



## OPEN Summary of EMN Ad-Hoc Query No. 2018.1303

Intra-Schengen border monitoring and border control.

30-11-2018 prepared by NL EMN NCP

### 1. KEY POINTS TO NOTE

- ★ The legal mandate for most forms of intra-Schengen cross-border control and monitoring seems to be predominantly based on administrative (immigration) law.
- ★ The aim for the different measures taken by Member States to monitor and control intra-Schengen cross-border mobility seems to be based on both crime prevention and the prevention of irregular immigration.
- ★ A variety of actors and organizations is involved in the monitoring and controlling of intra-Schengen cross-border mobility, but in most countries a leading role is played by the (National) Police.

### 2. BACKGROUND AND CONTEXT

On the 4<sup>th</sup> of June 2018, the NL EMN NCP launched an ad-hoc query about intra-Schengen border monitoring and border control.

Over the past couple of years, the Schengen area has come to face several challenges. In particular in response to a range of terrorist attacks as well as the so-called European refugee “crisis”. Member States have used a variety of measures to enhance the monitoring of cross-border mobility. These measures are not exclusively taken at the external border of the European Union, but also increasingly at the physical borders between two Schengen States.<sup>1</sup> For instance, by temporarily reintroducing border checks under Article 29 of the Schengen Border Code (SBC) or by using the possibility to carry out police or immigration checks in a region around the physical border under Article 23 SBC. In the light of one of the core principles of the European Union and the Schengen Agreement, the principle of free movement, the temporary introduction of border checks under Article 29 SBC is to be seen as a last resort that can only be

justified by exceptional circumstances. While acknowledging the urge felt by Member States to nevertheless better monitor cross-border mobility, the European Commission issued a recommendation for the Member States in May 2017 to more effectively use the possibilities offered by article 23 SBC. Yet, whereas Member States have to inform the European Commission when temporarily reinstating border checks under article 29 SBC, the use of article 23 SBC is not registered anywhere.

As a result, a wide and comprehensible EU overview of what actors are involved in the monitoring of intra-Schengen cross-border mobility is lacking, as is an overview of the different measures that are taken by the Member States. The limited CJEU case law on Article 23 SBC shows that the implementation or, perhaps better said, the translation of the article into actual national and/or local policing practices is something that deserves to be monitored as Article 23 SBC provides countries, and thus also those who are in charge of exercising the checks, with quite some discretionary space on the specific measures. This could result in large differences between the ways in which Member States control and monitor intra-Schengen cross-border mobility. This query aims to get a better insight into the different ways in which Member States operate.<sup>2</sup>

Important note: When this document speaks of intra-Schengen border checks or intra-Schengen border

<sup>1</sup> Please note that the United Kingdom is not part of Schengen.

<sup>2</sup> The query was triggered by a research project that is currently carried out in the Netherlands. The 5-year research project “Getting to the Core of Crimmigration: Assessing the Role of Discretion in Managing Intra-Schengen Cross-Border Mobility” is funded by the Dutch Organization for Scientific Research (NWO) and carried out under the coordination and supervision of Prof. dr. Maartje van der Woude. She is affiliated with the Van Vollenhoven Institute for Law, Governance & Society of Leiden Law School, the Netherlands. More information on the project can be found at: <https://www.universiteitleiden.nl/en/research/research-projects/law/getting-to-the-core-of-crimmigration>

control, it refers to the different ways in which countries have implemented Article 23 of the SBC – if they are part of the Schengen area – as a way to monitor intra-Schengen cross-border mobility.

### 3. MAIN FINDINGS

*Question 1. What actor(s)/institution(s) is/are involved in the monitoring and control of intra-Schengen cross-border mobility in your country?*

In most countries, the responsibility for the monitoring and control of intra Schengen cross-border mobility lies with a combination of actors. **HU** and **SI** report that the National Police is the main responsible agency. In almost all countries, the National/Federal (and regional and/or local) police will be involved with either immigration authorities (**BE**), customs or border guard agencies (**CZ, EE, FI, DE, LT, LU, IT**), or a combination of all three (**PT, PL**). **NO** and **SE** also report the involvement of the coast guard. In **HR** (not part of Schengen) and **LV**, the sole responsible agency for the monitoring of intra-Schengen cross-border mobility is the Border Police or the Border Guard. **NL** deserves a specific mention in this respect, as the responsible agency for intra-Schengen border control is the Royal Netherlands Marechaussee, which is a police force with military status responsible for carrying out immigration checks in the intra-Schengen border regions. The only other countries that also report the involvement of armed forces are **PT** and **IT**. In **AT**, the police is the main responsible institution, whereas the armed forces are primarily used to monitor the “green border” within the framework of the assistance deployment decided by the Federal Government.

*Question 2. What measures are in place to monitor intra-Schengen cross-border mobility in your country?*

- *Physical barriers (e.g. fences, road blocks, barbed wire, etc.):*

**AT, PT** and **SK** report the use of some physical barriers at their intra-Schengen borders, or *during* intra-Schengen border checks. **AT** mentions the use of physical barriers such as fences and border management infrastructure (containers and tents for facilitating border control) at some parts of the border. **PT** reports the use of road blocks, signaling cones, speed reduction obstacles and light beacons *during* intra-Schengen border checks as a measure of internal security and prevention of illegal migration. **SK** also mentions temporarily using some physical

barriers during the execution of unspecified “security-repressive activities”.

- *Border checks at the border<sup>3</sup>:*

As the temporary reinstatement of permanent border checks *at* the border is to be seen as a last resort under the Schengen *acquis*, it is not a surprise that very few of the countries that have responded to the query, actually report the use of border checks conform article 29 SBC. **AT** reports such checks, as do **PT** and **SE**. **DE** states that no temporary checkpoints are set up on the borderline as a rule, but that there is visual surveillance of the cross-border traffic at the border.

- *Police checks in the border region:*

**AT, BE, CZ, DE, EE, IT, LT, PL, PT, SI, SK** and **SE** all report the use of police or crime-control checks in intra-Schengen border areas.

- *Immigration checks in the border region:*

**AT, BE, DE, EE, FI, HU, IT, LT, LU, LV, NL, NO, PL, PT, SK** and **SE** all report the use of immigration or immigration-related checks in intra-Schengen border areas.

- *Others, please specify:*

Some countries report that technological devices or risk assessment analysis are being used as part of, or to support, the checks that are carried out. For instance, **FI** reports the use of risk analyses on different levels (strategic, operational, tactical). In explaining the legal mandate upon which border control is based, **EE** also reports making use of risk management in order to decide what type of check is necessary at a given time. In **NL**, a smart camera system, called Amigo-boras, is used, while **IT** reports that video surveillance is integrated in the management and control of border mobility. Furthermore, **AT** reports that besides border-crossing controls, so-called compensatory measures (Ausgleichsmaßnahmen/AGM) are in place in all of the Federal Territory on grounds of European Commission recommendations from May 2017.

*Question 3. What is the aim of the measures identified under 2?*

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<sup>3</sup> According to the website of the European Commission, Directorate of Migration and Home Affairs, the following countries currently have temporarily reintroduced border checks at the border: France, Germany, Austria, Denmark, Norway, Sweden. See: [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en)

All countries report a mixed aim for the measures that are taken: on the one hand the checks are carried out to prevent irregular stay in and irregular migration into the country and on the other hand, the checks also serve a crime control purpose, or at least a public order purpose. Some countries specifically address the pre-emptive aim of the different checks. **AT**, for instance, mentions that checks are a pre-emptive measure, stating that “reducing border controls in the current situation would send wrong signals to illegal migrants and organisations active in the field of human trafficking”. Whereas most countries also state that the checks have the aim to address ‘cross-border crime’ in general, several countries specify certain criminal phenomena. In identifying specific forms of crime, several countries (**BE, NL, NO, IT** and **DE**) mention human trafficking and identity fraud. **LU** mentions human smuggling and identity fraud. **BE** also explicitly states terrorism as a phenomenon to be targeted with the checks. **PL** refers to ‘threats to public security’. **DE** and **SK** also specifically add the prevention of health risks to be a central aim of the measures taken in intra-Schengen border areas.

*Question 4. Could you please indicate and specify under what legal mandate – criminal law, administrative law, other – the responsible agencies mentioned under question 1 perform their police and/or immigration checks?*

Apart from European Union legal provisions, like the Schengen Borders Code, several countries mention that the legal mandate under which the agencies and institutions perform intra-Schengen border checks is a mixture of administrative and criminal law (**PL, PT, SI** and **NL**). There are also countries that report only an administrative mandate (**AT, BE, CZ, EE, FI, HR, IT, LU** and **NO**). Some countries report Border Control, Border Patrol or (Federal) Police acts as (part of) the legal foundation upon which checks are being performed (**SK, LV, SI, HU, CZ** and **LT**). It is not always clear to what extent these acts are administrative or criminal law oriented or whether these acts are merely stating the tasks and responsibilities of the specific organization and officials working for it. In the case of **DE**, it is clear that the Federal Police Act is the body of legislation that governs the management and control of intra-Schengen cross-border mobility, allowing officers to carry out checks for both reasons of crime control and migration control.

For a more detailed overview of the specific national laws and regulations, please see the compilation.

*Question 5. Are there any important landmark cases<sup>4</sup>, that have influenced or changed national policies or practices in your country?<sup>5</sup>*

With the exception of **NL**, none of the countries report any important landmark cases that have influenced the way in which either intra-Schengen border control practices are being carried out. In **NL**, the Council of State has issued two rulings as a result of which the national framework governing the immigration checks that are carried out in the intra-Schengen border region by the Royal Netherlands Marechaussee had to be adapted.<sup>6</sup> Clarity had to be provided about the frequency, intensity and duration of the checks. The two rulings were the response to the Melki/Abdeli (C-188/10 and C-89/10) ruling of the Court of Justice for the European Union. **BE** also mentions the Melki/Abdeli case as well as the Adil ruling, also by the Court of Justice for the European Union (C-278/12). Although the country does not have any national case law on the matter, the outcomes of the two judgements by the CJEU are said to be taken into account with regard to the way in which intra-Schengen border checks are organized in Belgium. **IT** notes that due to its civil law judicial system, the interpretation of legislation performed by national courts has limited effects beyond the trial. Whereas the Italian Constitutional Court is able to define or refine the interpretation of laws, so far there has not been a specific intervention on the subject. **AT** notes that its internal border controls at the border to Slovenia have been assessed as legally faultless by the provincial administrative court of Styria.<sup>7</sup>

**EMN NCPs participating:** Responses from Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Norway, Slovak Republic, Slovenia, Sweden, United Kingdom (21 in total).

<sup>4</sup> In the context of this query, a landmark case has been defined as an important case in (further) defining or refining the interpretation of laws. In the context of this question, a landmark case would be a case that discusses, in the light of article 23 of the Schengen Border Code, what national authorities can and cannot do in terms of crime control and/or migration control in intra-Schengen border areas.

<sup>5</sup> For this summary, the answers to question 5 (what landmark cases) and question 6 (what has been the effect of these cases) have been combined.

<sup>6</sup> The rulings of December 28 December 2010 and 12 January 2011.

<sup>7</sup> Germany has also responded to this question, yet based on the answer it seems that the question for landmark cases has been misinterpreted as the answer lists a series of requests and issues the German authorities have been confronted with at the border so far.