legislation amends the Regulation on the Schengen Borders Code (EU) 2016/399, meaning that the original text and the amendments must be read jointly in a consolidated version. The amendments are laid down in highly complex provisions. One can easily miss decisive elements or be appeased by promising language, even though the legal substance remains meagre.

As to the latter, the revision of the Schengen Borders Code was not part of the 'package approach' under which the New Pact was negotiated, though the trilogue negotiations were completed at around the same time. Whereas the provisions on secondary movements in

the AMMR will apply from June 2026 onwards, the SBCR, as amended by the Regulation (EU) 2024/1717, will start applying on 10 July 2024. This means that, for close to two years, the Dublin III Regulation will remain applicable at the same time as the reformed SBCR.

'Schengen' and 'Dublin' have a close—but burdensome—relationship, even though they constitute, legally speaking, two separate bodies of legislation. This official separation is the consequence of the thematic scope of the opt-outs of Ireland and Denmark and the association agreements with Norway and others. However, it does not undo the political, historical, and legal linkages based on the objective of achieving an area without internal border controls 'in conjunction with appropriate measures' in the realm of asylum.[2] The latest reform ultimately reinforces the statutory connections.

The following sections examine the legislative changes, including; the extended time limits for internal border controls, the promotion of technology as an alternative to internal border controls, a new procedure for swift transfers in response to irregular movements within the Schengen area, the response to secondary movements, the potential of further legislation on border surveillance, and travel bans during a pandemic.

INTERNAL BORDER CONTROLS: LEGALISATION OF EXISTING STATE PRACTICES

A resurgence of 'temporary' border controls has been witnessed within the Schengen area for prolonged periods of time and for diverse reasons, including terrorism, secondary movements, the COVD-19 pandemic, and the war in Ukraine.[3] In some cases, internal border controls have been maintained for several years, despite the six-month threshold enshrined in the previously applicable 2016 SBCR.[4] The Court of Justice interpreted this time limit strictly in a 2022 judgment.[5] Nevertheless, several countries, including Austria, France, and Germany, have since reinstated internal border controls in more or less open defiance of the judgment. Rather than infusing greater willingness to comply with the existing rules, the judgment seems to have fed the appetite for legislative change. As such, the new rules will effectively legalise former state practices, as the amendments on the activation threshold, the time-limits and supervision procedure illustrate.

A resurgence of 'temporary' border controls has been witnessed within the Schengen area for prolonged periods of time and for diverse reasons, including terrorism, secondary movements, the COVD-19 pandemic, and the war in Ukraine.

Activation threshold: Abstract references to 'public policy' and 'public security' previously gave rise to uncertainties as to whether a pandemic and secondary movements, or, rather, the social, economic, and administrative consequences they have, could qualify as valid reasons for introducing such controls.[6] The new legislation overcomes these uncertainties through a list of examples, which do not, however, present a carte blanche. Secondary movements will only cross the activation threshold when they present an 'exceptional situation' characterised by a 'sudden large-scale' influx which puts a strain on the overall capacities of 'well-prepared' national authorities and, at the same time, is 'likely to put at risk the overall functioning' of the Schengen area.[7] Such wording aims at limiting excessive state practices, although judges can be expected to grant governments some leeway when assessing these abstract conditions. The list of examples is not exhaustive, meaning that other public policy and security threats than the ones mentioned explicitly in the amendment can be relied upon.

Maximum time limit: In a reversal, EU institutions extended the maximum period of 'temporary' internal border controls from six months to two years. Doing so effectively sanctions previous—illegal—state practices. In 'exceptional circumstances', member states may even extend border controls for a 'further final' six months, albeit subject to enhanced procedural oversight, including a mandatory European Commission recommendation on the legality of that move.[8] That does not mean, however, that controls for more than 2,5 years are not possible. In line with case law, new threats, such as terrorism instead of secondary movements, may justify the seamless continuation of internal border controls, based on the assumption that another period of up to 2,5 years has begun.[9]

Supervision procedure: Anyone reading the almost 2,500 words governing the reintroduction of internal border controls will come across numerous conditions and limitations, which could be considered as major constraints by the lay reader.[10] They constitute a laudable attempt at preventing excessive state practices through complex *ex ante* and *ex post* notification, consultation, and reporting requirements. However, the supervision procedure does not change the ultimate authority of national governments to decide whether to reintroduce internal border controls—an important difference to the need for supranational authorisation to activate the derogations laid out in the Crisis and Force Majeure Regulation.[11] It remains unclear whether such procedural oversight by the EU institutions, which does not prevent member states from introducing border controls unilaterally, will be more effective than the 2013 reform of the SBCR, which relied on a similar strategy, albeit with limited success. The Commission, in particular, took a hands-off approach, sparking debates as to its willingness to formally enforce compliance (see more below).

ALTERNATIVES TO INTERNAL BORDER CONTROLS: WISHFUL THINKING?

The original Schengen Convention was based on a *quid pro quo* logic: in exchange for the abolition of internal border controls, national authorities could rely on 'flanking measures' to compensate for the absence of border controls. These alternatives have been promoted by the Commission to convince member states not to resort to internal border controls, resulting in a Recommendation, adopted in 2023,[12] and reinforced efforts by the Schengen Coordinator. The new legislation builds upon these initiatives by streamlining the provisions on police checks in border areas, introducing the transfer procedure discussed below, and highlighting the significance of monitoring and surveillance technologies. However, the usage of the latter is not chiefly a question of supranational law-making, but depends on states' willingness to apply them.

The effectiveness of the alternatives depends on what governments want to achieve with internal border controls. If the primary objective is to tackle the public policy or security threats listed in the SBCR, the alternatives would suffice, provided they deliver in practice. If governments used reinstatement as a 'control signal'[13] to counter public scepticism about efforts to address security threats and persisting deficiencies in the field of asylum – whether real or amplified through political rhetoric – internal border controls will be more symbolic than practical. However, this would not render border controls any less relevant or consequential. Arguably, it is this signalling effect that underlies the resurgence of border controls and the keenness to erect walls and fences, both within the Schengen area and beyond.[14]

Considering the practical and symbolic importance of borders in the European project, the growing tendency of 'closing off' is detrimental to the regions and citizens on both sides of internal borders, and to the EU. The symbolism national governments wish to achieve through internal border controls represents a distrust in the EU to effectively respond to secondary movements. Such internal border controls motivated by symbolism might be much harder to discontinue, since doing so might be perceived as a sign of weakness of public opinion.

Considering the practical and symbolic importance of borders in the European project, the growing tendency of 'closing off' is detrimental to the regions and citizens on both sides of internal borders, and to the EU.

SWIFT TRANSFERS AT INTERNAL BORDERS: 'RETURN LIGHT'

To respond to secondary movements while trying to preserve the borderless area, the reformed SBCR foresees a new procedure for the transfer of persons apprehended in border areas. From now on, it will be possible to implement transfers within 24 hours based on a streamlined procedure, following a short hearing assessing the legality of stay and the individual's intent to apply for asylum.[15]

These expedited returns with reduced procedural safeguards do not presuppose the reintroduction of internal border controls and may serve as one of the alternatives discussed above. Especially in the context of secondary movements, it is important to distinguish between the introduction of internal border controls and ensuing police powers. State authorities may not simply refuse entry or swiftly return anyone entering without authorisation, as they must comply with the procedural requirements in the Return Directive and the Dublin III Regulation, which will be replaced by the AMMR as of 2026.

Several countries have long resisted these obligations. Police practices have been applied by France and Slovenia at their borders with Italy, Spain, and Croatia. These countries have essentially 'pushed back' third-country nationals who wish to make an application for asylum. Germany and Austria have also seen political and legal debates about the potential refusal of entry of asylum applicants at internal borders. The new procedure for the transfer of persons apprehended in border areas responds to their calls for more flexibility.

Crucially, they presuppose inter-state cooperation and cannot be used by member states without the consent of the neighbouring country. The final text, however, holds that a generic bilateral cooperation framework between member states is sufficient; swift returns are thus not limited to scenarios of joint police patrols, as the Commission had proposed.[16] This renders it easier to revert to the new procedure, which, however, requires an inter-state cooperation framework.

Asylum applicants and beneficiaries of international protection are exempted explicitly, thus rendering the new transfer procedure irrelevant for secondary movements, at least on paper. When applying the exception, it is important to recognise that third-country nationals are asylum applicants from the moment they express a wish to apply for asylum to any state authority, including border guards.[17] In practice, the competent authorities may miss or misinterpret the wish to apply for asylum, as happens regularly in the countries mentioned above.

While guarantees for asylum applicants remain intact, the new legislation effectively introduces another exception from the procedural safeguards for refusing entry based on the Return Directive.[18] Any application of the new rules presupposes that state authorities verify that individuals do not have a legal authorisation to enter

the member state in question. If that is the case, they will receive a transfer decision based on a standard form, with potential grounds of refusal to be added in writing.[19] Such formalistic reasoning is widespread for visas and refusal of entry at the external borders and has been accepted by the Court of Justice of the EU (CJEU) to be compatible with the Charter, subject to some caveats.[20] Individuals have a right to appeal before domestic courts, but such appeals do not have suspensive effect, meaning that they do not hinder the actual transfer.[21] Non-governmental organisations may rely on the best interests of the child to challenge the swift transfer of unaccompanied minors and families, who are not exempt from the transfer procedure.[22]

Non-governmental organisations may rely on the best interests of the child to challenge the swift transfer of unaccompanied minors and families, who are not exempt from the transfer procedure.

TRANSFER OF RESPONSIBILITY: LIMITED MODIFICATIONS

While public debates often focus on the structural unfairness of the Dublin criteria, seemingly technical provisions on the transfer of jurisdiction for specific asylum applicants as a result of secondary movements are less visible. The new legislation outlaws them officially.[23] Nevertheless, by way of example, an asylum applicant for whom Italy or Spain would officially be responsible will retain the legal authority to apply for asylum a second (or third) time in other member states, such as France, Austria, Germany, or the Netherlands, after having moved there irregularly. These destination countries can issue a take-back decision in accordance with the present Dublin III Regulation (EU) and the AMMR that will apply as of June 2026. However, these countries will officially have to assume responsibility if applicants do not comply with the take-back decision or if states do not enforce it within six months.[24] This happens regularly, as reflected by the high number of first instance decisions in destination countries compared to states of first arrival, where many applicants do not remain until the completion of their asylum procedure.[25]

Minor changes to the provisions on the transfer of jurisdiction concern scenarios of absconding, which were generously redefined to the advantage of the destination countries.[26] The cessation of responsibility under the ‘first country of entry’ criterion, meanwhile, was redefined to the advantage of countries of first arrival.[27]

Once the AMMR begins to apply, take-back procedures will also be streamlined, including by limiting the scope of legal remedies. In emergency scenarios, governed under the Crisis and Force Majeure Regulation, it will become possible to extend time limits for transfers (to the benefit of destination countries) and to suspend take-back procedures (to the benefit of countries of first entry), depending on which country is facing such a situation.[28]

MORE STICKS, AND NO CARROTS, AGAINST SECONDARY MOVEMENTS

As part of the New Pact reforms, new sanctions are being introduced to deter secondary movements. In particular, the recast Reception Conditions Directive (RCD) envisages that asylum seekers moving unlawfully to a member state different from that of their asylum will no longer benefit from the rights guaranteed by the Directive there. In other words, reception conditions will be guaranteed only in the state responsible, albeit subject to a fourfold caveat.[29]

First, the withdrawal will apply only once a transfer decision has been notified, not automatically when someone files another asylum application. Secondly, the general scheme of the RCD indicates that the withdrawal of reception conditions will end with the transfer of jurisdiction, which is usually after six months. Thirdly, Article 21 RCD and Article 18 AMMR can be interpreted in a way that member states will be required to take an administrative decision assessing each individual case, which might prove time-consuming in practice.

Fourthly, exceptions for minors, access to emergency healthcare, and the EU Charter of Fundamental Rights (the ‘Charter’), could be used as grounds to challenge the legality of withdrawal. It remains an open legal question whether the CJEU will accept complete withdrawal under the condition that social benefits are available in another member state. The CJEU accepted that outcome for EU citizens, without discussing the impact of the Charter.[30] It is worth highlighting, in connection to this, that German courts have held the same in light of the far-reaching constitutional guarantee of human dignity under the condition that Germany provides support during a two-week period and pays for the voluntary return to the country where social benefits are available.

Finally, there are minimal incentives to comply with the take-back decision. They include the option of considering ‘meaningful links’ during relocation under the Solidarity Pool established by the AMMR and the discretionary clause.[31] On that basis, asylum applicants may be allowed to be transferred to or stay in the member state of their preference. However, member states retain unfettered discretion on whether to activate this option, meaning that applicants cannot demand to stay in the member state of their preference.

BORDER SURVEILLANCE: BRINGING LAW INTO MUDDY WATERS

While checks on persons at crossing points are densely regulated, the legal framework for surveillance between official crossing points is much less developed. This is all the more significant as controversial state practices vis-à-vis people trying to cross borders mainly occur during the surveillance of the external 'green' land and the 'blue' sea border. In this respect, the SBCR reaffirms the option for the Commission to adopt delegated acts and introduces an urgency procedure for adopting them. These rules may be used to govern select aspects of border surveillance.[32] The entry into force of a delegated act does not suppose an active vote by the Council and the European Parliament in favour of the new rules. Rather, both institutions can oppose the new rules, meaning that majority requirements are reversed. They become effective unless the Council and the European Parliament actively voice their opposition. Silence is interpreted as consent.[33] On that basis, the Commission will be able to adopt abstract rules on controversial questions, including the behaviour of state officials during Search and Rescue (SAR) operations by coast guard vessels or the treatment of migrants apprehended in forests and other remote locations. It is conceivable that the Commission might even introduce mandatory fundamental rights monitoring in those situations where the Screening Regulation and the provisions on asylum border procedures do not already foresee such monitoring.[34]

In a symbolic move, the new legislation endorses surveillance by 'all types of stationary and mobile infrastructure' — a thinly veiled reference to fences which have spread along EU external borders in recent years.

In a symbolic move, the new legislation endorses surveillance by 'all types of stationary and mobile infrastructure'[35] —a thinly veiled reference to fences which have spread along EU external borders in recent years.[36] It also contains a coded reference to an ECtHR judgment, which found Spanish pushback practices to be compatible with human rights.[37] That judgment was limited in that it did not discuss stricter obligations on access to asylum enshrined in the Asylum Procedures Directive. Indeed, the CJEU recently reaffirmed that pushback practices following an application for asylum will always violate EU legislation even if they are compatible with the European Convention on Human Rights.[38] Vague provisions in the revised SBCR do not change that outcome from a legal perspective. Nevertheless, governments may try to rely upon the new provision politically to counter accusations of wrongdoing.

COVID-19: REACTIVE LAW-MAKING AND SILENCE ON OTHER SCENARIOS

During the COVID-19 pandemic, member states agreed on an entry ban for third-country nationals on the basis of 'soft law' measures coordinating administrative practices when implementing the 2016 SBCR. This external travel ban rested on shaky but defendable legal grounds. EU institutions built upon this experience by authorising the Council to adopt implementing legislation to further define the scope and permissible measures.[39] It is worth noting that the provision covers 'large-scale public health emergencies' only and therefore cannot be used to respond to other public policy or public security threats. This is politically relevant, as several countries have emulated the model of the external travel ban during the pandemic to significantly restrict the entry of Russian nationals over the past two years.[40] Despite adding new provisions, EU institutions missed the opportunity to establish a supranational procedure for such external travel bans, including a definition of those third-country nationals not covered by it.

Conclusion and forward-looking reflections

Trust is a prerequisite for a functioning area of freedom, security, and justice. The EU faces a fundamental problem if member states lose trust in the effectiveness of supranational legislation due to substantial differences between law and practice over an extended period. In this respect, core aspects of Schengen and Dublin have proven dysfunctional: internal border controls; irregular secondary movements; and failure of the take-back procedure. This Discussion Paper puts forward three strategies to remedy these shortcomings, involving the promotion of compliance, reinvigorating the original political momentum behind the abolition of internal border controls, and, in the longer-term, addressing the structural weaknesses that the half-hearted legislative reforms have failed to address.

FOSTERING COMPLIANCE AND ENFORCEMENT

Recent reform measures have produced a strategy to overcome the entrenched deficits of the Schengen and Dublin systems by focusing on implementation. That is apparent in the , reliance on evidence-based policymaking, administrative capacity-building,

contingency planning, and legal supervision. Both the AMMR and the new Schengen governance revolve around an annual policy cycle with risk assessments, reliable indicators, reporting obligations, contingency planning, and strategies at the national and European levels.[41] Money from the EU budget and administrative support by the EU Asylum Agency (EUAA) and the European Border and Coast Guard Agency (Frontex) are supposed to further increase capacities on the ground.

Looking ahead, if the Commission is committed to improving compliance, it will have to fully assume its supervisory role, together with other means of fostering compliance.

By contrast, supervision of national practices by the Commission has been treated with caution. In the past, the Schengen Coordinator and Commission officials may have behind closed doors tried to encourage states to properly implement Dublin rules and to abandon internal border controls. These efforts have had limited success, at least so far, in overcoming deep-seated compliance and enforcement deficits with regard to Schengen and Dublin. In both respects, the Commission has refrained from publicly reprimanding recalcitrant governments by means of political pressure ('naming-and-shaming') or infringement proceedings before the CJEU. That passivity could be explained by the desire not to complicate the negotiations on the New Pact. Looking ahead, if the Commission is committed to improving compliance, it will have to fully assume its supervisory role, together with other means of fostering compliance.

Recommendations:

- The Commission should not shy away from initiating infringement proceedings in scenarios of open defiance by member states. At the very least, it should take seriously the supervision procedure for internal border controls and asylum management under the revised SBCR and the AMMR.

- Capacity-building, including through the EU Asylum Agency and Frontex, can foster compliance and pre-empt some incentives for secondary movements and should therefore be prioritised in the implementation of the revised SBCR.

REBUILDING INTER-STATE TRUST

Agreement on legislative reform was an important intermediary step to overcome the breakdown of mutual trust between Southern and Northern member states. To sustain that political momentum, it will be critical to foster administrative compliance and enforcement. Otherwise, reciprocal accusations between member states will resurface sooner or later. If that were to happen, governments might be tempted to unite behind a simple goal, namely, to prevent disputes between them by reducing the number of arrivals by means of cooperation with neighbouring states in the Western Balkans, Northern Africa, and with Turkey.[42]

In this context, EU institutions could possibly succeed in de-linking internal border controls from the effectiveness of the asylum legislation. Institutional fora at EU level should aim at building political momentum in support of border-free travel among ministerial and expert meetings in the context of the 'Schengen Forum' and the 'Schengen Council'. This would remind governments of both the economic benefits of border-free travel and the paramount symbolic value of the Schengen area for EU citizens and the Union. If successful, the result could be paradoxical: a more flexible legal framework, adopted this past spring, might result in fewer—not more—internal border controls. Such an outcome is not unthinkable considering that Schengen had originally been created by national governments perceiving open borders among the member states to be in their collective interest.

Recommendations:

- Stakeholders, politicians, civil servants, and the EU institutions should, whenever possible, strengthen initiatives which unite governments behind a common vision, including measures other than cooperation with third countries.

- EU institutions and member states should reinvigorate the original political momentum behind the abolition of internal border controls to advance the interests of states and citizens. Citizens and politicians in border areas can be critical to building and sustaining these efforts.

PURSUING FURTHER LEGISLATIVE REFORM

Political will on the side of EU institutions and member states may not be enough to ensure a departure from the status quo for the simple reason that the very idea of stable asylum jurisdiction in an area without internal frontiers may be the 'original sin'[43] of the EU rulebook. Whether the AMMR's Solidarity Pool is enough to compensate for the structural unfairness of the responsibility-allocation system remains to be tested, as it is governments that decide autonomously about the type of solidarity contributions.[44] But if the past is any indication, even a quota-based mandatory relocation scheme may not have remedied this deficit as applicants may have fled the responsible member state.[45]

Many of the multiple 'push' and 'pull' factors influencing secondary movements were and will remain beyond the direct reach of states in the newly reformed system: ethnic and family networks, labour market opportunities, or disparate welfare states.[46] These factors help explain

why we can expect secondary movements to continue after the New Pact reforms and the revision of the SBCR, albeit to a lesser extent.

There is a flipside to the choice of not substantially amending the Dublin criteria, which is discussed less frequently but becomes especially relevant when considering the likely possibility of secondary movements continuing in the future. Once the option of mandatory relocation was abandoned, there was no realistic alternative other than to retain the permissibility of multiple asylum applications and the transfer of jurisdiction in response to secondary movements. Frontline member states would have never agreed to a reform leaving them with indefinite responsibility for asylum applicants entering the EU irregularly via the external borders.

Diplomatic euphoria about the 'historic' legislative breakthrough represented by the New Pact and the amendment of the SBCR, which can be understood after years of complex negotiations and divisive debates, should not hide the failure of structural reform. Addressing the design deficits enshrined in EU legislation would be the ideal solution in this context. While there may not be sufficient political appetite by member states and the European Parliament for further reforms to the Common European Asylum System (CEAS) or, for that matter, to the SBCR, this will not detract from the remaining flaws in both. Failure to address these structural weaknesses will likely continue to undermine trust between member states, other than causing economic and political damage to the EU.

Any structural reform will have to address the double weakness of the Schengen area in the SBCR and Dublin system, to be replaced by the AMMR as of June 2026. Also, the criteria on asylum jurisdiction and the weakness of the Solidarity Pool would have to be addressed, while secondary movements would have to be prevented more effectively than in the past. That is what the Commission had proposed in 2016, before the New Pact reverted to a less ambitious approach in the absence of political support for more radical reform. A return to the 2016 proposal in the future is not least the case because a hypothetical alternative solution of 'free choice' for asylum seekers, or regulated mobility subject to conditions such as economic self-sufficiency, have so far had no realistic chance of being politically accepted.[47]

Diplomatic euphoria about the 'historic' legislative breakthrough represented by the New Pact and the amendment of the SBCR, which can be understood after years of complex negotiations and divisive debates, should not hide the failure of structural reform.

Recommendations:

- Member states and the Commission should make the Solidarity Pool work, thus mitigating the impact of the structurally unfair Dublin criteria on asylum jurisdiction.
- The Commission should put political pressure on countries of first arrival to cooperate in take-back procedures under the Asylum and Migration Management Regulation. At the same time, it should insist that countries of destination comply with the rules on internal border controls.
- In the medium run, further legislation chance should be considered, once better implementation has helped rebuild inter-state trust between Northern and Southern member states.

1 Maiani, Francesco (2024), "Responsibility-determination under the new Asylum and Migration Management Regulation: plus ça change…", *EU Migration Law Blog*, 18 June 2024.

2 See Article 3(2) TEU; and further Thym, Daniel (forthcoming), "Schengen-Dublin-Nexus: the Return of Legal Linkages", in Philippe De Bruycker, Fabian Lutz, Jorrit Rijpma and Daniel Thym (eds.), *The Law of Schengen. Limits, Contents and Perspectives after 40 Years*, Cheltenham and Camberley: Elgar.

3 See Carrera, Sergio, Davide Colombi and Roberto Cortinovis (2023), "An Assessment of the State of the EU Schengen Area and its External Borders", Brussels: Study for the European Parliament, PE 737.109, pp. 25-38.

4 See the former Article 25(4) Schengen Borders Code Regulation (EU) 2016/399.

5 See Joined Cases C-368/20 & C-369/20 *Landespolizeidirektion Steiermark & Bezirkshauptmannschaft Leibnitz* EU:C:2022:298.

6 For the pandemic, see Case C-128/22 NORDIC INFO EU:C:2023:951, paras 124-127; generally Thym, Daniel (2023), *European Migration Law*, Oxford: OUP, pp. 258-262.

7 Article 25(1)(c) Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

8 Ibid., Article 25a(5)-(6); the co-legislators did not accept a Commission proposal of indefinite prolongation.

9 See *Landespolizeidirektion Steiermark* (n. 4) paras 71, 79-81.

10 See the revised Articles 25–27a Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

11 Neidhardt, Alberto-Horst (2024), The Crisis and Force Majeure Regulation: Towards future-proof crisis management and responses?", Policy Study, Brussels: Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre.

12 See Commission Recommendation (EU) 2024/268 on cooperation between the member states with regard to serious threats to internal security and public policy.

13 Hollifield, James F., Philip L. Martin and Pia M. Orrenius (2014), "The Dilemmas of Immigration Control", in ibid. (eds.), *Controlling Immigration*, Redwood City: Stanford UP, pp. 3, 27.

14 See Brown, Wendy (2010), *Walled States, Waning Sovereignty*, Brooklyn: Zone Books.

15 Such hearing is implicit in Article 23(1)(1)(d), (1)(2) Schengen Borders Code, as amended by Regulation (EU) 2024/1717; case law on the right to be heard under Article 43(2)(a) Charter of Fundamental Rights reaffirms the need for a basic screening; see Thym (n. 5), p. 186.

16 Article 23(1)(1)(c) Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

17 See Case C- 36/20 PPU *Ministerio Fiscal* EU:C:2020:495, paras 52-68.

18 Article 23(2) Schengen Borders Code, as amended by Regulation (EU) 2024/1717, effectively overturns Case C-143/22 *ADDE and Others* EU:C:2023:689; the additional exception under Article 6(3) Return Directive 2008/115/EC for pre-existing bilateral agreements had covered several countries before the latest SBC amendment already.

19 *Ibid.*, Part B of Annex XII.

20 See Joined Cases C-225/19 and C-226/19 *Minister van Buitenlandse Zaken* EU:C:2020:951, paras 44-47; and Case C-584/18 Blue Air EU:C:2020:324, paras 82-86.

21 Article 23(3) Schengen Borders Code, as amended by Regulation (EU) 2024/1717; judges have confirmed that suspensive effect is only required if there is a real risk of illegal refoulement, something which will not usually be the case for transfer between EU member states; see Case C-233/19 *CPAS de Liège* EU:C:2020:757, paras 61-66.

22 It remains subject to debate whether the Charter applies to swift transfers in accordance with Article 51(1) TFEU, since the new provision does not require Member States to use that procedure, meaning that they do not necessarily 'implement' Union law when doing so. Alternatively, 'only' national constitutions, the ECHR, and international law would apply.

23 See Article 17(1), (4) Asylum and Migration Management Regulation (EU) 2024/1717; on the status quo, see Thym (n 5) 316-319.

24 *Ibid.*, Article 46.

25 See the EUROSTAT datasets 'migr_asydcfsta' on first instance decisions and 'migr_asywitha' on implicitly withdrawn applications; other leave that state after the first instance decision.

26 *Ibid.*, Articles 2(17) and 46(2).

27 *Ibid.*, Articles 33 and 37.

28 See Article 12 Crisis and Force Majeure Regulation (EU) 2024/1717; Neidhardt, Alberto-Horst (2024), "The Crisis and Force Majeure Regulation: Towards future-proof crisis management and responses?", Policy Study, Brussels: Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre, p. 15.

29 See Articles 18 Asylum and Migration Management Regulation (EU) 2024/1717; and Article 21 Reception Conditions Directive (EU) 2024/1346.

30 While the European Court of Human Rights has obliged states to provide basic needs to asylum applicants, it has not dealt with a scenario where such basic needs are available in another member state in law and in practice. Such a scenario might possibly be accepted under similar conditions than in the German case law, i.e. provisional support and a train or bus ticket to the state responsible.

31 *Ibid.*, Articles 34(2) and 67(2).

32 See Articles 23(5) and 37a Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

33 *Ibid.*, Article 36(5).

34 See also, as part of this series: Tsourdi, E. (2024), "The new screening and border procedures: Towards a seamless migration process?". Policy Study, Brussels: Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre.

35 See Article 13(4) Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

36 Euronews/AP, "Poland plans to fortify border with Belarus amid security concerns", 27 May 2024.

37 Ibid., Article 5(1a), read in light of Council doc. 6331/24 of 13 February 2024, No. 6, which had referred to ECtHR, judgment of 13 February 2020 [GC], Nos 8675/15 & 8697/15, *N.D. & N.T. v. Spain*.

38 See Case C-392/22 *Staatssecretaris van Justitie en Veiligheid* EU:C:2024:195, paras 50-52.

39 Article 21(1) and Annex XI, Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

40 See Thym, Daniel (2022), "Border Closure and Visa Ban for Russians", Odysseus Network, EU Immigration and Asylum Law and Policy, 17 October 2022.

41 See also, as part of this series, the policy study by Philippe De Bruycker (forthcoming).

42 De Leo, A. and Milazzo, E. (2024), "Responsibility-sharing or shifting? Implications of the New Pact for the future cooperation with third countries", Policy Study, Brussels: Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre.

43 See Tsourdi, Evangelia (Lilian); Cathryn Costello (2021), "The Evolution of EU Law on Refugees and Asylum", in Paul Craig, Gráinne de Búrca (eds.), *The Evolution of EU Law*, Oxford: OUP, pp. 793, 805-807.

44 See, as part of this series, a Policy Study by Philippe De Bruycker (forthcoming).

45 See Maiani, Francesco (2017), "The Reform of the Dublin System and the Dystopia of 'Sharing People'", *MJECL*, Vol. 24, p. 622.

46 See the open access publication Thym (n. 39), pp. 131-137.

47 See the open access publication Thym, Daniel (2022), "Secondary Movements", in Thym, Daniel: Odysseus Academic Network (eds.), *Reforming the Common European Asylum System*, Baden-Baden: Nomos, pp. 129, 137-139.

The **European Policy Centre** is an independent, not-for-profit think tank dedicated to fostering European integration through analysis and debate, supporting and challenging European decison-makers at all levels to make informed decisions based on sound evidence and analysis, and providing a platform for engaging partners, stakeholders and citizens in EU policymaking and in the debate about the future of Europe.

The **European Migration and Diversity** programme provides independent expertise on European migration and asylum policies. The Programme's analyses seek to contribute to sustainable and responsible policy solutions and are aimed at promoting a positive and constructive dialogue on migration. The programme follows the policy debate taking a multidisciplinary approach, examining both the legal and political aspects shaping European migration policies. The analysts focus, amongst other topics, on the reform of the Common European Asylum System; the management of the EU's external borders; cooperation with countries of origin and transit; the integration of beneficiaries of international protection into host societies; the links between migration and populism; the development of resettlement and legal pathways; and the EU's free movement acquis. The team benefits from a strong network of academics, NGO representatives and policymakers, who contribute regularly to publications and policy events.

The **Odysseus Academic Network** is a network of experts in European immigration and asylum law and policy. It was founded in 1999 by Philippe de Bruycker, Professor at the Institute for European Studies of the Université Libre de Bruxelles (ULB), initially with the financial support of the European Commission. The Network brings together legal experts from all EU Members States, Schengen associated States (Norway, Switzerland, Iceland), as well as Turkey. Its coordination team is based in Brussels. The Network and its members provide comprehensive scholarly analysis of European law and policy; undertake consultancies for EU institutions; support the studies of the European Migration Network (EMN); organize European thematic conferences; publish scientific and policy outputs at European and national levels; communicate and co-create research with policy-makers; run a widely read blog that analyses legal and policy developments; and, undertake training in these fields, most notably through a well-established annual summer school held in Brussels and a certificate program combining long-distance learning with residential elements.

Co-funded by the European Union