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THE SCHENGEN REFORM, 2011-
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WHEN THE REVOLUTIONARY WAVE COMES: ARAB SPRING AND THE ROLE OF THE EUROPEAN COMMISSION IN THE SCHENGEN REFORM, 2011-2013²

By studying the process of reform of the Schengen *acquis* in 2011-2013 inspired by the Arab Spring and the inflow of migrants to the Mediterranean shores of the European Union, in this paper I seek to show how policy entrepreneurs exploit windows of opportunity that open following an external shock (a notion I use to conceptualise the events of the Arab Spring) in order to fulfill their own preferences, regardless of the substance of the external shock in question. How could it happen that the reform initiated by Italy and France in 2011 to “re-nationalise the Schengen” would in the end turn just the opposite of what they sought to achieve? My research suggests that the major factor which helps explain this is the institutional standing of the European Commission which holds exclusive right of legislative initiative, and the fact that by using its position, the Commission was able to win over the European Parliament to its side by effectively making it into a veto-player in its negotiations with the EU Council, thus trapping the Member States into the “joint decision trap”.

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INTRODUCTION

With the European Coal and Steel Community, the European Economic Community and the Euratom, all created in the 1950s, came theories devised to explain the phenomenon of regional integration in Europe. The reason neofunctionalism and the intergovernmental approach are commonly referred to as “grand theories” is precisely that their task was to explain the process of integration as a whole, taking it for a major dependent variable. Yet by the late 1980s the research agenda has noticeably shifted from “the ultimate question of life, the Universe and everything” and towards the narrower question of how the Communities (EC) function. During this period the students of European integration started to pay more attention to specific manifestations of the integration process: the new policies created within the EC institutional framework, their implementation in the Member States, reforms of the supranational policies, etc. (these developments in the discipline are outlined in Dekalchuk and Khokhlova 2015).

In this paper I contribute to this research agenda by studying the process of reform of the Schengen *acquis* in 2011-2013 inspired by the Arab Spring and the inflow of migrants to the Mediterranean shores of the European Union (EU), with a special attention to the role played by the European Commission in this process. The paper seeks to show how policy entrepreneurs exploit windows of opportunity that open following an external shock (a notion I use to conceptualise the events of the Arab Spring) in order to fulfill their own preferences, regardless of the substance of the external shock in question.

The 2011-2013 Schengen reform is interesting here for two reasons. First, the Arab Spring and the migration pressures it created form a classical example of an external shock, that is a shock external to the policy both geographically and content-wise (Dekalchuk 2014). Indeed, neither geographically, nor substantially the Arab Spring event can be easily related to the functioning of the Schengen area as such. If the inflow of migrants were to expose weak spots in an EU policy and cause its reform, then it should have been the migration policy and possibly the common asylum policy, but certainly not the policy pertaining to free movement of persons within the Schengen area.

Secondly, a number of diverse actors active in European politics tried to take benefit of the window of opportunity that opened with the Arab Spring, and to push through with the reform that corresponded to their preferences. In this respect both the Italian and French governments, and the European Commission acted as political entrepreneurs anticipant of an appropriate external shock “like surfers waiting for the big wave” and “ready to paddle” (Kingdon 2003, 165). Curiously, the French and Italian authorities were very active in promoting their preferences to “re-nationalise the Schengen” and consolidate the national component in the Schengen governance at the outset of the reform⁶ and their interests diverged

dramatically with those of the European Commission which saw the opportunity to deepen the integration in free movement of persons within the Schengen area. It is curious exactly because despite all the attempts France and Italy made to get their own way, the outcome of the reform ultimately reflected the preferences of the Commission, rather than those actors who initiated the reform in the first place.

How could it happen that the reform initiated by Italy and France in 2011 would in the end turn just the opposite of what they sought to achieve? My research suggests that the major factor which helps explain this is the institutional standing of the European Commission which holds exclusive right of legislative initiative, and the fact that by using its position, the Commission was able to win over the European Parliament to its side by effectively making it into a veto-player in its negotiations with the EU Council.

A significant body of research is devoted to the impact of the Arab Spring on the European Union. Yet most of it does not seek to explain the outcomes of specific reforms launched in response to the revolutionary events in Maghreb, and the studies that deal with the impact of the Arab Spring on the EU-level policies mostly focus on the issues of migration and asylum.

At the same time the research on the Schengen reform is plenty (Carrera 2010; Carrera 2011; Hobbing 2011; Carrera 2012; Carrera, Den Hertog, and Parkin 2012; Carrera, Hernanz, and Parkin 2013a; Carrera, Hernanz, and Parkin 2013b; Pascouau 2011a; Pascouau 2011b; Pascouau 2011c; Pascouau and McLoughlin 2011; Pascouau 2012; Pascouau 2013; Monar 2011; Monar 2012; Monar 2013; Monar 2014). Common for these studies is that while providing thorough description of the processes that preceded the reform, as well as the impact of the Arab Spring and the roles played by all major actors on the European political arena and their input in the reform, they do not attempt to theoretically explain these processes. A number of recent studies (Zaiotti 2013; Bocquillon and Dobbels 2014) makes up for this obvious shortcoming to some extent by analysing and theoretically substantiating certain aspects of the process of adopting the Schengen Governance Package in 2011-2013.

Unlike the literature mentioned above the present paper traces the influence of the Arab Spring on the behaviour of the major actors not only on the stage of initiating the reform, but during the negotiations and when adopting the Package. Thus the paper presents a comprehensive and detailed account of the Schengen reform in 2011-2013. Theoretical substantiation of these events follows in the conclusion.

Besides the primary sources and secondary coverage provided in the media, I also rely on three in-depth interviews with the first-hand participants in the Schengen reform (conducted in Brussels in July 2012).

All of the interviewees preferred not to be named which is why only their job titles at the time of the interviews are mentioned.

EXPOSITION: THE ARAB SPRING AND THE INFLOW OF MIGRANTS TO LAMPEDUSA

The 2010-2011 revolutionary uprisings in the Maghreb countries were from the very outset accompanied with a massive outflow of the African population. Already by February 2011 the numbers of migrants from Tunisia and the neighbouring countries was big enough to cause a serious concern with the Italian authorities. On February 11, 2011 the Minister of the Interior Roberto Maroni (who represented Lega Nord in the coalition government headed by Silvio Berlusconi) stated that the ever-growing inflow of migrants on the Lampedusa island could soon lead to a major humanitarian catastrophe, and mentioned that together with the Minister of Foreign Affairs Franco Frattini they would ask the EU for help along the lines of the Marshall plan assistance provided to Europe after the World War II («Mille tunisini sbarcati a Lampedusa Maroni: „Emergenza umanitaria“» 2014).

Already on February 12 Cecilia Malmström, the Commissioner for Home Affairs, suggested in a phone call with Berlusconi that the Commission could help. Yet on February 14 the Italian Ministry of the Interior issued a news release condemning “the indifference of Europe” to the problems Italy faced, and Maroni later compared the arrival of the African migrants to “an exodus of biblical proportions” («Comunicati Stampa: Crisi nel Maghreb: dichiarazione del sottosegretario all’Interno Mantovano» 2011; Pop 2011; «Tunisia Boat People Put EU to the Test» 2011).

The next day, February 15 when talking to the MEPs Commissioner Malmström suggested that financial assistance could be provided to Italy from the European Refugee Fund. The same day the Italian authorities asked the Frontex³ for assistance in the form of a joint operation “Hermes” which started on February 20 (Pascouau and McLoughlin 2011, 1–2; «Frontex | News – Hermes 2011 running» 2011).

Yet by the end of the month the situation deteriorated. On February 24-25 Maroni attended the EU Council only to demand once again that the EU shows more solidarity with Italy and that the migrant pressure is redistributed among Member States more evenly, but received no support from the other ministers (except for his Greek, Cypriot, Maltese and Spanish colleagues). Austria, Germany and some

³ Frontex is one of the EU agencies. It was established in 2004 and is in charge of coordinating joint EU operations conducted on its external borders.

other Member States believed that the Italian authorities overstated the problem (*Spiegel Online* 2011; Dohment et al. 2011; Monar 2012, 117, 122).

The hostilities in Libya and the growing flow of migrants to the southern coast of Europe were the major subject of the Extraordinary Summit of the EU heads of states and governments which took place on March 11 in Brussels. The European Council expressed its deep concern regarding the events in Maghreb, and the leaders of the Member States approved an extension of the resources available to the Frontex. This was intended as a manifestation of solidarity of all the Member States with those countries that faced the growing migratory pressures on their borders. The European Council also charged the Council of Ministers and the Commission with a task of putting together “a plan for the development of capacities to manage migration and refugee flows” by the next summit in June 2011 (see points 10-11 in «Extraordinary European Council 11.03.2011: Declaration» 2011, 4).

These actions taken by its European partners seemed insufficient to Italy, and on March 25 the Italian Ministers of the Interior and of Foreign Affairs went to Tunisia. Their goal was to conclude a readmission agreement with the Tunisian authorities and to reinstate the existent arrangement to reinforce the sea border controls with Tunisia («Press Release: Immigration: Frattini and Maroni in Tunisia to Reinstate Common Rules» 2011).

When Cecilia Malmström visited Tunisia on April 1 she, too, talked of readmission of the Tunisian migrants. On the press-conference after the visit Malmström told that the Tunisian authorities were ready to accept the citizens of Tunisia back in their country, and, when asked if the solidarity mechanism provided for by the Council Directive EC/2001/55⁴ would be activated, expressed her doubts, saying that the number of migrants that Italy received was too low according to the Directive (Malmström 2011a).

All the efforts (both by Italy and by the EU officials) were rewarded when already on April 5 Italy and Tunisia signed a readmission agreement that, according to Maroni, would “shut down the migratory flow” («Maroni firma l'accordo con la Tunisia» 2011). The same day Berlusconi signed a decree to grant residence permits to all the African migrants already in Italy by April («Decreto del Presidente del Consiglio dei Ministri aprile 2011 „Misure di protezione temporanea per i cittadini stranieri affluiti dai Paesi nordafricani“ (11A04818)» 2011). Obtaining the residence permit would allow the migrants to move

⁴ This Directive provides for redistribution of the migratory pressures in case of mass migration of displaced persons. The Council of Ministers may decide to help those Member States most exposed to the inflow of immigrants by redirecting some of them to the less affected countries.

freely within the Schengen area, which explains why Italy took this decision: indeed, the readmission agreement would not apply to those migrants who have arrived to Italy before the agreement was signed.

Moreover, Umberto Bossi, the leader of the extreme right Lega Nord, Berlusconi's minor partner in the coalition, has been suggesting this solution for quite some time. Already in mid-February Bossi announced that "if they [the migrants] come, we will just send them to France and Germany" (*Spiegel Online* 2011). And while welcoming the agreement with Tunisia, Bossi noted that "turning of the faucet" was not enough, and that it was necessary to also "clean the sink", that is, get rid of the migrants already present in Italy («Maroni firma l'accordo con la Tunisia» 2011).

ENTANGLEMENT: THE FRANCO-ITALIAN PROPOSAL TO "RE-NATIONALISE THE SCHENGEN"

Of course, these actions and statements by the Italian authorities raised hackles among Italy's European partners. Even before Italian Prime Minister signed the decree, the French authorities made it clear they found Italian position unacceptable. As early as in late March the French police were stopping migrants who tried to get into France in the border areas with Italy, and sent them back to Italy («Vintimille, nouvelle frontière du Maghreb» 2011; «Italy, France Tussle over „Boat People“» 2011). The Decree was promulgated on April, 5 and the next day the French Ministry of the Interior diffused an instruction to the police not to let on the French territory those travelers who only traveled with the temporary residence permits and who could not prove to have enough means of subsistence during their stay in France (Ministère de l'intérieur, de l'outre-mer, des collectivités locales et de l'immigration 2011). Naturally, the travelers mentioned in the instruction were mainly the migrants arriving from Italy (Monar 2012, 122).

Now it was Italy's turn to be outraged. Its initial plan was to hand round the residence permits and thus overcome the lack of solidarity among its EU partners without even bothering them, yet already on April 7 it became known that during the Council of Ministers of the interior (due on April 11) Italy would officially ask for activation of the solidarity mechanism under the Directive EC/2001/55. But now, even despite the fact that Commissioner Malmström (who was rather skeptical only a week ago) expressed her support for the Italian initiative, the chances for activation of the mechanism were rather thin – Italian behaviour angered not only Paris, but also Berlin and Vienna («France Prepares to Shut Down Border with Italy» 2011; Schlamp 2011).

Silvio Berlusconi who visited the isle of Lampedusa the day before the Council of Ministers met in Luxembourg, once again resorted to the now traditional Italian rhetoric and asked Europe to help Italy handle “the human tsunami” (Grant 2011). Yet during the Council on April 11 did not only Italy receive little support from the rest of the EU Member States. Many ministers openly expressed their criticism of the Italian policies. Thus, the Dutch Minister for Migration and Asylum Gerd Leers said he was “quite dissatisfied with Italy’s surprise decision to pass on its problems to all the others without prior notice”. Similar criticism followed from the Austrian, Belgian and German ministers (Lorig 2011; *The Economist* 2011; «EU Seasick with African Boat People» 2011).

The crisis in Italy’s relations with its partners reached its apex on April 17 when the French police blocked several trains with migrants which passed from the Italian Ventimiglia to Menton (*BBC* 2011). Then followed an exchange of mutual accusations between Paris and Rome, which resulted in a joint press-conference by Silvio Berlusconi and Nicolas Sarkozy who declared they sent a letter to the Commission President José Manuel Barroso and the European Council President Herman Van Rompuy. The contents of the letter were made public beforehand: the French and Italians proposed a revision of the Schengen agreement in order to include “a possibility to temporarily reinstate the border controls on the Schengen internal borders in situations of extreme difficulties in controlling common external border” of the Schengen area (Lettre de MM.Sarkozy et Berlusconi 2011, 4; «Migrants tunisiens: la France envisage de suspendre les accords de Schengen» 2014; «Sarkozy, Berlusconi to Propose Schengen ‘Upgrade’» 2011). In their letter Berlusconi and Sarkozy also emphasized the need for refurbishing the proposal for reform of the Schengen evaluation system and making it more ambitious as compared to the 2010 Commission proposal⁵. Of course, what they meant was primarily reinforcement of the Member States position on this

5 Indeed, by the time of these events both the mechanism used to evaluate the implementation of the Schengen *acquis* in the Schengen Member States, and the mechanism to evaluate readiness of the non-Schengen states to join the Schengen area, were being reformed for several years. The first attempt to reform these evaluation mechanisms was taken by the Commission as early as in spring 2009. The goal of the reform was to introduce the evaluation system into the legal and institutional framework of the EU (throughout the 2000s the evaluation procedure was regulated by the Decision of the Schengen Executive Committee (see «Decision of the Executive Committee of 16 September 1998 Setting up a Standing Committee on the Evaluation and Implementation of Schengen (SCH/ Com-ex (98)26 def.)» 2000), and was therefore elaborated outside the EU legal framework). The 2009 proposals of the Commission were very cautious. The Member States would retain their major role in evaluating the readiness of non-Schengen states to join the area. Yet, on the issue of evaluating the implementation of the Schengen *acquis* by the Schengen members the Commission went further and proposed to grant it the coordination authority within the procedure, while still keeping full engagement of the national experts from Member States in the process (European Commission 2009b; European Commission 2009a). It might seem that adopting such a cautious reform should not have caused any difficulties. Yet the Parliament joined the game as the Council had to consult it in order to approve the Commission proposals. In his negative conclusion the EP LIBE Committee rapporteur Carlos Coelho demanded that the Commission withdraw its proposals and comes back with the new ones. The reason for that was the fact that the proposals’ legal base did not take full account of the role of the Parliament which could only state its opinion in the consultation procedure that could then be completely ignored by the Council. The rapporteur found that the Commission had to propose co-decision as the legal procedure so that the EP would become a co-legislator along the Council. Partly this reasoning was due to the fact that the Lisbon Treaty which would shortly enter into force gave the Parliament much more authority in this area (European Parliament 2009).

issue (Lettre de MM.Sarkozy et Berlusconi 2011, 4; «France, Italy call for Schengen Treaty re-write» 2011).

Observers note that these actions of the French and Italian Prime Ministers were motivated primarily by considerations of national politics. Sarkozy played the card of national sentiment and used the anti-immigration rhetoric to win over the voters who were expected to vote for Marine Le Pen during the upcoming presidential elections. Electoral calculations also mattered to Berlusconi who faced local elections in May (see Koenig 2011; Lombardi 2011, 42).

The French and Italian proposal caused a lot of concern. Some experts suggested that the reform proposed by Sarkozy and Berlusconi would totally change the “Schengen philosophy”: its underlying idea of mutual trust would be replaced with the mutual distrust (Pascouau 2011a, 2). Yet even more surprising was the reaction of the European Commission. Already on April 29 in a letter addressed to Sarkozy and Berlusconi the Commission President Barroso promised that the issues they raised would be examined during the European Council in June, and acknowledged that “temporary reinstatement of the border controls is an option which, if regulated by clear-cut criteria and properly defined, could be an element that would consolidate the governance of the Schengen area” («Lettre de le President de la Commission européenne» 2011, 1–2; «Brussels Readies Plans to Reinstate Border Checks» 2011).

The Commission confirmed its willingness to launch a full-fledged reform of the Schengen legislation when in a few days it issued a Communication on migration. Among other things the Communication emphasised the need to consolidate the system of governance in the Schengen area, as well as its evaluation system. The Commission also noted that the mechanism for temporary reinstatement of the border controls would be considered, though a reservation was made that in the Commission’s opinion a decision to reinstate border should be taken on the EU level, not by the individual Member States (see paragraph 2.3 in European Commission 2011a, 8; Malmström 2011b).

Decision by the Commission to propose draft legislation in these areas caused some agitation in the European institutions, but of course most excited were the members of the European Parliament. When talking to the MEPs on May 10 Barroso was forced to make excuses and explain that the reform was neither a spontaneous reaction, nor a concession to Rome and Paris:

It took Commission a little less than one year to review its proposals, and on November 16, 2010 it initiated the reform of the Schengen evaluation mechanism once again. Now the legislative procedure suggested by the Commission was the ordinary legislative procedure (previously known as co-decision). The Parliament would thus become a co-legislator on this Regulation. Substantially though the new proposal did not differ much from the old one (European Commission 2010). It is this proposal that Berlusconi and Sarkozy refer to when they write about the necessity to keep the leading role in the evaluation process for the Member States in their letter.

“Already last year, the Commission put forward proposals to preserve and strengthen the evaluation mechanism of Schengen... And I want to underline: already last year, well before the recent developments, the Commission has identified some problems in the governance of Schengen. We will now update and complete these proposals... While recent events have provided a spark of urgency to bring this to the table, the Commission takes this opportunity..., to address the long-standing, underlying inconsistencies and unresolved issues that have provided scope for some Member States to act unilaterally... This is not a knee-jerk reaction. This is not an improvisation.”

Our interviewee who participated in preparing the Communication issued by the Commission in May confirms that it was not provoked by the discord between Paris and Rome. In fact, “the content of that [the Communication] was not influenced by the Franco-Italian dispute even though the timing might indicate that it was; the content of that was already decided before that [these events]” (Interview with the high-level official from DG «Home Affairs» of the Commission (at the time of the interview) 2012).

On May 12 during the extraordinary meeting of the Council of Ministers of the Interior the Member States supported the Commission proposal to reform Schengen legislation, although many of them found the idea of transferring the authority to decide on reinstatement of the internal borders to the EU level completely unacceptable. This is why the ministers decided to leave the ultimate decision on what the Schengen reform would look like to the European Council meeting in June («Ministers Agree on Need for New EU Border Rules» 2011).

In the Conclusions of the European Council held on June 23-24 heads of states and governments reaffirmed their willingness to reform the Schengen evaluation mechanism – in particular, the mechanism used to evaluate how Schengen members implemented the Schengen *acquis*. They also intended to adopt a safeguard clause which would allow Member States to temporarily reinstate border controls on their internal borders in cases of “a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules”. The European Council instructed the Commission to initiate all the necessary legislation by September 2011 (see paragraphs 20-22 in «European Council Conclusions 23-24.06.2011» 2011, 7–8).

Thus on the initial stage of reform the European Commission managed to take the lead and used its Communication to shape the discussion during the June Summit. Essentially, through its May and June actions the European bureaucracy prompted the European Council to instruct it to conduct the type of reform it wanted and planned to conduct. As one of the staffers of the Council secretariat mentioned, “in fact a successful Commission is a Commission which uses cleverly the European Council to push its own ideas” (Bocquillon and Dobbels 2014, 27).

On July 7 the European Parliament also made clear its position concerning the Schengen reform. While in general supporting the Commission proposal, the MEPs warned it against any attempts to include in the proposal any provisions that would expand the grounds for temporary reinstatement of the border controls. To the contrary, they insisted on a narrower and stricter definition of the criteria already listed in the Schengen Border Code⁶. Finally, the MEPs also made it unambiguously clear that the legal base for the Commission proposals could only be article 77 of the Treaty on the Functioning of the European Union (TFEU) which provides for the ordinary legal procedure⁷ (European Parliament 2011b).

Thus the Parliament not only demonstrated its pro-integrationist stance, but also made clear to the Commission that it was willing to play by its side and counter the attempts of some of the Member States to “re-nationalise” the Schengen legislation and jeopardise “the very spirit of the Schengen rules” (European Parliament 2011b).

CULMINATION: COMMISSION’S DEXTERITY AND THE INTER-INSTITUTIONAL CONFLICT

The proposal presented by the Commission on September 16, 2011 could not fail to seem extremely ambitious to all of the participants to the process, especially given the circumstances that served as a pretext for the supranational bureaucracy to launch the reform. In the proposal, “re-nationalising the Schengen” was completely out of question. To the contrary, the Commission tried to enlarge its authority to the widest extent possible. As one of the Commission officials mentioned, “the conclusions [of the European Council] also left room for interpretation..., and we interpreted that they [the rules for reintroducing border checks] had to be simplified by introducing more Europe” (Bocquillon and Dobbels 2014, 33).

When initiating the proposals, the Commission acted very rationally and tried to engage the European Parliament on its side. Indeed, the changes it introduced to its earlier 2010 proposal for the Schengen evaluation mechanism were practically identical to those suggested by the EP rapporteur Carlos Coelho in April 2011. Take the idea of a safeguard clause whereby the Commission could issue an implementing act

⁶ The Code was adopted in 2006 by the Council and the European Parliament. It regulates the rules governing the temporary reinstatement of the border controls by the Schengen members. The grounds for reintroduction of the border controls are public security concerns in cases of large-scale events or the necessity to urgently reinforce the internal security as a reply to emergencies (e.g. terrorist attacks). The decision to reintroduce border controls should be taken by the Member State, but it has to give advance notice to the other Member States and the Commission (if it is the matter of a preplanned event, such as a football championship) or to report it after the event (if the reinstatement was extraordinary) (Council of the European Union and European Parliament 2006).

⁷ The Lisbon Treaty renamed co-decision into the ordinary legislative procedure.

to force a Member State to reinstate the border controls if after evaluation the Commission finds persistent problems with the implementation of the Schengen *acquis* in the Member State in question which could jeopardize safe functioning of the Schengen area. This idea was borrowed by the Commission from the Coelho report in its entirety (see sections 13a and 13b in European Parliament 2011a, 7–8, 15; see article 15 in European Commission 2011b, 15; see articles 23, 23a and 26 in European Commission 2011c, 8–9, 11). Following the EP demands the Commission also further specified the criteria for justification of a temporary border control reinstatement and transferred the authority to take such decision to the EU level – from now on such decisions would have to be taken through a Commission implementing act (see article 24(4) B European Commission 2011c, 10).

The only provision that could be remotely considered a concession to the Member States was a reference made in the preamble which stated that “the crossing of the external border of a large number of third-country nationals might, in exceptional circumstances, justify the immediate reintroduction of some internal border controls, if such a measure is needed to safeguard public policy and internal security at the Union or national level from a serious and urgent threat”. A Member State could take such a decision unilaterally, but for a period no longer than five days – the prolongation of this period was up to the Commission (see paragraph 5 of the preamble and article 25 in European Commission 2011c, 6, 10–11).

Finally, the same applied to the legal base suggested by the Commission proposals. Both pieces of legislation⁸ used articles which provide for adopting regulation through the ordinary legislative procedure as their legal basis (European Commission 2011b, 3–4; European Commission 2011c, 3–4) – which again followed the EP demands closely.

One of our interviewees who took active part in drafting the Commission proposals was very careful in the way he put this, but he recognized that “it is true that the Parliament is the natural ally of the Commission in most of these files because... as [it is] more integration-minded. I think that may have been a motivation among others” (Interview with the high-level official from DG «Home Affairs» of the Commission (at the time of the interview) 2012).

It was then quite natural that the Commission proposals caused a storm of criticism from the Member States who were not ready to give up the decision on such a sensitive matter of national security and cede it to the Commission (Monar 2012, 124). Already by December 2011 it was obvious that the Council was

8 The first covered the mechanism used to evaluate readiness of a Schengen non-member-state to join the Schengen area and the mechanism to evaluate the implementation of the Schengen *acquis* by the Schengen members. The second one amended the Schengen Border Code on the issues of temporary reinstatement of the internal borders within the Schengen area.

not only going to reject the idea of transferring the competence of reinstating border controls to the European Commission, but would also try to change the legal base for one of the two proposals which related to the evaluation mechanism in order to exclude the European Parliament from the decision-making process in this area.

In the negotiations that took place in early 2012 the Member States insisted on returning them the right both to reinstate border controls and to evaluate the implementation of the Schengen *acquis*. Meanwhile both the Commission and the EP resisted these efforts of the Council and “saw [them] as a subordination of the continuation of border control free travel within the EU to purely national internal security considerations” (Monar 2013, 129).

On April 20, 2012, six days before the meeting of ministers of the interior in Luxembourg, the French Minister Claude Guéant and his German colleague Hans-Peter Friedrich sent the Danish presidency a letter where they demanded that the Member States retain the competence to reinstate internal border controls in its entirety. On April 26 during the meeting their call was supported by the Ministers of the Interior of Austria, Hungary and the Czech Republic. In turn Belgium, Luxembourg and Sweden, as well as Commissioner Malmström, were all outraged at the fact the French authorities used the Schengen reform “instrumentally” on the threshold of the first round of the presidential elections in France. After the meeting Malmström stated that “Schengen is far too important for it to be exploited for campaign purposes” («Sarkozy Aide Brings Election Campaign to EU Meeting» 2012; «EU Interior Ministers Argue over Border Controls» 2012).

One final blow was dealt to the inter-institutional cooperation when the ministers of the interior of the 27 Member States unanimously decided on June 7-8 to change the legal base of the Regulation on the Schengen evaluation mechanism from article 77(2) to 70 TFEU, and returned the right to reinstate border controls to the Member States both if persistent problems of Schengen *acquis* implementation were established (that is, as part of the safeguard clause) and in case of a serious threat to the public order or national security (see Council of the European Union 2012, 9–12).

It was already clear in December that the Council would be discontented with the legal base of the Regulation on the Schengen evaluation mechanism and would try to change it. By July 4 all but one country agreed to the change. General approach to the compromise version of the two Regulations was prepared by the Danish presidency at the request of France, Italy, the Netherlands and Germany, and was practically agreed upon already during the COREPER meetings on May 23 and 30, when it was also decided that in case of a unanimous agreement to change the legal base the Council would voluntarily

cooperate with the Parliament to take its position on the reform of the Schengen evaluation mechanism into account. Finally, as the Danish presidency noted, the compromise suggested by the Council also took account of the positions of the EP rapporteurs Carlos Coelho and Renate Weber, members of the EP LIBE Committee who were put in charge of the two Commission proposals (see Presidency 2012b; Presidency 2012c; Presidency 2012a; Manners 2013, 78).

According to our interviewee who at the time of the interview was in charge of Schengen affairs in the Council Secretariat, the decision of the Member States to change the legal base was primarily based on the position of the Council legal service. But there was a political reason, too. The Council was reluctant to grant access to the Schengen *acquis* implementation evaluation reports to the Parliament:

“...you have these evaluation reports that are not published and then the Parliament wants to be informed because the Parliament in co-decision has its say, and how can you decide if you are not fully informed. They have a point there. [But] the Member States are not very trustworthy, as far as politicians are concerned, they are under the impression that if you gave the Parliament the document, telling them not to give it to the press, it would be there in exactly half an hour. One of the things Parliament wants to solve is this: they want to be involved in a way that they have access to all of the information about the evaluations. Parliament is also always looking for power. (Interview with the high-level official from the DG D «Justice and Home Affairs» of the General Secretariat of the EU Council (at the time of the interview) 2012).

By changing the legal base of the Regulation and thus excluding the Parliament from the decision-making procedure, the Council could ignore this primary preference of the EP. It is noteworthy though that the Council’s willingness to engage in informal consultations with the Parliament on this Regulation was largely due to the fact that the Regulation on the evaluation mechanism was bundled with the other Regulation to amend the Schengen Border Code as part of the single package of measures to regulate the Schengen area. And this latter regulation would undoubtedly have to be adopted in co-decision with the European Parliament.

The reaction of the EP was quick to follow and was something absolutely novel for the relations between the two legislative institutions (Carrera, Hernanz, and Parkin 2013b, 14). Although substantively the positions of the EP and the Council on most issues within the package were very close (Koper 2013, 40–43; Peers 2013, 35–41), on June 14 the Parliament suspended the adoption of both regulations by withdrawing them from the agenda of the July plenary session. Moreover, it also “froze” another five proposals on justice and home affairs that were under consideration at the time. Martin Schulz, the President of the Parliament, expressed the joint position of most political groups by saying that “it is without precedent that in the middle of the legislative process, one co-legislative chamber excludes the other” and that this decision of the Council taken on June 7 was a “a slap in the face of parliamentary democracy and is unacceptable to the directly elected representatives of European citizens”. The MEPs

also expressed their willingness to join the Commission and bring a suit to the ECJ against the Council («Schengen: MEPs Strongly Object to Council Decision and Consider Legal Action» 2012; «Schengen: MEPs Angry at Council Attack on Democratic Powers» 2012; «EP Decides to Suspend Cooperation with Council on Five JHA Dossiers until Schengen Question is Resolved» 2012).

Thus for the rest of 2012 the negotiations stalled. Mostly this was due to the fact that the Cypriot presidency, as well as the Danish presidency already discredited in the eyes of the MEPs, could hardly broker the deal between the two institutions. As Dinan mentions, “the fact that Cyprus was not in the Schengen area and faced considerable criticism for its handling of migrants did not increase the country’s relatively limited diplomatic leverage” (Dinan 2013, 100).

DENOUEMENT: PARLIAMENT AS A VETO-PLAYER AND THE OUTCOME OF THE REFORM

By April 2013 the conflict between the Council and the Parliament remained unresolved. First of all, Carlos Coelho, the rapporteur on the Regulation on evaluation mechanism, insisted on introducing the so called bridging clause into the regulation – a special provision which would effectively link this regulation to the one on Schengen Border Code. Thus if the Council would want to amend the Schengen evaluation mechanism, it would also be obliged to reform the Border Code, which would allow the EP to participate in the procedure and influence indirectly the Council position on the evaluation mechanism. There also were some other issues that still disturbed the MEPs:

- the nonbinding character of the document that the Council (and not the Commission as the EP and the supranational bureaucracy aspired for) could adopt if in the process of evaluation of the implementation of the Schengen *acquis* by the Commission it would find persistent problems that could jeopardise the functioning of the Schengen area;
- the insufficiency of information provided to the Parliament regarding the contents of the country evaluation reports;
- and the procedure for conducting unscheduled inspections of individual Member States by the Commission (Carrera, Hernanz, and Parkin 2013a, 10).

The compromise was found when on May 30, 2013 the Irish presidency made public the new draft version of the Council Regulation on Schengen evaluation mechanism which did not only formally recognise that the Council would amend the Regulation only after consulting the EP, but also, and more importantly, agreed to provide all the country reports to the EP, even if they contained classified information (see paragraph 15 (a) in the preamble and articles 13 and 16 in Presidency 2013, 6, 19, 21). In less than two

weeks, on June 12 the Parliament held its first reading both on the Council and Parliament Regulation amending the Schengen Border Code, and the draft Council Regulation as proposed on May 30. Both documents were approved by the MEPs. On October 7 the Council adopted the Regulation on evaluation mechanism and approved the new version of the Schengen Border Code in the first reading. On October 23, 2013 this document was signed by the Council and the EP presidents.

Thus although “stemming from a context of political crisis and with the objective (for the French and Italians) of reinforcing Member States’ control of the Schengen mechanism, the legislative package yields quite a different result”, it weakened the intergovernmental component in the Schengen governance policy relative to its initial status quo and gave more powers to the supranational institutions (the Commission and the EP) than was initially preferred by the Member States (Pascouau 2013, 1–2, 11).

The package to regulate Schengen area did not only significantly change the role of the European Parliament and the Commission within the procedure of evaluation of a state’s readiness to join Schengen and of the implementation of Schengen *acquis* by the Schengen members, but it also specified and detailed the rules to follow when reintroducing border controls on the Schengen internal borders, while the reinstatement itself is now considered a measure of a last resort only. The renewed Schengen Border Code also set a higher level of accountability of the Member States to the EU institutions. Now any Member State which reinstates the border controls is obliged to provide all the relevant information to the Commission and to supply a report stating the reasons for reintroducing the borders, as well as proof of the proportionality of this measure to the threat it seeks to eliminate.

The safeguard clause which entitles the Council of Ministers to recommend one or several Member States to temporarily reintroduce border controls if during its evaluation of their conformity to the Schengen *acquis* the Commission finds serious and persistent violations, was introduced. This effectively “takes the decision on a general threat to the functioning of the system and a resulting prolonged re-introduction of internal controls out of the discretion of individual Member State... and makes it subject to collective decision-making” (Monar 2014, 151). As Jörg Monar mentions, this provision is the exact opposite of what the French President Sarkozy and the Italian Prime Minister Berlusconi wanted when demanding a thorough overhaul of the Schengen legislation in April 2011 (Monar 2014, 151).

Finally thanks to the efforts of the European Parliament the preamble of the document is explicit about the fact that “migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security.” (see paragraph 5 of the preamble in Council of the European Union and European Parliament 2013, 2) – once again, to the

contrary from what Paris, Rome and some other Member States wanted initially when they tried to use the events of the Arab Spring and the inflow of migrants that followed, to broaden the grounds for a Member State to temporarily and unilaterally reintroduce border controls.

CONCLUSION

One important feature of the Arab Spring viewed as an external shock was the asymmetry of its impact on different Member States. Although during the Extraordinary European Council in early March 2011 all heads of states and governments without exception somewhat bombastically “[saluted] the courage demonstrated by the people of the region and [reaffirmed] that it is for them to decide their future, through peaceful and democratic means” (see paragraph 2 in «Extraordinary European Council 11.03.2011: Declaration» 2011, 1), just a few of them experienced the immediate influence of the revolutionary upsurge in Maghreb first-hand.

This is why the move to securitize (Buzan, Waever, and Wilde 1998) the events of the Arab Spring and the migrant inflow proved somewhat asymmetrical, too – of all the Member States, the only securitizing actor in this situation became Italy which suffered the most. Italian authorities on all levels of government and within the ministries in charge demanded more solidarity in shouldering the burden of the migratory pressure from their European partners. And throughout the first months of 2011 they used the alarmist rhetoric of state of emergency most actively: take for instance Berlusconi’s vivid metaphors of the “human tsunami” and Maroni’s “exodus of biblical proportions”.

This unanimous attempt to securitize the Northern African migrants undertaken both by the Head of Government and the Minister of the Interior can be partly explained by the fact that the rhetoric Rome used was mostly directed at Italy’s own population and only partially at its EU partners. Not least this was induced by the approaching local elections in Italy which made resorting to the anti-immigrant rhetoric very natural for the extreme right Lega Nord and the populist center-right Berlusconi. Moreover, showing the resolution to overcome the problem to the national voters despite “Europe’s indifference” and “Brussels’ inaction” only added points in the electoral race to both parties.

No wonder that this rhetoric had no effect on the European Commission or the other Member States which time after time denied activation of the solidarity mechanism to Italy and failed to perceive the relatively restrained migratory pressure that Italy experienced as an emergency.

The situation changed when Italy moved from words to deeds and started handing out temporary residence permits to the migrants from Tunisia and the neighbouring countries whose only goal was to move to France, Germany, Austria, Belgium and the Netherlands. Now it was the French President's Nicolas Sarkozy to use the securitizing rhetoric, although again the target of his securitizing move were not France's European partners, but French population – and again because of the approaching elections. The actions that followed: detaining migrants in the border regions, their removal back to Italy and the effective introduction of the border control on the French-Italian border, were justified by the French authorities through the threat to public order and national security that migrants allegedly posed.

The discourse used by the two countries' authorities led them to assert the need to reform the Schengen legislation in order to reinforce the national control over the system of temporary reinstatement of the internal borders, in particular as a response to growing migratory pressures on external borders of the Schengen area. Yet as our interviewee mentions,

after a while not only Italy and France but everybody realized that this uncontrolled influx of asylum seekers, refugees, has nothing to do with Schengen and you're not going to solve this with Schengen. Schengen is something totally different – it's about movement of free persons within the Schengen zone. The problem with immigration with asylum, refugees, is an asylum, refugee problem! (Interview with the high-level official from DG D «Justice and Home Affairs» of the General Council of the EU Council (at the time of the interview) 2012).

Thus the French and Italian governments obviously proved the first-mover entrepreneurs who responded to the electoral incentives that the national authorities faced by explicitly connecting the external shock to the Schengen policy and using this connection to articulate the need for a reform. Sarkozy's and Berlusconi's preferences regarding the reform were absolutely specific: reinforcing the national control over the Schengen system and the effective “re-nationalization” of the right to temporarily restore the border controls on the internal borders when the Member State deems such reinstatement necessary.

Yet due to the Commission's exclusive right to initiate EU legislation it was only the Commission that could launch the Schengen reform in reaction to the demands of Paris and Rome. As one EU official who for a long time was in charge of migration, asylum and borders in the Commission, in fact there was a number of strategies that the Commission could embrace after Sarkozy and Berlusconi sent their letter to Barroso. And in his opinion it would have been a sound decision not to initiate the reform:

I think that what the Commission should have done in this case should have been to apply the Metock case working method. Metock was a court case concerning, to put it in very simple terms, the consequences of free circulation of persons of marriage of EC and non-EC citizens. Metock caused some emotion in some of our Member States, which immediately wanted to question some of the provisions of the consolidated free circulation directive. The Commission at that time very skillfully resisted this by making clear that it was not willing to embark onto a modification of this directive unless there was a very good case for it and by therefore, committing itself to engage into an in-depth examination together with Member States of possible

problems, issues, and ways to solve and to sort out... This led, in a very swift way, to the conclusion that no revision of the directive was needed, that no, the problems were not of such a magnitude that the free circulation of person could have been seen as opening the door for irregular migrants entering or moving within the EU through fake marriages... It went down that way and now today everybody has forgotten about the consequences of the case... (Interview with the high-level official from the Commission (at the time of the interview) 2012).

In other words, the Commission through its steering of the legislative agenda could try to bring to naught the discussion of the Schengen reform by choosing the option that Bachrach and Baratz call *nondecision-making* (Bachrach and Baratz 1963). Yet the Commission understood that the question of reforming the Schengen rules would anyway make it to the focus of the discussion during the June European Council, and so it decided to gain the first mover advantage by attempting to set the framework of this discussion thus effectively forcing the EU leadership to instruct it to initiate the kind of reform that would correspond to the Commission's own preferences.

The Commission proposal was made public in September 2011. It proved extremely ambitious and caused some bewilderment and indignation among the Member States who found the proposals to encroach upon the matters of security and sovereignty. Nevertheless, according to the interviewee from the Council's Secretariat, the Commission acted very rationally:

“The first thing I want to say is... [that] power is always taken and never offered. This explained maybe already part of it [of the content of the Commission's proposals]. Secondly, it is of course also clear that if the Commission comes with this kind of proposal, then it knows that there is going to be tough negotiation. My second proverb is, if you fire an arrow, aim it high because it will come down as it flies... I think everybody, on the side of the Commission, was taking into account that within the negotiation procedure the church would move to the middle of the village again, you see? And that we would come with some more equilibrated, but the first was of course, give it all to the Communities. (Interview with the high-level official from DG D «Justice and Home Affairs» of the General Council of the EU Council (at the time of the interview) 2012).

Against this background both France and Italy, as well as the rest of the Member States who prescribed the Commission to come up with a reform proposal by September, were caught in the “joint-decision trap”: now they could not influence the exact contents of the proposals. The Commission was also rational in the way it engaged the European Parliament which allowed it to make a stand for the pro-integrationist reform not only during the initiation of the reform, but also on a later stage of negotiations.

The Commission knew from its own experience of the 2009 negotiations that the Parliament had a clear preference to co-legislate on the Schengen evaluation mechanism, and that the Member States were reluctant to let the supranational institutions into this sensitive area. It seems that the strategy and calculus of the Commission allowed it to use the European institutional framework to its benefit and not only prevent a regress of the integration within the Schengen policy, but also to force the Member States to accept the outcome they would not initially approve.

By prescribing the ordinary legislative procedure as the decision-making procedure for both regulations, the Commission effectively transformed the European Parliament into a veto-player. The Council (which has no formal means of influencing the EU legislative agenda) tried to follow the Rikerian logic⁹ and changed the voting procedure for one of the two regulations in order to exclude the Parliament from voting on the evaluation mechanism, which should have changed the outcome of the negotiations. But this still would not allow the Member States to disregard the MEPs given that the reform could only succeed if both regulations would be adopted at the same time, and that it was impossible to adopt the second regulation without the Parliament.

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9 Riker writes: “The reason why agendas are manipulable... is that... it [cannot] be guaranteed in all cases that the social choice will be independent, of the method by which it was chosen. And if the choice depends in part on the way it was chosen, then politicians can reasonably expect to change the outcome if they can change the way that questions are posed... or the way votes are counted, or which votes are counted and so on” (see Riker 1986, 142–143).

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