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ARTICLE

A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship

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Abstract

Border controls within the Schengen area are meant to be a thing of the past. Yet, since the refugee crisis of 2015, “temporary” border controls have become quasi permanent in several European Union Member States. Although these controls are against the letter and spirit of the Schengen Borders Code, the Commission has not taken any measures to enforce these rules. One of the reasons for the dismal state of the Schengen area is the one-sided focus on the abolition of internal border controls as primarily functional for the establishment of the internal market. This comes at the expense of Union citizens’ rights and disregards the fundamental role that the abolition of border controls has on how citizens see the Union in political terms and conceive themselves as Union citizens. Against this background, we argue that from its beginning the objective of the project to abolish border controls was to foster a supranational political identity of Union citizens by transforming citizens’ spatial experience. Union citizenship in the current EU Treaty framework constitutes the legal expression of that historical connection between the abolition of border controls and free movement. Emphasizing the citizenship dimension of an area without internal frontiers provides a different perspective on current controls at the Schengen internal borders.

Keywords: Union citizenship; Schengen; border controls; reinstatement of; AFSJ

A. Introduction

Controls at the internal borders between EU Member States have been formally abolished since the entry into force of the Convention Implementing the Schengen Agreement on March 26, 1995. Although border controls within the Schengen area “are meant to be a thing of the past,”¹ “temporary” border controls have become quasi-permanent in five EU Member States since the “refugee crisis” of 2015.² The number of controls at internal borders increased

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¹THE ECONOMIST, *Border Checks are Undermining Schengen* (October 27, 2018), <https://www.economist.com/europe/2018/10/27/border-checks-are-undermining-schengen>.

²The “refugee crisis” was “first and foremost a policy crisis” that derived from structural weaknesses of the European asylum system. Relative to the overall population of the EU and compared to other regions in the world, the number of asylum seekers who arrived in EU Member States throughout 2015 and 2016 was relatively low. For an extensive analysis of the structural

in March 2020 when the first COVID-19 infections were detected in Europe and most Member States reinstated controls at their internal borders to prevent the spread of the virus.

Data on the reinstatement of checks at the internal borders illustrate the increase of border controls as an instrument to respond to perceived security threats in the Schengen area. In the nine years preceding September 2015, Member States reintroduced border controls a total of 40 times, while in the following five years—September 2015 - October 2020—this number rose to 237.³ The continuous prolongation of border controls goes against the letter and spirit of the Schengen Borders Code, the principal legislative instrument that governs border management in the EU, and which permits only a temporary reinstatement of controls at internal borders. The result is a partial, de facto, suspension of Schengen. Although it is not uncommon for Member States to act in breach of their obligations under EU law, in those cases, the Commission normally avails itself of its enforcement powers, especially when an infringement of EU law extends over a significant period of time in a core area of European integration. Yet, at the time of writing—July 2021—the Commission has neither taken any formal steps to enforce the rules of the Schengen Borders Code, nor has it issued any political statement opposing the reinstatement of internal borders.⁴ How did we arrive at this point?

The two principal theories of European integration—intergovernmentalism and neofunctionalism—consider the abolition of border controls in the Schengen area as a key area of integration. Yet, neither intergovernmentalism nor neofunctionalism adequately explains the current state of the Schengen area. While neofunctionalism is able to explain that the current Schengen system suffers from dysfunctions that follow after an external shock—prolonged reintroduction of border controls as response to the “refugee crisis”—⁵ it cannot explain why, despite the significant economic costs of maintaining border controls,⁶ supranational actors, especially the Commission, have done so little to end the reintroduction of border controls. Intergovernmental approaches aptly show that Member States ultimately want to maintain their power to control immigration of third-country nationals, and are therefore reluctant to relinquish

deficits of the Common European Asylum System see, Maarten den Heijer, Jorrit Rijpma & Thomas Spijkerboer, *Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System*, 53 CML REV 607 (2016).

³European Commission, *Member States' notifications of the temporary reintroduction of border control pursuant to Article 25 and 28 et seq. of the Schengen Borders Code*, (Jul. 1, 2021), https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en.

⁴See Pola Cebulak & Marta Morvillo, *The Guardian is Absent*, VERFASSUNGSBLOG (June 25, 2021), <https://verfassungsblog.de/the-guardian-is-absent/>.

⁵See Liesbet Hooghe & Gary Marks, *Grand Theories of European Integration in the Twenty-First Century*, 26 J. EUR. PUB. POL'Y 1113, 1121 (2019).

⁶A study commissioned by the European Parliament estimated that the one-off costs for the “physical re-establishment of border checks amount to €7.1 billion for Schengen area as whole (€0.7 billion for 7 Member States).” A two-year reintroduction of border controls would cost the European economy €5 billion—seven Member States—and up to €51 billion for the entire Schengen area. See also, European Parliament, *Costs of Non-Schengen: The Impact of Border Controls Within Schengen on the Single Market*, PE 578.974, at 9 (May, 2016). Another study commissioned by the European Parliament estimated the costs at every Schengen border where controls were reinstated for trade of goods at 0.4 to 0.9 percent of GDP for the country that reintroduced controls and approximately €7 to €14 billion annually for the entire EU. Study commissioned by European Parliament IP/A/IMCO/2016-01, *Schengen Border Controls: Challenges and Policy Options*, at 11 (Jan., 2016). The Commission has argued that the direct economic cost “delays at the borders would have a substantial impact on cross-border service provision, transport, tourism, public administrations and cross-border workers and travellers. For those categories, the direct costs are estimated to range between EUR 5 and 18 billion per year. The medium-term indirect costs of non-Schengen could be substantially higher than those direct estimates, as the impact on intra-EU trade, investment and mobility would be unprecedented.” See European Commission, *A Strategy Towards a Fully Functioning and Resilient Schengen Area*, COM (2021) 277 final, at 18 (June 2, 2021) [hereinafter “Schengen Strategy”].

power over their borders,⁷ which is often seen as one of the “crown jewels’ of national sovereignty.”⁸

As Thym and Bornemann observe, “Member States treat border controls as their quasi-sovereign domain.”⁹ Moreover, and especially so in times of crisis, Member States rely on the symbolic function of border controls to “convey a message of political power.”¹⁰ While we agree with this assessment, it does not explain why border controls effectively function as a symbol of *Member State* power. After all, the concrete function of a symbol is contingent on the structure of a discourse. Within legal discourse, border controls could represent an arbitrary exercise of state powers over Union citizens,¹¹ as much as a legitimate instrument to protect national security against external threats.

In our view, the current state of the Schengen area must also be considered as the result of a one-sided focus on the economic dimension of free movement, at the expense of Union citizens’ rights; a focus which is reflected in much of the legal literature that sees the abolition of internal borders as primarily functional for the establishment of the internal market and the unimpeded free movement across borders for economic purposes.¹²

This Article has a twofold objective. The first is to show that from the very beginning, the abolition of controls at the Member States’ internal borders was connected to fostering a supranational political identity of Union citizens. More specifically, the project to abolish border controls had the objective to transform the way in which citizens experience space and ultimately the Union. Both the internal market project and the Schengen agreements share a common normative rationale and were the fruit of a shared political objective that went well beyond economic considerations. The second objective is to demonstrate that Union citizenship forms the legal expression of that historical connection between the abolition of border controls and free movement within the EU’s current Treaty framework. This link between Union citizenship and the absence of border controls thus adds a political rationale to the more familiar economic foundations for the absence of border controls. Economic rationales have only weak legitimizing power and in times of crisis easily give way to a security rationale, namely a Member State’s duty to protect its own citizens. By emphasizing the political dimension of free movement, we thus recalibrate the perspective on the current controls at the Schengen internal borders.

By looking at the political rationale behind Schengen, our Article links to recent literature on European integration which enquires into how the integration of core state powers—for instance in fiscal policy, migration control, or criminal justice—constitutes a driver for the creation of collective identities.¹³ Recent scholarship shows that highly mobile Union citizens feel more

⁷Galina Cornelisse, *What’s Wrong With Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders*, 51 CML REV. 741, 743 (2014).

⁸Koen Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, 256, 59 INT’L COMP. L. Q. 255 (2010).

⁹Daniel Thym & Jonas Bornemann, *Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics*, 11485 EUR. PAPERS 1143 (2020).

¹⁰*Id.* at 1144.

¹¹European Commission, *White Paper on Completing the Internal Market*, COM (85) 310 final (June 14, 1985), at paras. 46–47 [hereinafter “White Paper”].

¹²See Cornelisse, *supra* note 7, at 744; Kees Groenendijk & Elspeth Guild, *In Search of Europe’s Borders: Article 62 EC, Visas and European Community Law*, in *IN SEARCH OF EUROPE’S BORDERS 1* (Kees Groenendijk, Elspeth Guild & Paul Minderhoud eds, 2003); Daniel Thym, *Entry and Border Controls*, in *EU IMMIGRATION AND ASYLUM LAW: A COMMENTARY 31* (Kay Hailbronner & Daniel Thym eds, 2016); David O’Keeffe, *The Free Movement of Persons and the Single Market* 17 EUR. LAW REV. 1, 18 (1992); Eckart Wagner, *The Integration of Schengen into the Framework of the European Union* 25 LEG. ISSUES ECON. INTEGRATION 1 (1998); STEVE PEERS, *EU JUSTICE AND HOME AFFAIRS LAW: VOLUME I: EU IMMIGRATION AND ASYLUM LAW 70* (2016);

¹³See, inter alia, Theresa Kuhn & Francesco Nicoli, *Collective Identities and the Integration of Core State Powers*, 58 J. COMMON MARK. STUD. 1 (2020); Tanja Börzel & Thomas Risse, *From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics*, 25 J. EUR. PUB. POL’Y 83 (2017); Philipp Genschel & Markus

European than less mobile Union citizens, which highlights the important function of free movement in the Union as a vehicle for identity formation.¹⁴ The abolition of border controls shows how the transformation and creation of a common space—the abolition of physical border checks in an area of freedom, security and justice—serves a similar purpose.

The Article is structured as follows. Part B sets the background for this contribution and lays out the legal framework for the reintroduction of border controls and relates it to the practice of Member States and the Commission from September 2015 to May 2021. Part C shows that the abolition of controls of persons at internal borders was not merely based on an economic rationale of establishing the internal market, but also entailed an important political rationale of transforming citizens' spatial registers and thereby the way they would see the Union and themselves as *Union* citizens. In part D, the Article argues that this link between citizens and the abolition of border controls was, starting with the Amsterdam Treaty, gradually incorporated into the EU Treaty framework. This eventually resulted in a right of Union citizens to cross internal borders without being subject to border controls in the Lisbon Treaty.¹⁵ The last part—part E—draws the consequences from the preceding analysis. At a meta-level, the partial suspension of Schengen negatively affects the way in which citizens relate to the Union and see themselves as Union citizens. At the level of positive law, the link between the abolition of border controls and Union citizenship in the Treaty framework calls for an interpretation of the exceptions in the Schengen Borders Code on reintroducing border controls in line with the exceptions to the free movement of EU citizens.

B. The Law and Practice of the Reintroduction of Border Controls

1. The Rules on the Reintroduction of Border Controls in the Schengen Borders Code

The core principle of the Schengen Border Code is that no controls on persons shall be conducted at the internal borders. The Schengen Borders Code includes two different grounds of exception from this core principle. The first derogation can be labelled the “ordinary” public policy or internal security exception. Article 25(1) Schengen Borders Code, which sets out the general framework for the reintroduction of border controls, provides that a Member State may exceptionally reintroduce controls at its internal borders where “there is a serious threat to public policy or internal security in a Member State.” The Schengen Borders Code unambiguously states that reintroduction of controls can only be a means of last resort and the scope and duration thereof shall not exceed what is strictly necessary. The Schengen Borders Code distinguishes between foreseen threats in Article 25, such as major sporting events or political gatherings, and unforeseen circumstances in Article 28, such as terrorist attacks. The distinction is relevant for the maximum duration of controls and the notification procedure. In case of foreseen threats, the initial period of reintroducing controls is a maximum of 30 days and can be prolonged to a maximum of six months if the threat persists. In situations that require immediate action the initial period is a maximum of 10 days, which can be extended up to a maximum of two months.¹⁶ Under the

Jachtenfuchs, *From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory*, 56 J. COMMON MARK. STUD. 178 (2018).

¹⁴See Matthias Matthijs & Sonia Merler, *Mind the Gap: Southern Exit, Northern Voice and Changing Loyalties Since the Euro Crisis*, 58 J. COMMON MARK. STUD. 96, 100 (2020). See also, Felix Karstens, *Let Us Europeans Move: How Collective Identities Drive Public Support for Border Regimes inside the EU*, 58 J. COMMON MARK. STUD. 116 (2020). However, Karstens enquires into how having a European identity determines support for the Schengen regime. We enquire, from a theoretical perspective, into the inverse relation and argue that the transformation of space, for example the abolition of border controls, shapes political identities.

¹⁵Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007 2007 O.J. (C 306) 1 [hereinafter “Lisbon Treaty”].

¹⁶Article 28 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders, 2016 O.J. (L 77) 1 [hereinafter “Schengen Borders Code”].

procedure of Article 25 of Schengen Borders Code, Member States only need to notify the Commission and the Council either in advance—foreseen circumstances—or as soon as possible—unforeseen circumstances—¹⁷ of their intention to reintroduce controls.¹⁸ However, Member States must provide concrete reasons for the reintroduction of border controls, including details on the events that constitute a serious threat to public policy or internal security,¹⁹ and assess the proportionality of the reintroduction of controls on the free movement of persons.²⁰

The second derogation can be labelled as a “specific” public policy and internal security ground—Article 29 Schengen Borders Code—which was inserted in response to a political standoff in 2011 between France and Italy. France had closed its borders in response to Italy issuing temporary residence permits to large numbers of Tunisian migrants.²¹ Whereas the ordinary exception ground refers to a threat to public policy or internal security in a Member State, Article 29 requires that there is “a *serious* ground to public policy or internal security to the overall functioning of the Schengen area,” and that this risk is caused by “persistent deficiencies in the management of the external borders.” Where this is the case, the Council may issue a recommendation that one or more Member States reintroduce controls at their internal borders, for renewable periods of up to six months, up to three times and with a maximum of two years.²² Compared to the procedure under Article 25, the powers of the Member States are more narrowly circumscribed. It is only on the basis of a Council Recommendation that they are allowed to reinstate border controls for a prolonged period of time.²³ Moreover, the prolonged reintroduction is limited to narrowly defined exceptional circumstances subject to strict substantive and procedural requirements.²⁴

¹⁷*Id.* arts. 25(1), (3).

¹⁸*Id.* art. 28.

¹⁹*Id.* art. 27(1).

²⁰*Id.* art. 26.

²¹Sergio Carrera, Elspeth Guild, Massimo Merlino & Joanna Parkin, *A Race Against Solidarity: The Schengen Regime and the Franco-Italian Affair*, CENTER FOR EUROPEAN POLICY STUDIES (Apr. 29, 2011), <https://www.ceps.eu/ceps-publications/race-against-solidarity-schengen-regime-and-franco-italian-affair/>.

²²Schengen Borders Code art. 29(1). Schengen Borders Code art. 25(4) provides that the maximum period for the reintroduction of controls shall not exceed two years, which raises the question of whether the maximum periods in arts. 25, 28 and 29 Schengen Borders Code are cumulative. Although the Commission suggested in the past that these grounds indeed are, the legal service of the Commission has argued that Schengen Borders Code art. 25(4) limits the period for the reintroduction of border controls to two years. *Proposal for a Regulation amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders*, COM (2017) 571 final, 3 (Sept 27, 2017); Oral hearings at the European Court of Justice in Luxemburg, on 15 June 2021, in *Joined Cases C-368/20, N.W.* [cases pending].

²³Art. 29(2) Schengen Borders Code provides that the “Council may, as a last resort and as a measure to protect the common interests within the area without internal border control . . . recommend that one or more Member States decide to reintroduce border control.” The wording of this provision seems to suggest that a Council recommendation is not a necessary precondition for the reintroduction of border controls. Yet, the legislative history of the provisions suggests otherwise. When Art. 29 was inserted into the Schengen Borders Code by Regulation (EU) No 1051/2013 (2013 O.J. (L 295) 1), the extension of the maximum period for reintroducing border controls to two years was tied to common and more robust procedures and supervisory mechanisms. Then Commissioner for Home Affairs, Cecilia Malmström, commented that “we should not leave it only up to the member states at our external borders to deal with extraordinary migratory situations” and that such situations had to be resolved by a joint decision taken at European level by the Member States. Quoted in, Ruben Zaiotti, *The Italo-French Row over Schengen, Critical Junctures, and the Future of Europe’s Border Regime* 28 J. BORDERL. STUD. 337, 341 (2013). Recital 9 of Regulation (EU) 1051/2013 stated that “implementing powers to adopt recommendations under that specific Union-level procedure should be conferred on the Council, acting on a proposal from the Commission.” Accordingly, Regulation (EU) 1051/2013 provided that border controls “shall only occur on the basis of a recommendation of the Council.” The Council recommendation should be based on a prior proposal of the Commission and an evaluation on the existence of serious deficiencies at the external borders. See also, STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW 113 (2016), (arguing that “it appears that [the Member States] cannot exercise this power without a prior recommendation from the Council, in light of the ‘exceptional’ nature of the reintroduction of internal border controls”).

²⁴These exceptional circumstances relate to the inaction of Member States over findings of deficiencies in their management of their part of the external borders under the so-called Schengen Evaluation Mechanism or the Vulnerability Assessment Mechanism carried out by Frontex: Art. 29(1) Schengen Borders Code.

II. The practice of reintroduction of border controls and the failure of supervisory mechanisms

Despite the substantive and procedural requirements governing the use of the derogations in the Schengen Borders Code, when put to the test, these norms have turned out to be “fair weather rules.”²⁵ Since 2015, border controls have been reinstated by five Member States on a quasi-permanent basis: First, in response to the 2015 “refugee crisis” and the 2016 terrorist attacks in France, and since 2020 to counter the spread of COVID-19.

Although several European leaders have questioned the tenability of the Schengen rules or have openly called for their overhaul,²⁶ Member States generally notified the Commission and the Council and sought to justify the reinstatement of controls under the existing derogation grounds. In their notifications, Member States’ invoke related but slightly different public policy and internal security concerns and thereby alternate between different exception grounds. In addition, Member States maintain that the reintroduction of border controls cannot be limited to the temporal limitations of the Schengen Borders Code in case of prolonged threats. This approach was accepted by the French Conseil d’État in two cases in which several non-governmental organizations requested annulment of the decision of the French government to prolong border controls for exceeding the time limits stated in the Schengen Borders Code. In both decisions, the Conseil d’État argued that in case of new (“*nouvelle*”) or renewed (“*renouvelés*”) threats, nothing stands in the way of restarting the clock and to prolong border controls beyond the time limits of the Schengen Borders Code.²⁷ In neither case did the Conseil d’État elaborate on what would constitute a new or renewed threat, nor did it decide to refer questions to the Court of Justice of the European Union (CJEU). In contrast, the Austrian Administrative Court of Styria which, in two cases pending before the CJEU at the time of writing, questioned the compatibility of the prolonged reinstatement of border checks by Austria.²⁸

Also, the Commission has been extremely reluctant in using its supervisory powers to protect borderless travel in Europe. The Schengen Border Code itself states that if the Commission has doubts on the necessity or the proportionality of a reintroduction of border controls, it “shall issue an opinion to that effect.”²⁹ In its Proposal for a New Pact on Migration and Asylum of September 2020, the Commission stated that “[c]oncerns about existing shortcomings have contributed to the triggering of temporary internal border controls. The longer these controls continue, the more questions are raised about their temporary nature, and their proportionality.”³⁰ However, with the exception of a single evaluation of the proportionality of the reintroduction of border controls in October 2015 by Austria and Germany, the Commission has never systematically evaluated these reinstatements, openly questioned their legality, or initiated infringement proceedings against Member States. In its opinion of October 2015, the Commission characterized Germany’s reinstatement of border controls as adequate to counter the “identified threat to the internal security and public policy consisting of the uncontrolled influx of exceptionally large numbers of undocumented/improperly documented persons and the risk related to organized crime and terrorist threats,”³¹ despite the fact that the EU legislator agreed that the large inflow of

²⁵Kay Hailbronner used this expression to describe the rules of the Dublin system. Kay Hailbronner, *Asyl in Europa: wenn, wie, wann, wo?*, FRANKFURTER ALLGEMEINE ZEITUNG (2015).

²⁶Thomas Escritt & Matthieu Protard, *France, Germany Push for Tighter EU Borders After Attacks*, REUTERS (Nov 10, 2020), <https://www.reuters.com/article/uk-europe-security-idUKKBN27Q24P>; Premier Michel, *Misschien moeten we Schengenakkoorden aanpassen*, DE STANDAARD (Aug. 22, 2015), https://www.standaard.be/cnt/dmf20150822_01829627.

²⁷Conseil d’État [Council of State], Decision No 415291 (Dec 28, 2017), para 7 (Fr.); Conseil d’État [Council of State], Decision No. 425936 (Oct 16, 2019), para 7 (Fr.).

²⁸Joined Cases C-368/20 and C-369/20, *N.W.* [cases pending].

²⁹Schengen Borders Code art. 27(4).

³⁰European Commission, *New Pact on Asylum and Migration*, (2020) COM 609 final, at 14 (Sept. 23, 2020).

³¹European Commission, *Opinion on the Necessity and Proportionality of the Controls at Internal Borders Reintroduced by Germany and Austria Pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)*, C (2015) 7100 final (Oct. 23, 2015), 8.

third-country nationals should not *per se* be considered a threat to public policy or security.³² Moreover, the Commission noted that the reintroduction had not prejudiced the rights of refugees to request asylum or the free movement of EU citizens.³³

In its communication on “preserving and strengthening Schengen” of 27 September 2017, the Commission noted that irregular entries into the EU and secondary movement have decreased significantly,³⁴ yet stopped short of criticizing the maintenance of border controls or to issue an opinion on their proportionality. The Commission merely recommended Member States to assess the proportionality of border controls and “encouraged” them to consider using police checks within the territory instead.³⁵ On the same day, the Commission published a proposal that sought to accommodate the security concerns of Member States, in what can be seen as an attempt to codify existing practice. This proposal would increase the maximum period under Article 25 Schengen Borders Code from six months to a year and allow for an extension to two years for situations in which serious threats to public order or internal security persist after that year.³⁶ Although the Council considered after 9/11 that temporary border controls are not an adequate response to the long-term threat of terrorism,³⁷ the Commission argued that “persistent serious threats to public policy or internal security [terrorism and secondary movements] . . . may require more time to deal with.”³⁸ However, the proposal was never adopted and the Commission announced it will put forward a new proposal, which will also address exceptions based on public health, thus reaffirming that Member States retain the power to reintroduce border controls as a means of last resort.³⁹

The different reactions of the Commission towards the reintroduction of border controls related to irregular secondary movements in the Schengen area and terrorist threats, on the one hand, and border controls related to health reasons, on the other, show that the Commission has adopted a bifurcated approach towards public policy and internal security, depending on the concrete reasons for the reintroduction of border controls. When Member States reintroduced border controls in March 2020 to stop the spread of COVID-19, the Commission was willing to subsume the threat under the exceptions of public order and internal security, despite the absence of any specific reference to public health in the Schengen Borders Code. But the Commission also quickly established coordination procedures and announced that it would regularly assess the proportionality of border controls and request their lifting if they were found to be disproportionate.⁴⁰ On May 15, 2020, the Commission issued a communication in which it argued for “a return to unrestricted free movement of persons.”⁴¹ By contrast, with the exception of its opinion of October 2015 in which it held that the border controls by Austria and Germany were in compliance with the Schengen Borders Code, the Commission refrained from any evaluation of border controls that Member States prolong for almost six years for reasons of secondary movement of refugees or terrorist threats.

³²Pursuant to Recital 26 of the Schengen Borders Code: “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.”

³³European Commission, *supra* note 31, at 7–8.

³⁴European Commission, *Preserving and Strengthening Schengen*, COM (2017) 570 final, 4.

³⁵See Lenaerts, *supra* note 8, and earlier, European Commission, *Recommendation on the Implementation of the Provisions of the Schengen Borders Code on Temporary Reintroduction of Border Control at Internal Borders in the Schengen Area*, COM (2017) 6560 final, 4–5 (2017).

³⁶European Commission, COM (2017) 571 final, *supra* note 22, at 8.

³⁷Kees Groenendijk, *Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?* 10 EUR. L. J. 150 (2004).

³⁸European Commission, COM (2017) 571 final, *supra* note 22, at 8.

³⁹European Commission, *Schengen Strategy*, *supra* note 6, at 18.

⁴⁰European Commission, *Joint European Roadmap Towards Lifting COVID-19 Containment Measures*, 2020 O.J. (C 126) 1 (Apr. 17, 2020).

⁴¹European Commission, *Towards a Phased and Coordinated Approach for Restoring Freedom of Movement and Lifting Internal Border Controls - COVID-19*, 2020 O.J. (C 169) 30 (May 15, 2020).

The reason for the bifurcated approach of the Commission may, at least in part, be explained by the scale and economic influence of the border controls that were introduced in response to COVID-19. Yet, it may also be explained by the fact that the controls that aimed to control the movement of terrorists or irregular migrants were framed as measures countering external threats, whereas controls to stop the spread of COVID-19 by their nature aimed to control the movement of EU citizens. This, however, obscures the fact that the reinstatement of border controls primarily affects the rights of Union citizens, irrespective of the underlying rationale.⁴²

The Commission's initial emphasis was clearly on the economic dimension of free movement in the internal market: goods, services, and essential workers. Although the social dimension of restrictions on the free movement of EU citizens was given more attention at the later stages of the pandemic, border controls were only considered problematic to the extent that they interfered with the exercise of free movement rights and not as such. The Commission's focus on the economic dimension of free movement, is also reflected in legal literature on Schengen. This focus on the economic dimension of the abolition of internal border controls, as a corollary of the internal market project, often obscures the citizenship dimension of Schengen, which we turn to in the following part.

C. The “Lost” History of the Abolition of Border Controls and Citizenship

I. Making the Community Visible to the “citizens of Europe”⁴³

The project of establishing an area without internal borders has been at the core of European integration since the Treaty of Rome.⁴⁴ The principal reasons for abolishing border controls between Member States were economic considerations; the free movement of goods, reduction of indirect costs, and an increase in competitiveness were considered necessary measures towards the establishment of a common market. However, already in the 1960s and the 1970s the abolition of border controls between Member States went beyond the economic sphere and was explicitly linked to political integration. By doing away with border controls between Member States, the Community ought to be made visible to the “man in the street,” the ordinary citizen of the Community.⁴⁵

Although the Commission drafted several proposals that envisaged reducing formalities at internal borders in the 1970s, Member States considered these proposals as going too far and systematic checks at borders between Member States remained in place.⁴⁶ However,

⁴²Already in 2004, Kees Groenendijk highlighted that the reinstatement of border controls affects first and foremost Union citizens, *supra* note 37, at 164–65.

⁴³European Commission, *Memorandum of the Commission on the Action Programme of the Community for the Second Stage*, COM (62) 300 final, 13–14 (Oct 24, 1962).

⁴⁴Treaty Establishing the European Economic Community, Mar. 25, 1957, 294 UNTS 3, No 4300 [hereinafter Treaty of Rome].

⁴⁵In its Communication of 1962, the Commission already argued that physical checks at the borders between Member States not only “prevent the establishment of a true common market, but also tend to obscure from the citizens of Europe the political significance of the undertaking embarked on by the six member states.” European Commission, COM (62) 300 final. In another Communication to the Member States, the Commission argued that as long as Member States would continue to carry out physical checks at their internal borders “the citizens of the Community [would] continue to feel that there has been no decisive change.” European Commission, *Communication to the Council of Ministers of the EEC and to Member States Governments*, at 3 (Oct. 2, 1962), http://aei.pitt.edu/53872/1/ECIS_10.2.62.pdf.

⁴⁶In 1975, the Commission suggested the creation of a common passport for the nationals of the Member States with the objective to represent the Community as a uniform entity vis-à-vis third countries and to ease border controls between Member States and transfer systematic controls to the external borders. European Commission, *A Passport Union*, COM (75) 322 final, 4, 9–11 (July 2, 1975). See also the Report to the European Council by Belgian Prime Minister Leo Tindemans, Bulletin of the European Communities, Supplement 1/76, (Dec. 29, 1975), <http://aei.pitt.edu/942/> [“the Tindemans Report”]. This resulted in a draft Council Resolution which was however met by opposition from the Member States, which only agreed on the introduction of different lines for nationals of EC Member States and third country nationals at the borders. Draft Council Resolution on the easing of the formalities relating to checks on citizens of Member States at the Community's internal frontiers, 1982 O.J. (C 197) 6 (July 31, 1982); Council Resolution of 19 June 1984 Concerning Free Passage Across the Community's Internal Frontiers for Member States Nationals, 1984 O.J. (C 159) 1.

secondary legislation, adopted to give effect to the provisions on the free movement of the nationals of the Member States, did limit the extent of such checks. In *Pieck*, the CJEU ruled that “any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity check at the border, at whatever place or time and in whatever form” would amount to an “entry visa or equivalent requirement” and would thus be prohibited.⁴⁷ Border guards may not inquire about the purpose and duration of stay or the financial means of the EU citizen before permitting entry.⁴⁸ And although Member States were still permitted to carry out identity controls, the Court limited these controls: When identity controls take place at the time of entry into a Member State’s territory, they constitute a barrier to free movement when carried out in a systematic, arbitrary or unnecessarily restrictive manner.⁴⁹

The key documents on abolishing border controls in the 1980s were the Commission’s 1985 White Paper on the Creation of the Single Market and the Single European Act. Although the White Paper did not offer significantly more than what the Treaties and the case law of the Court of Justice had already provided for,⁵⁰ it introduced a subtle but remarkable change of rhetoric. Whereas previous policy documents sought to change the *mode* of border controls, the White Paper questioned the very *existence* of border controls. The Commission made clear that the objective of the White Paper was not merely to ease existing border procedures “but to do away with internal frontier controls in their entirety.”⁵¹ For this, the Commission advanced two sets of arguments: The first based on a market rationale, the second on a political rationale. Both rationales entailed specific arguments and assumptions about the market, competition, and modes of integration, as well as distinct conceptions of space.

Under the market rationale, the Commission advanced economic arguments, stating that “[t]he reason for getting rid entirely of physical and other controls between Member States is not one of theology or appearance, but the hard practical fact that the maintenance of any internal frontier controls will perpetuate the costs and disadvantages of a divided market.”⁵² Border controls were conceived as inefficient means of controlling substantive policy domains, such as public health, veterinary inspections, VAT collection, and transport safety, which could be more efficiently governed through harmonization, administrative cooperation, and, if necessary, spot checks.⁵³ The reasoning behind this rationale was formal, technical, and bore an aura of necessity. It translated physical border controls into economic figures and calculated their direct and indirect costs.⁵⁴ It argued that the abolition of controls was to take place through harmonization and the use of technical bodies, such as the European Standardization Organizations.⁵⁵

⁴⁷Case 157/79, *Regina v. Stanislaus Pieck*, 1980 E.C.R. 2171, para. 10. Art. 5(1), Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 158) 77 [hereinafter “Citizens’ Rights Directive”] (speaking of “no entry visa or equivalent formality may be imposed on Union citizens”).

⁴⁸Case C-68/89, *Commission v. Netherlands*, 1991 E.C.R. I-2637, para. 13.

⁴⁹Case 321/87, *Commission v. Belgium*, 1989 E.C.R. 997, para. 15.

⁵⁰See Editorial Comment 23 CML REV. 745 (1986). European Commission, *White Paper*, *supra* note 11. The Single European Act, Sept. 9, 1985, 1986 O.J. (L 169) 1 [hereinafter “SEA”], only entailed the objective of furthering the free movement of factors of production; an objective that was already present in the Spaak report (1956), thirty years earlier, which formed the blueprint for the Treaty of Rome.

⁵¹European Commission, *White Paper*, *supra* note 11, at para 27.

⁵²See Cornellise, *supra* note 7.

⁵³*Id.* See also European Commission, *Abolition of Controls of Persons at Intra-Community Borders*, COM (88) 640 final (Dec 7, 1988), in particular para. 7.

⁵⁴In this formal jargon, the free movement of students and researchers is conceived of as “making better use of human resources, in particular by means of increased mobility,” as the European Council put it at its meeting preceding the White Paper. See European Council, March 29-30, 1985, SN 1381/2/85, 5, https://www.consilium.europa.eu/media/20653/1985_march_-_brussels__eng_.pdf.

⁵⁵On the technical rationale of the White Paper, see the contributions in 25 J. COMMON MARK. STUD (1987).

And it presented the need to do away with border controls as the inevitable result of structural changes in the global economy, necessary to maintain economic competitiveness on a global scale. The specific conception of space is that of a market, a synthetic formal space that is governed by technocrats and rationally ordered to achieve specific objectives —such as, higher competitiveness, efficiency, and reduced costs.⁵⁶ In this market space, the rationale for abolishing border controls is functional: It is *a means to realize the internal market – and not an end in itself*.

Yet, the drafters of the White Paper were aware of the weak legitimacy of the market rationale and the need for a broader political narrative.⁵⁷ Thus, the White Paper linked the abolition of border controls to the discourse of constructing European citizenship. The crucial difference between the market rationale and the political rationale is that while behind the market rationale the abolition of border controls is a means to establish the internal market, the abolition of border controls in the political rationale *is an end in itself*. Borders are constitutive of political communities and, more precisely, of liberal conceptions of citizenship.⁵⁸

The European Council meeting at Fontainebleau in June 1984 had already considered it essential to “respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world.”⁵⁹ The Council established an Ad Hoc Committee on a People’s Europe, which recommended the implementation of measures that facilitate the freedom of movement of Community citizens across intra-Community land borders as the easiest way to provide the citizens of the Member States with “tangible benefits in their everyday lives.”⁶⁰ Only three months afterwards, the Commission in its White Paper adopted a similar line of reasoning, when suggesting the full abolition of intra-Community borders:

It is the physical barriers (. . .) which to the ordinary citizen are the obvious manifestation of the continued division of the Community – not the ‘broader and deeper Community’ envisaged by the original Treaties but a Community still divided.⁶¹

⁵⁶Or, in the words of David O’Keeffe’s, a “Europe of the technicians.” David O’Keeffe, *Can the Leopard Change its Spots? Visa, Immigration and Asylum—Following Amsterdam*, in *LEGAL ISSUES OF THE AMSTERDAM TREATY* 274 (David O’Keeffe & Patrick Twomey eds, 1999). For a critique of this form of “abstract, measurable and negotiable space,” what we label “market space,” see Alain Supiot, *The Territorial Inscription of Laws*, in *SOZIOLOGISCHE JURISPRUDENZ* 375 (Christian Callies, Graf-Peter Callies, Andreas Fischer-Lescano, Dan Wielsch & Peer Zumbansen eds, 2009).

⁵⁷See LORD COCKFIELD, *THE EUROPEAN UNION: CREATING THE SINGLE MARKET* 24 (1994).

⁵⁸Liberal political theory on citizenship and political communities distinguishes between two normative paradigms: An internal domain and an external domain. In the internal domain, the sphere of citizenship, territorial presence is the basis for recognition of rights as it reflects an ethos of inclusiveness and equality between members of a community. In the external domain, the sphere of immigration law, the boundaries of citizenship are enforced. The boundaries that separate these two domains is constitutive of citizenship. For a classical work see, MICHAEL WALZER, *SPHERES OF JUSTICE* (1983), in particular chapter 2. These boundaries are in principle territorial. In an ideal world of liberal political theory, the external domain of immigration law is being enforced at the territorial borders of states and the internal domain is not invested by the exclusionary logics of border controls. On the constitutive aspect of borders for citizenship see also, LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* (2006), ch. 2.

⁵⁹European Council at Fontainebleau, Conclusions, 8 (June 25–26, 1984), http://aei.pitt.edu/1448/1/Fontainebleau_june_1994.pdf.

⁶⁰Report to the European Council by the ad hoc committee ‘On a People’s Europe’, A 10.04 COM 85, SN/2536/3/85 (June 29, 1985) [“the Adonnino Report”]. See European Commission, *Implementation of point 10 of the final communique issued at the European Summit held in Paris on 9 and 10 December 1974 concerning a Passport Union*, COM (75) 322 final, 7 (July 2, 1975) (“the introduction of such a [i.e. common] passport would have a psychological effect, one which would emphasize the feeling of nationals of the nine Member States of belonging to the Community”). Already, symbolic effects of establishing passport Union internally, and also intended to construct a common entity towards non-EC Member States.

⁶¹European Commission, *White Paper*, *supra* note 11, para 24.

And it continued:

Even though these controls are often no more than spot checks, they are seen as the outward sign of an arbitrary administrative power over individuals and as an affront to the principle of freedom of movement within a single community.⁶²

There are two aspects to the White Paper's terminology. First, although no Community legislation existed which requires the abolition of controls at intra-Community borders, the White Paper nevertheless states that the principle of free movement mandates the abolition of border controls. This is essentially a legal argument. However, the White Paper does not explain the legal reasoning that mandates the abolition of border controls, but rather employs legal terminology to advance an argument about European integration. This is linked to the second aspect. Free movement is couched in a narrative that construes border controls as material obstacles that prevent citizens from seeing the progress of European integration. If border controls, as physical outward signs that divide different Member States, were removed, citizens would be able to see a single Community instead of different national jurisdictions. The objective of abolishing border controls in the White Paper aimed at transforming the way citizens would *see* the Community.⁶³ Like a state, the Community requires a material manifestation to become real in the political imagination of citizens.⁶⁴ Interestingly enough, the terminology of the White Paper was not merely a bold pitch of Brussels-based elites, but reflected and dwelled on prior historical events; in particular, as we argue below, on the protests of truck drivers against border controls in several Member States that occurred one year before the publication of the White Paper.⁶⁵

II. Schengen as 'Test' Laboratory for the Internal Area Without Borders

The Single European Act was adopted to enable the completion of the internal market as envisaged by the White Paper. It inserted Article 8a into the European Economic Community (EEC Treaty)⁶⁶, which defined the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."⁶⁷ However, disagreement arose as to the definition of the internal market as an area without internal frontiers. This is best illustrated by Margaret Thatcher's speech at the College of Europe in 1988. While the UK government supported the neo-liberal idea of borderless trade, Thatcher made clear that she regarded it "a matter of plain common sense that we cannot abolish frontier controls if we are also to protect our citizens from crime and stop the movement of

⁶²*Id.* para 47–48 [italics added].

⁶³Kant already pointed out the epistemological aspect of space: The spatial image is prior to theoretical understanding and political concepts. IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS, §10 (Gary Hatfield translation & ed., 2004). Phenomenology has further developed this aspect and pointed to the constitutive aspect of spatial experience. See in particular Edmund Husserl's phenomenology of space, Stephan Günzel, *Einleitung*, in RAUMTHEORIE 109–12 (Jörg Dünne & Stephan Günzel eds, 2006). The frequent references to the importance of the psychological aspect of the visibility of border controls, both in the White Paper and in the preceding policy documents concerned with abolishing controls, suggest that the drafters of the White Paper were, at least, aware of the importance of modifying material space for political consciousness. Lord Cockfield, the architect of the White Paper, argued that "one can see a lorry carrying goods stopped at the frontier: but you cannot see a banking service or insurance stopped at the frontier." LORD COCKFIELD, *supra* note 57, at 24.

⁶⁴Ethnographic scholarship emphasizes how both concrete institutions and languages, or ideas, of government and authority constitute the modern State. See for example, Thomas Blom Hansen & Finn Stepputat, *Introduction*, in STATES OF IMAGINATION 4–10 (Thomas Blom Hansen & Finn Stepputat eds, 2001).

⁶⁵See *infra* C.II.

⁶⁶Now Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter TFEU].

⁶⁷SEA art. 8a.

drugs, of terrorists and of illegal immigrants.”⁶⁸ The idea that the lifting of internal borders triggered a security question, was not exclusive to the UK. The White Paper itself recognized a need for “alternative means of protection for controls at the internal borders and to strengthen those already existing.”⁶⁹ However, where the UK and other Member States differed was where and by whom this security concern was to be addressed.⁷⁰

In June 1989, the Madrid European Council approved a work program for the establishment of an area without internal frontiers, the so-called Palma Document, but noted the political divergences “on the interpretation and scope of the relevant Treaty provisions *inter alia* 8A EC and the obligation flowing therefrom . . . and where the competence for taking decisions and action lay [to adopt the measures deemed necessary to allow for the abolition of internal borders].”⁷¹ The way forward was intergovernmental. Under the responsibility of the immigration ministers, work started on a *Convention on crossings at the external frontiers of the Member States*.⁷² This resulted in the Member States reaching agreement in June 1991. Although a Declaration attached to the Convention stated that it was signed “with a view to achieving the objectives of Article 8a [EEC],” that same Declaration made clear that it did not “contain any express or implicit obligation upon Member States concerning controls at intra-Community frontiers.”⁷³ Ultimately, disagreement between the UK and Spain over the status of Gibraltar prevented the Convention’s signature.⁷⁴

It was the lack of progress within the Community framework that allowed Schengen, as a parallel initiative to abolish border controls between continental Member States, to gain practical and legal significance. With the signature of the Schengen Agreement in June 1985, Germany, France, and the Benelux countries took the principled decision to abolish border controls between their territories. Subsequent accession agreements were signed with other EU Member States, except the UK and Ireland. The Schengen Agreement set out some immediate measures; for instance, the easing of formalities at border controls,⁷⁵ reinforcement of cooperation of police authorities, and approximation of rules.⁷⁶ The actual lifting of controls at internal borders, however, was made dependent on the adoption of a set of common rules in the field of external borders, migration, asylum, and police cooperation. The adoption of these common rules aimed to offset the alleged

⁶⁸Margaret Thatcher, *Speech to the College of Europe*, Bruges, September 20, 1988, <http://www.margarethatcher.org/document/107332> [“the Bruges Speech”].

⁶⁹European Commission, *White Paper*, *supra* note 11, at 10.

⁷⁰JEFF HUYSMANS, *THE POLITICS OF INSECURITY: FEAR, MIGRATION AND ASYLUM IN THE EU* 87 (2006).

⁷¹Report to the Madrid European Council by the Co-ordinators Group, *Free Movement of Persons*, (June 26–27, 1989), https://www.consilium.europa.eu/media/20589/1989_june_-_madrid_eng_pdf [“the Palma Document”]. The document was initially intended to remain confidential, but was reproduced in a Report of the House of Lords Select Committee on the EC, 1992: *Border Controls of People* 55 (HL Paper 90, Session 1988–89, 22d Report, 1989). One may consider this document an early forerunner of the multi-annual policy plans, setting out the EU’s Agenda in JHA, starting with the Tampere European Council, *Conclusions*, (Oct. 15–16, 1999), https://www.europarl.europa.eu/summits/tam_en.htm [hereinafter “Tampere Agenda”]. Although its focus is on the free movement of persons, the measures it envisaged as necessary for the abolishment of checks at the internal borders covered illegal immigration, drug trafficking, terrorism, information exchange, and co-operation between law enforcement agencies . . .

⁷²Jorrit Rijpma, *Building Borders: the Regulatory Framework for the Management of the External Borders of the European Union*, at 34 (2009) (unpublished Ph.D. thesis, European University Institute).

⁷³*Convention Between the Member States of the European Communities on the Crossing of Their External Frontiers*, AD HOC GROUP IMMIGRATION SN 2528/91 WGI 822, <https://www.statewatch.org/media/documents/semdoc/assets/files/keytexts/ktch9ext.pdf>.

⁷⁴RUBEN ZAIOTTI, *CULTURES OF BORDER CONTROL* 122 (2011). In 1990, an agreement had been reached, including with the United Kingdom, on an international agreement regarding the responsibility for asylum claims lodged in one of the Member States, replacing the more or less identical rules in Chapter 7 of the Schengen Implementing Convention: the Dublin Convention, 1997 O.J. (C 254) 1.

⁷⁵Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 14, 1985 2000 O.J. (L 239) 1, arts. 2–6, 11–12 [hereinafter “Schengen Agreement”].

⁷⁶Schengen Agreement, arts. 7–10, 13–16.

security deficit that would result from the abolition of internal borders and was foreseen by January 1, 1990.⁷⁷

It took five years to adopt these so-called “flanking measures” in the Schengen Implementing Convention (CISA). Unlike the Schengen Agreement, the CISA included the abolition of border controls as a legal obligation and not merely as an objective to be realized in the future. In March 1995, all Schengen participating states, with the exception of France, had abolished controls at their internal borders.⁷⁸ Two years later, the Member States, in the Treaty of Amsterdam, decided to incorporate the Schengen *acquis* in the EU legal order.

Although the development of Schengen under international law can be formally regarded as separate from the internal market project and thus EU law, the two cannot be regarded in isolation.⁷⁹ They took place at the same time, involving the majority of Member States and, most importantly, shared an underlying rationale that transcended considerations of an economic nature. Three examples illustrate this: The events that eventually resulted in the adoption of the Schengen Agreement in 1985, the scope of the CISA, and the measures adopted to implement the CISA.

First, the origins of the Schengen Agreement lay in a “symbolic initiative”⁸⁰ taken by Germany and France to relax checks for car drivers, which led to protests by French, German, and Austrian lorry drivers, who continued to be stopped at internal borders. Although economically motivated, these protests cannot be reduced entirely to a market rationale: The protests were widely regarded as targeting controls that “should have ceased to exist.”⁸¹ These protests eventually resulted in the conclusion of the Saarbrücken Agreement, which formed the blueprint for the conclusion of the Schengen Agreement one year later.⁸²

Second, the preambles of both the Schengen Agreement and the CISA explicitly refer to the objectives of the European Community. The Schengen Agreement stated that “the ever closer union of the peoples of the Member States of the European Communities should find its expression in the freedom to cross internal borders for all nationals” and that the removal of obstacles to free movement would “strengthen solidarity between them.”⁸³ The CISA added a specific reference to the Single European Act and the internal market as an area without internal frontiers. It also affirmed that it would not prejudice the objectives of the European Community. The Schengen process soon came to be regarded as a “laboratory” for a common European space without borders,⁸⁴ a form of enhanced cooperation *avant la lettre*, and was broadly understood as part and parcel to the construction of an area without internal borders.⁸⁵ Commission officials and

⁷⁷Didier Bigo has pointed out the “mythical” nature of the security deficit that would result from the abolition of border controls between Member States. The “need” for compensatory measures and the alleged security deficit were discursively constructed in an institutional environment that was heavily dominated by officials of national ministries of interior. See, Didier Bigo, *Border Regimes, Police Cooperation and Security in an Enlarged Europe*, in *EUROPE UNBOUND: ENLARGING AND RESHAPING THE BOUNDARIES OF EUROPE* 214 (Jan Zielonka ed., 2003).

⁷⁸France maintained controls at its internal borders, essentially due to the Netherlands’ liberal drugs policy. The other Schengen states, in particular Germany and Netherlands, insisted that the maintenance of controls by France was contrary to CISA art. 2(2). See Kees Groenendijk, *supra* note 37, 156–58.

⁷⁹See John Morijn, *Personal Conviction and Strategic Litigation in Wijzenbeek*, in *EU LAW STORIES* 184 (Fernanda Nicola & Bill Davies eds, 2017).

⁸⁰Julian Schutte, *Schengen: Its Meaning for the Free Movement of Persons in Europe* 28 CML REV. 549, 549 (1991).

⁸¹A report in the German magazine *Der Spiegel* aptly summarizes the public sentiment: the border blockages reflect the “state of Europe 26 years after the foundation of the European Community. Because the chaos has been triggered by a group that, according to the intention of the EC founding fathers, should have ceased to exist: custom officers.” See Ziviler Ungehorsam, *DER SPIEGEL* (Mar. 5, 1984). See also Unterwegs ins Mittelalter, *DIE ZEIT* (Mar. 2, 1984).

⁸²Convention relative aux bureau de controles nationaux juxtaposes aux gares communes ou d’échange a la frontiere franco-allemande du 13 Juillet 1984, 746 U.N.T.S. 335 [hereinafter “Saarbrücken Agreement”].

⁸³Preamble, *supra* note 75.

⁸⁴See O’Keeffe, *supra* note 12, at 16.

⁸⁵See Schutte, *supra* note 78, at 567.

representatives of Member States endorsed the view that the Schengen cooperation concerned Community boundaries, which is also confirmed by the definition of alien under the CISA as anyone not holding the nationality of a Member State.

Third, the explicit links to the European project already show that the Schengen *acquis* sought to create more than just an internal market. This is particularly obvious from one of the key decisions adopted by the Schengen Executive Committee in April 1994 for the implementation of the CISA, concerning the reduction of obstacles to traffic flows. The brief and single operative paragraph of the decision simply states that material structures at border crossing points must be removed, as they constitute obstacles that hinder free movement and traffic across internal borders.⁸⁶ However, the Annex to the Decision goes much further than merely ensuring unhindered crossing of the border and suggests to either dismantle entire border structures and facilities or putting them to another use. This can only be understood when seen in the light of the objective to transform the sensory perceptions of citizens of the Union as a single spatial entity.

III. Meeting Mr Wijsenbeek

The Maastricht Treaty repeated the objective of establishing an internal market as an area of free movement without internal frontiers.⁸⁷ Yet, despite this unambiguous wording and the objective to complete the internal market by December 31, 1992, the failure to adopt the External Frontiers Convention meant that internal border controls were not lifted by this date.⁸⁸ Frustrated by the lack of progress, a group of integration-minded Members of the European Parliament (MEPs) tried to force a judicial breakthrough by seizing the CJEU of the matter. In previous situations of political deadlock, the CJEU had proven instrumental in giving full effect to the provisions of the Treaties and strategic litigation has been at the basis of some of the classic cases of EU law.⁸⁹ The case that eventually reached the CJEU, by way of preliminary reference, was that of Dutch MEP Floris Wijsenbeek. Upon arriving from Strasbourg at Rotterdam airport, which only operated intra-Community flights, Mr. Wijsenbeek refused to show his passport. He was fined for violating Dutch immigration law and the Dutch Court of Appeal eventually referred a straightforward set of questions to Luxembourg: Do Articles 7a, —now Article 26 TFEU— and 8a —now Article 21 TFEU— of the Treaty establishing the European Community (EC Treaty) preclude Member States from imposing an obligation to present a passport at intra-Community borders?⁹⁰

The standard account of the *Wijsenbeek* decision is that the Court held that neither Article 7a nor Article 8a of the EC Treaty had direct effect, since both Treaty provisions required the adoption of implementing legislation. The CJEU therefore concluded that, absent any harmonized

⁸⁶*Decision of the Executive Committee of 26 April 1994 on Adjustment Measures Aiming to Remove the Obstacles to, and Restrictions on, traffic at Road Crossing Points at Internal Borders*, 1994 O.J. (L 239) 1.

⁸⁷Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, art. K(1) [hereinafter “Maastricht Treaty”].

⁸⁸The head of states and governments noted in the Conclusions of the Edinburgh European Council meeting that the creation of an area without internal borders cannot be realized by the turn of the year as the adoption of harmonization measures, deemed necessary to avoid “creating dangers for public security and compromising the fight against illegal immigration,” was still in progress. Conclusions of the Presidency, Edinburgh, SN 456/1/92 rev. 1, para. 18, (Dec. 12, 1992), https://www.europarl.europa.eu/summits/edinburgh/a0_en.pdf.

⁸⁹Mr. Wijsenbeek was part of larger group of integrationist minded MEPs, which also included Mr. Wijsenbeek’s lawyer in the proceedings and who sat in the LIBE Committee. Moreover, Wijsenbeek was not the only case before the CJEU. Already a few months prior to the incident at Rotterdam airport, the Northern Irish politician Gerard Adams achieved getting a preliminary reference to the CJEU on the same issue. See, Case C-229/94, Adams, 1994 O.J. (C 275) 18. Mr. Adams’s case, however, was withdrawn as the UK authorities lifted the exclusion order against him.

⁹⁰Consolidated Version of the Treaty on the Functioning of the European Union, arts. 21, 26, July 6, 2016, 2016 O.J. (C 202) 1 [hereinafter “TFEU”]. Case C-378/97, Criminal proceedings against Florus Ariël Wijsenbeek, 1999 E.C.R. I-06207, para. 24.

rules on the controls of external borders, visa, and asylum, Member States retain the right to carry out border controls.⁹¹ This account, however, overlooks the legal nuances of the decision.

There is an important part of the judgment that focusses on the role of Union citizenship. Both the Commission and Advocate General Cosmas made a clear distinction between free movement rights in the market sphere —Article 7a EC Treaty— and citizenship —Article 8a EEC Treaty. The Commission argued that while free movement in the market sphere requires the adoption of harmonization measures on external borders, the right of citizens to move freely across borders is “recognised directly in that provision, without any reservation and without the slightest scope for the exercise of discretion.”⁹² Although the Commission argued that the right of citizens has “incontestabl[y]” direct effect, the Commission considered that it may be subject to limitations foreseen in the Treaty; as long as no harmonized rules on external borders were adopted and put in place, the Commission argued, Member States could require Union citizens to show valid travel documents at the internal borders.⁹³

This distinction between free movement rights that pertained to the market sphere and free movement rights that pertained to the political sphere, in the context of border controls, is even more pronounced in the Opinion of the Advocate General. Advocate General Cosmas argued that the former “have established a functional possibility for nationals of the Member States . . . with a view to the creation of a common market, the objective of which can only be to permit persons to pursue their economic activities in optimum conditions.”⁹⁴ In other words, the abolition of border controls —and the rights linked to it— in the market sphere are functional to creating the internal market. By contrast, citizens’ rights to free movement differ categorically from the rights in the market sphere; they constitute, as Advocate General Cosmas argued, “a right of a different kind, a true right of movement, stemming from the status as a citizen of the Union.”⁹⁵ He continued:

Hence, as freedom of movement constitutes a goal in itself and is inherent in the fact of being a citizen of the Union, and is not merely a parameter of the common market, it does not merely have a different regulatory scope: it also, and primarily, differs in terms of the nature of the rights it bestows on individuals and the breadth of the guarantee that Community and national principles must accord it.⁹⁶

Thus, the freedom of *nationals of Member States* to enhance their economic benefits would not be “seriously threatened” by the requirement to show a valid travel document at the border; by contrast, the freedom of *Union citizens* would be seriously infringed by the requirement to show a travel document at the border.⁹⁷ Why? Because the “freedom to cross borders is in itself an important constituent of the citizen’s right to move freely, and not simply a means of achieving the common market. Moreover, recognition of the possibility of moving —in principle— unchecked within the geographic area corresponding to a legal order is inherent in the status of citizen covered by that legal order.”⁹⁸ Similar to the Commission’s legal opinion, Advocate General Cosmas concluded that the overriding public interest in the absence of harmonized rules on

⁹¹See inter alia, D. Martin, *Comments on Florus Ariel Wijsenbeek (Case C-378/97 of 21 September 1999) and Arblade (Joined cases C-369/96 and C-376/96 of 23 November 1999)* 2 EUR. J. MIGR. LAW 101 (2000); Jeremy Evans, *Freedom of Movement in the European Union* 14 GEO. IMMIGR. L. J. 255 (1999); Alvaro Castro Oliveira, *Workers and Other Persons: Step-by-Step From Movement to Citizenship – Case Law 1995-2001*, 39 CML REV 77, 101–103 (2002).

⁹²Wijsenbeek, Case C-378/97, at para. 35.

⁹³*Id.* at para. 36.

⁹⁴Opinion of Advocate General Cosmas at para. 84, Case C-378/97, Wijsenbeek (Mar. 16, 1999).

⁹⁵See Wijsenbeek, Case C-378/97, at para. 35.

⁹⁶See Wijsenbeek, Case C-378/97, at para. 86.

⁹⁷See *id.* at paras. 100–101.

⁹⁸See *id.* at para. 101.

external borders justified limiting a citizen's right to free movement by checking travel documents at the border.⁹⁹

Against the background of the elaborate arguments of the Commission and the Advocate General, it is interesting to see what the CJEU did and did not say in its short reply to the questions put before it. It is interesting to note the difference between the Court's arguments on free movement in the market sphere and in the political sphere. As regards the market sphere, the Court followed the Commission and the Advocate General and unambiguously held that no automatic obligation arises from Article 7 EC Treaty to abolish border controls after December 31, 1992, because it presupposes harmonization of rules on external borders.¹⁰⁰

As clear as the Court's argument was in regard to the market sphere, as enigmatic was its ruling in relation to Union citizenship. The Court merely stated that as long as EU legislation on external borders was absent "the exercise of those rights presupposes that the person concerned is able to establish that he or she has the nationality of a Member State."¹⁰¹ In the following paragraph the Court added that even if under Article 21 TFEU Union citizens were to "have an unconditional right to move freely within the territory of the Member States," which indeed it later held to be the case in *Baumbast*,¹⁰² Member States retained the right to carry out identity checks at the internal frontiers of the Community.¹⁰³ The Court thus argued that Article 8a EC Treaty, as was submitted by the Commission, can be justifiably limited. While it referred to the declaration on Article 7a EC Treaty, that the date of December 31, 1992 does not create automatic legal effect, it did not refer to the same declaration on Article 8a EC Treaty¹⁰⁴ nor to the UK and Ireland's arguments that Article 8a EC Treaty does not have direct effect. As it did in earlier cases,¹⁰⁵ the Court made a distinction between the existence and the exercise of free movement rights of citizens.¹⁰⁶ It clearly stated that the *exercise*, and not the *existence*, of citizens free movement rights presupposes EU legislation on external borders.¹⁰⁷ The CJEU thus recognized, albeit implicitly and subject to the conditions of flanking measures, such a right to free movement based on the Treaty's provision on Union citizenship.

It is important to realize that the Court upheld the distinction between free movement rights in the market sphere and free movement rights in the political sphere. By connecting the latter to the abolition of border controls the Court created a link between Maastricht's —intergovernmental— third pillar on justice and home affairs and its —supranational— Community pillar and confirmed the link between the abolition of border controls and Union citizenship.

D. The Absence of Border Controls as Fundamental Objective of EU Law

I. Amsterdam: Establishing the Area of Freedom, Security, and Justice

At the time Court delivered its judgment in *Wijsenbeek*, in autumn 1999, the Treaty of Amsterdam had already entered into force. The Court's reluctance to make a bolder move and explicitly recognize the direct effect of the free movement of EU citizens may be explained from its intention

⁹⁹See *id.* at paras. 106–109.

¹⁰⁰See *id.* at para. 40.

¹⁰¹See *id.* at para. 402.

¹⁰²Case C-413/99, *Baumbast* and *R v. Secretary of State for the Home Department*, 2002 E.C.R. I-07091, para. 86.

¹⁰³See *id.* at para. 43.

¹⁰⁴See Rijpma, *supra* note 72, at para. 38.

¹⁰⁵Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-02691, paras. 61–64. The Court argued in *Martínez Sala* that "it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit."

¹⁰⁶On this argument see Helen Toner, *Passport Controls at Borders Between Member States* 25 EUR. LAW REV 415, 420 (2000).

¹⁰⁷*Wijsenbeek*, Case C-378/97 at para. 42.

not to upset the compromise negotiated in the Amsterdam Intergovernmental Conference, which incorporated the Schengen acquis into the EU legal order at the cost of a variable geometry in this area.

Still, the Court could have simply accorded direct effect to the absence of internal frontiers. In quite a few internal market cases the Court was not deterred by the absence of harmonizing measures. To the contrary, legislative inaction was often at the basis for according direct effect to provisions of primary law.¹⁰⁸ The argument that this would have resulted in a “regulatory gap” does not convince, because the third pillar did provide the Union with powers in this field, and alternatively such powers were implied in the legal basis provisions on the free movement of persons.

More importantly, the objective of the strategic litigation in *Wijzenbeek*—to abolish controls at internal borders—had already materialized when the Court of Justice delivered its decision in September 1999. The Treaty of Amsterdam had entered into force on May 1, 1999 and incorporated the abolition of border controls into the EU legal order. It did so in a twofold way.

First, the Treaty of Amsterdam incorporated the Schengen acquis into EU law through Protocol No. 2,¹⁰⁹ thus “bringing to life the decades-old vision of a Europe without internal border controls.”¹¹⁰ It obliged the Council to adopt common measures on asylum within five years, external borders and visa for third-country nationals that aimed at ensuring the free movement of persons.¹¹¹ Until that moment, however, the compensatory measures of the Schengen acquis were considered as acts of secondary legislation.¹¹²

Second, the Treaty of Amsterdam established a link between citizens and the Schengen acquis by including the area of freedom, security and justice (AFSJ) as an objective of the Union into the Treaty framework.¹¹³ The establishment of the AFSJ was based both on a market rationale and a political rationale. On the one hand, the measures on migration, asylum, visa and borders clearly stand in function of the economic dimension of the free movement of persons.¹¹⁴ In two cases

¹⁰⁸See e.g., Case 2/74, *Jean Reyners v. Belgian State*, 1974 E.C.R. 631; Case 41/74, *Yvonne van Duyn v. Home Office*, 1974 E.C.R. 1337; Case C-292/89, *The Queen v. Immigration Appeal Tribunal, ex parte Antonissen*, 1991, E.C.R. I-745; Case C-340/89, *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 1991 E.C.R. I-2357. See, outside the realm of the internal market, Case 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 1976 E.C.R. 455.

¹⁰⁹Protocol No 2 annexed to the Treaty of Amsterdam, Protocol Integrating the Schengen acquis Into the Framework of the European Union, art. 2, 1997 O.J. (C 340) 93 [hereinafter “Schengen Protocol”]. Article 2 provides that the Schengen acquis shall, from the date of entry into force of the Treaty of Amsterdam, apply to the Member States. However, the Protocol does not define the Schengen acquis and left it to the Council to adopt a decision on which provisions exactly form part of the Schengen acquis. See *Council Decision of 20 May 1999 Concerning the Definition of the Schengen acquis for the Purpose of Determining, in Conformity with the Relevant Provisions of the Treaty Establishing the European Community and the Treaty on European Union, the Legal Basis for Each of the Provisions or Decisions Which Constitute the acquis* (1999/435/EC), 1999 O.J. (L 176) 1.

¹¹⁰Kay Hailbronner, *European Immigration and Asylum Law Under the Amsterdam Treaty*, 1060, 35 CML REV. 1047 (1998).

¹¹¹Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, arts. 73i, 73j(1), Nov. 10, 1997, 1997 O.J. (C 340) 1 [hereinafter “Treaty of Amsterdam”].

¹¹²See Article 3 of the Schengen Protocol as introduced by the Amsterdam Treaty. Moreover, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention), June 15, 1995, 1997 O.J. C 254, 1, which established the rules on the responsibility of a Member State to examine an asylum application, had already been adopted. Regarding visa policy, a common list of third countries whose nationals require a visa upon entry into the EU had also been adopted. See *Council Regulation (EC) 574/1999 of 12 March 1999 Determining the Third Countries Whose Nationals Must be in Possession of Visas When Crossing the External Borders of the Member States*, 1999 O.J. (L 72), 2–5; ANNELISA MELONI, *VISA POLICY WITHIN THE EUROPEAN UNION STRUCTURE* 45 ff (2006).

¹¹³The AFSJ united the Schengen acquis, competences over border controls, visa, migration and asylum more generally in the supranational first pillar, while competences on criminal justice and police cooperation, remained in the intergovernmental third pillar.

¹¹⁴Treaty of Amsterdam, arts. 61(a), 62(1).

brought by the UK against the Council, the Court of Justice ruled that a Member State can only participate in a measure of the Schengen acquis, if it accepted the area of the Schengen acquis on which that measure builds. As the UK had not accepted the rules on abolishing internal border controls, it could be validly excluded from Frontex, the European Border and Coast Guard Agency, and the Regulation on security features in passports.¹¹⁵

On the other hand, the establishment of an AFSJ clearly goes beyond the internal market rationale. The Turin European Council, which constituted the opening session of the Intergovernmental Conference, had identified the objective of bringing “the Union closer to its citizens” as one of the central themes for the Conference and had grouped the substantive policy fields of the AFSJ under this heading.¹¹⁶ The Treaty of Amsterdam inserted the aim to develop the EU as an AFSJ in which the free movement of persons is guaranteed as a new Union objective in the Treaty framework, in addition to the internal market objective.¹¹⁷ In line with this, the Tampere European Council Conclusions, the first five-year strategic plan for the development of the AFSJ, described the area as “a project” that “responds to the frequently expressed concerns of citizens”, “has a direct bearing on their daily lives” and freedom as the “right to move freely throughout the Union.”¹¹⁸ The title of Tampere’s successor program, the Stockholm Programme confirmed this political dimension, promising “an open and secure Europe serving and protecting the citizens.”¹¹⁹

A common critique of this political dimension is that security constitutes the overriding imperative, thus crowding out freedom and justice. It has been argued that the incorporation of the Schengen acquis into the EU legal order “Schengenized” the Union and codified the narrative that free movement internally can only be achieved by more restrictive compensatory measures.¹²⁰ While this is certainly true, we caution to consider the AFSJ only from a security perspective. By the Court’s own logic in *Wijzenbeek*, what is required is simply a framework for the management of the external borders; it did not impose any additional conditions as to the substance or effectiveness of these rules.¹²¹ Moreover, the lifting of internal border controls was deliberately premised on the idea of mutual recognition and limited harmonization, the so-called flanking measures. This logic remains present until today in the distinction between Schengen developing measures and other measures covered by Title V in the TFEU on the AFSJ. A lack of progress in AFSJ policy fields, such as the Common European Asylum System or criminal justice cooperation cannot be invoked to question the absence of border controls —although it might negatively affect Member States’ views on a borderless Schengen.

Like earlier Commission and Council documents on the abolition of border controls, which were discussed in the preceding section, the notion of citizen refers to Union citizens in a political register—and not as a formal legal status. The Treaty of Amsterdam did not link the AFSJ to the formal legal status of Union citizenship, a link that was established only explicitly in the Lisbon Treaty, but the notion of citizen also went beyond holding the nationality of one of the Member States. After all, the objective of including the AFSJ into the Treaty of Amsterdam was not merely

¹¹⁵Jorrit Rijpma, *Annotation of Cases C-77/05, UK v. Council and Case C-137/05, UK v Council*, 45 CML REV 835–52 (2008).

¹¹⁶Turin European Council, *Conclusions*, (Mar. 29, 1996), https://www.europarl.europa.eu/summits/tor1_en.htm.

¹¹⁷Consolidated Version of the Treaty on European Union (Amsterdam), art. 2, Nov. 10, 1997, 1997 O.J. (C 340) 145.

¹¹⁸Tampere Agenda, *supra* note 71, at para. 2. Already before, the so-called Vienna Action Plan had emphatically noted that the notions of freedom, security, justice “have one common denominator – people.” See Justice and Home Affairs Council, *Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice*, 1999 O.J. (C 19) 1, para. 5.

¹¹⁹European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 2010 O.J. (C 115) 1.

¹²⁰See Zaiotti, *supra* note 74, at 190; EC Treaty (Amsterdam), art. 61(a).

¹²¹Costello argues that “any internal market rationale is agnostic as to the restrictiveness or otherwise of external barriers, but simply requires the application of common rules.” See Cathryn Costello, *Administrative Governance and the Europeanisation of Asylum and Immigration Policy*, in EU ADMINISTRATIVE GOVERNANCE 289–90 (Herwig Hofmann & Alexander Türk eds, 2006).

to abolish border controls but “to develop [the EU] more rapidly into an area of freedom, security and justice.”¹²² Thus, the inclusion of the AFSJ into the Treaty of Amsterdam sought not merely to construct a “new kind of policy whole,”¹²³ but also to construct a common *area*. Had the Treaty drafters sought to establish merely different policy fields, they could have used freedom, security and justice *tout court*. However, they included the spatial notion of area and linked these three values to the area. By including the notion of area in the AFSJ, the Treaty drafters shifted the rhetoric of integration from a negative —absence of internal border controls— to a positive —construction of a common area— semantic.

The AFSJ as a common area of the Union entails two features. First, the AFSJ constitutes a geographic space where border controls are abolished and citizens can move freely without being subject to border controls. In order to establish and maintain this geographic space where internal border controls are abolished, the power of the EU institutions was enhanced: The Commission was given increased powers of initiative in all areas of the AFSJ, the Justice and Home Affairs Council preserved institutional unity across the different policy domains, and the European Council in Tampere in October 1999 set out concrete policy objectives to develop the AFSJ.

Second, the area as geographic space is normatively qualified by the values of freedom, security and justice. This dual dimension of the AFSJ—a concrete geographic space and a normative space—points to a deeper meaning of the notion of citizen in the political register: The relation between citizenship and space. For Hanna Arendt, the realization of freedom and equality—the hallmarks of modern citizenship—as a tangible concrete reality is the result of a decision taken by a political community to accord to its members equal rights: “We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.”¹²⁴ As a community is necessarily located somewhere, the realization of freedom and equality requires spatial boundedness, which, as Arendt argued, was “especially clear for the greatest and most elementary of all negative liberties, the freedom of movement.”¹²⁵ If Arendt’s argument is transposed to the AFSJ: The abolition of internal border controls and the creation of a common external border established a territorially bounded place in which free movement is realized as a tangible reality. Hans Lindahl argues that “values are a constitutive feature of territoriality”; by deciding which values are legally relevant and which values are not, a community—in this case: the ensemble of Union citizens—relates to that space and creates its “own place.”¹²⁶

To be clear, it is only in the abstract that the geographic and the normative features of the AFSJ as a legal place can be held apart. A legal place always involves territorial boundedness and at the same time a decision which values are legally relevant in that place. Therefore, how a community understands itself is constantly reinterpreted by how that community relates to itself, mediated by its “own” place.¹²⁷ It is in these registers of political theory that the Treaty of Amsterdam linked the AFSJ, as a bounded place where freedom is actualized as free movement of citizens, to Union citizens. It was only in the Lisbon Treaty, as we argue in the following section, that Union citizenship as a formal legal status was explicitly linked to the AFSJ.

¹²²Preamble, Protocol (No 2) integrating the Schengen acquis into the framework of the European Union, Treaty establishing the European Community, 1997 O.J. (C 321 E) 191.

¹²³Neil Walker, *In search of the area of freedom, security and justice: a constitutional odyssey*, in *THE AREA OF FREEDOM, SECURITY AND JUSTICE* 7 (Neil Walker ed., 2004).

¹²⁴HANNA ARENDT, ON TOTALITARIANISM, quoted in Hans Lindahl, *Finding a Place for Freedom, Security and Justice: The European Union’s Claim to Territorial Unity*, 29 *EURO. L. REV.* 461, 473 (2004).

¹²⁵HANNA ARENDT, ON REVOLUTION 275 (1965).

¹²⁶See Lindahl, *supra* note 124, at 472.

¹²⁷See Lindahl, *supra* note 124, at 465.

II. The Lisbon Treaty: Linking AFSJ and Union Citizenship

In the Lisbon Treaty,¹²⁸ the political aspect of the AFSJ was given further prominence. Whilst the Treaty of Amsterdam had mentioned the internal market objective before the AFSJ, and the Draft Constitution placed the AFSJ and the internal market at the same level, Article 3(2) TEU positions the AFSJ above the internal market. Unlike in the Treaty of Amsterdam, the substantive provisions on the AFSJ in Title V of the TFEU lack a reference to free movement in the internal market. These are not merely semantic differences, but reflect both the increasing significance of the AFSJ in the constitutional framework of EU law and its gradual emancipation from the economic rationale of the internal market.¹²⁹

The Lisbon Treaty further elevates the political dimension of free movement in a twofold way: It proclaims that the AFSJ constitutes an area without internal frontiers¹³⁰ and explicitly links the area to Union citizenship.¹³¹ Article 3(2) TEU states that the “Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured.” The claim that the AFSJ is an area without internal frontiers does not merely constitute a Treaty objective but is further developed in the Treaty title on the AFSJ. Article 67(1) TFEU first states that the “Union shall constitute an area of freedom, security and justice” and the subsequent paragraphs programmatically relate to these three values and attach concrete legal substance to them. Article 67(2) TFEU begins the enumeration with the notion of “freedom” and states that the Union “shall ensure the absence of controls at the internal borders for persons.” In the terminology of political theory, Article 67(2) TFEU legally concretizes the abstract notion of freedom by making it a tangible reality to move within the Union unhindered by internal border controls. This is highlighted in the case law of the Court of Justice on Article 67(2) TFEU.

In *Touring Tours*, the Court held that Article 67(2) TFEU is not merely a programmatic provision, but also entails a primary law obligation that extends to Member States. This case concerned German legislation that imposed a general obligation on private transport companies to check the travel documents of passengers before they boarded a bus in intra-EU journeys and financial sanctions in case of non-compliance. Most of the legal reasoning in *Touring Tours* is concerned with the question whether the German legislation amounted to measures having the equivalent effect of border controls, prohibited by Article 23 of the Schengen Borders Code, which the Court ruled to be the case.¹³² However, the Court did not stop there and held that Article 67(2) TFEU also “precludes such legislation.” This finding was anything but obvious. The wording of Article 67 does not refer to the Member States, and the Court itself had decided in earlier cases that Article 67 is principally addressed to the Union.¹³³ The Court also did not need to refer to Article 67(2) TFEU to find that the German legislation violated EU law. In consequence, by anchoring an obligation on the side of the Member States—and not merely the Union—to ensure the absence of border controls directly in the substantive Treaty provisions on the AFSJ, the

¹²⁸Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter]

¹²⁹See also, Jörg Monar, *Der Raum der Freiheit, der Sicherheit und des Rechts*, in *EUROPÄISCHES VERFASSUNGSRECHT* 754 (Armin von Bogdandy & Jürgen Bast eds, 2009).

¹³⁰EU legal literature indeed describes the AFSJ primarily as an area without internal borders and describes the abolition of border controls as constitutive of the entire AFSJ. See STEVE PEERS, *EU JUSTICE AND HOME AFFAIRS LAW* 85 (2016); Monar, *supra* note 129; Volker Röben, *Art. 67 AEUV*, in *DAS RECHT DER EUROPÄISCHEN UNION*, para. 10, 55 (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds, May 2020).

¹³¹Koen Lenaerts, writing in extrajudicial capacity, states that: “One of the fundamental objectives of the European Union (‘the EU’) is to offer its citizens an Area of Freedom, Security, and Justice without internal frontiers.” See Lenaerts, *supra* note 8, at 256.

¹³²Joined Cases C-412/17 & C-474/17, *Bundesrepublik Deutschland v. Touring Tours und Travel GmbH and Sociedad de Transportes SA*, ECLI:EU:C:2018:1005, Judgment of 13 Dec. 2018, para. 73.

¹³³Case C-14/13, *Gena Ivanova Cholakova v. Osmo Rayonno Upravlenie pri Stolichna direktzia na vatreshnite raboti*, ECLI:EU:C:2013:374, para. 24; Joined Cases C-188/10 & C-189/10, *Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10)*, ECLI:EU:C:2010:363, Judgment of 22 June 2010, para. 64.

Court underscored the constitutional nature of the obligation to abolish border controls in the EU.¹³⁴

The Court's decision in *Touring Tours* illustrates a second aspect: The link between the abolition of border controls in the AFSJ and Union citizenship. Both the wording of Article 21 TFEU and Article 45 of the EU Charter of Fundamental Rights entail the right of Union citizens to “move and reside freely within the territory of Member States.” In *Wijsenbeek*, the Court left the question of whether the citizenship provisions in the Treaty encompass a right not to be subject to border controls unanswered. In his Opinion in *Touring Tours*, Advocate General Yves Bot suggested that the right of free movement includes a right not to be subject to border controls: “For citizens of the European Union, the right to move freely and unhindered within the territory of the Member States constitutes a fundamental right in accordance with Article 3(2) TEU and Article 20(2) and Article 21 TFEU.”¹³⁵ As the facts of the case concerned German legislation that was considered to have equivalent effects to border controls, the “right to move freely and unhindered” arguably entails a right to move across internal borders without being subject to border controls. Movement could barely be described as free and unhindered if it was subject to controls.

The Court in *Touring Tours* did not take up the Advocate General's argument that the citizenship provisions in the TFEU include a right not to be subject to controls at internal borders. Rather, the Court left it open whether such a right flows directly from the citizenship provisions in the Treaties —primary law— or merely from the Schengen Borders Code —secondary law—. However, the Court's silence on this issue should not be overstated. Already in earlier cases, the Court had stated that the right to “to enter the territory of another Member State and reside there for the purposes intended by the Treaty is a right conferred directly by the Treaty or, as the case may be, by the provisions adopted for its implementation [the Citizenship Directive].”¹³⁶ Thus, as the Court suggested, what the right to enter entails has to be considered in light of the provisions of the Citizenship Directive, which gives effect to the free movement rights in Articles 20 and 21 TFEU. Therefore, the right to enter another Member State in Article 5 Directive 2004/38 —Citizenship Rights Directive— is one particular aspect of the broader right of free movement in the Treaty provisions. In the past, the Court had held that Member States must not make the right of entry subject to any additional conditions that are not included in Union law.¹³⁷

As the abolition of border controls essentially aims to ensure the free movement of Union citizens, as we argue above, the provisions in the Treaty and the Citizenship Rights Directive on free movement of Union citizens must be read in connection with the Schengen acquis, in particular the provisions on the abolition of controls at the internal borders.¹³⁸ This, however, raises the question on the exact relation between the free movement rights of Union citizenship and the rules of the Schengen Borders Code. This relation includes two different aspects.

The first aspect is a negative relation between Union citizens free movement rights and the Schengen Borders Code: The application of the provisions in the Schengen Borders Code should not impede free movement rights of Union citizens and must be in accordance with the rights in the Citizenship Directive.¹³⁹ The Court of Justice made clear that the Schengen Borders Code does

¹³⁴See STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW 85 (2016); Monar *supra* note 129, 754; Röben, *supra* note 130, para. 55.

¹³⁵Opinion of Advocate General Bot at para. 38, Joined Cases C-412/17 & C-474/17, *Touring Tours* (Sept. 6, 2018).

¹³⁶Case C-215/03, Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie, 2005 E.C.R. I-01215, para. 17.

¹³⁷Case C-157/03 Commission v. Spain, 2005 E.C.R. I-2911, paras. 29, 30.

¹³⁸The Schengen Borders Code refers to the Citizenship Rights Directive, stating that the rules of the Schengen Borders Code shall not affect the free movement rights of Union citizens under recital (5) and Article 8(6) of the Schengen Borders Code. Likewise, the Citizenship Rights Directive states that the “formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.” Recital (7), Directive 2004/38.

¹³⁹Schengen Borders Code, arts 3a, 8(2), 8(6).

not have the purpose “to restrict the freedom of movement of Union citizens as provided for by the FEU Treaty.”¹⁴⁰

The second aspect is a positive relation in the sense that the rules of the Schengen Borders Code enable Union citizens to move freely in the Schengen area. As Elspeth Guild and others have argued, the provisions of the Schengen Borders Code are of “particular relevance to the practical exercise of the right of exit and entry provided for in Articles 4 and 5.”¹⁴¹ The historical development of the Schengen acquis, as we argue above, was based on a political rationale to enhance free movement of citizens. Thus, the positive relation between the Schengen acquis and free movement rights in the citizenship provisions means that Union citizens should, in principle, not be checked at all when crossing an internal border. Article 5 of the Citizenship Directive states that “[w]ithout prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport” According to Advocate General Szpunar, the fact that the current wording of this Article —“with”— has replaced “on production of” in earlier legislation, reflects the lifting of checks at the internal borders.¹⁴² As such, this Article could only be validly invoked by Member States to ask a Union citizen to show their travel documents if this Member State: (i) has obtained an opt-out from the Schengen cooperation; (ii) does not yet apply the Schengen acquis in full; or (iii) has temporarily reintroduced controls at their internal borders under the Schengen Borders Code.

III. *Géometrie Variable of Citizenship Rights?*

If the scope of the right to free movement in the citizenship provisions in the TFEU entails a right not to be subjected to controls at internal borders, how can this be squared with the fact that some Member States—Ireland, Croatia, Bulgaria, Romania—are not yet part of the Schengen area and still have controls at their internal borders to other Member States in place? Would this not result in a geographical fragmentation of citizenship rights? Union citizens could rely on the right not to be subjected to border controls in Germany, while they would not be able to do so in Ireland.

A *géographie variable* of citizenship rights is the consequence of political compromises that resulted in differentiated levels of integration. Two forms of differentiated integration can be distinguished in the Treaty framework. First, the special position of Ireland and Denmark — and formerly the UK— in the Schengen framework¹⁴³ constitutes a form of “*constitutional differentiation*.”¹⁴⁴ Constitutional differentiation means that the particular legal position of these Member States is enshrined in the Treaty framework, is likely to be permanent and concerns the reluctance of these Member States to transfer critical core competences to the EU. Second, the special position of the “new” Member States —Bulgaria, Croatia, Romania, Cyprus— can be described as “*instrumental differentiation*.”¹⁴⁵ Contrary to constitutional differentiation, instrumental differentiation is temporary and results from a perceived lack of factual harmonization. The Schengen Protocol clearly states that newly acceding Member States are under an obligation to participate in the Schengen rules. The upshot is that the refusal of the Council to fully apply the rules of the Schengen acquis, in particular the principle of the absence of controls at the internal

¹⁴⁰Case C-430/10, Hristo Gaydarov v. Director na Glavna direktsia "Ohranitelna politisia" pri Ministerstvo na vatreshnitate raboti, 2011 E.C.R. I-11637, para. 28.

¹⁴¹ELSPETH GUILD, STEVE PEERS & JONATHAN TOMKIN, *THE EU CITIZENSHIP DIRECTIVE: A COMMENTARY* 94 (2019).

¹⁴²Opinion of Advocate General Szpunar at para. 59, Case C-35/20, *Syyttäjä* [pending] (June 3, 2021).

¹⁴³Protocol No 19 Protocol on the Schengen acquis Integrated into the Framework of the European Union, arts. 3, 4, 2012 O.J. (C 326) 1; *Protocol No 21 on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, annexed to the TFEU*, 2016 O.J. (C 202).

¹⁴⁴See Cornelisse, *supra* note 7, at 752–53.

¹⁴⁵*Id.*

borders, should continue only for as long as these Member States are considered not being able to adequately control their external borders. However, the fact that these countries have been effectively kept in Schengen purgatory based on political concerns unrelated to the management of the external border,¹⁴⁶ does raise important concerns in relation to the citizenship rights of the nationals of these countries.

Both constitutional and instrumental differentiation, however, are exceptions to the general rule of the abolition of controls at the internal borders—and therefore to the right of citizens to move freely across an internal border without being stopped and having one's travel documents checked.

E. The Reintroduction of Border Controls From a Union Citizenship Perspective

So far, we have submitted that Member States maintain controls at their internal borders against the letter and the spirit of the Schengen Borders Code and they do so largely unchecked. The failure of the Commission to enforce EU law rules on the absence of border controls and the lack of assessing the effects of citizenship rights by Member States derives in part from the focus on the economic dimension of free movement. Indeed, both the European Parliament and the Commission have documented the economic costs of the de facto partial suspension of Schengen.¹⁴⁷ Unlike the economic costs of non-Schengen, the effects of the long-term reintroduction of border controls on citizenship cannot be easily quantified and are less obvious. Yet, the effects on Union citizenship might be more profound. Thus, in this section we draw two principal consequences of the preceding analysis of the link between the abolition of border controls and Union citizenship: At a meta-level, the partial suspension of Schengen affects negatively the way in which citizens relate to the Union and see themselves as Union citizens; at the level of positive law, the link between the abolition of border controls and Union citizenship in the Treaty framework calls for an interpretation of the rules in the Schengen Borders Code on the reintroduction of border controls.

If the reintroduction of border controls is considered from a 'purely' legal perspective of free movement rights of Union citizens, the infringement of these rights appears minimal. Having to flash one's passport at the border is merely a minimal infringement of a Union citizen's free movement rights. From this perspective, the reintroduction of border controls seems like, as some scholars argue, a mere nuisance for citizens walking their dog in their favorite park that stretches across an internal border.¹⁴⁸ Yet, this perspective fails to see the more profound effects of the *longue durée* reintroduction of border controls on how Union citizens see the Union and the way they conceive themselves as *Union* citizens. Arendt and Hans Lindahl argue, as discussed above in Part D.II., that territorial boundedness and the concrete actualization of values are constitutive features of a political community and essential for the identity of that community. For Arendt and Lindahl, however, territorial boundedness and the actualization of values are preconditions for political communities to exist. In other words: Arendt and Lindahl make an ontological claim. By contrast, we want to highlight the epistemic aspect of the abolition of border controls, something that neither Arendt nor Lindahl describe. The objective of the White Paper to change the way citizens would see the Union illustrates this epistemic aspect of the abolition of border controls. Cognition, as Edmund Husserl argued, has an intentional structure in that it is always aimed at something outside a person and thus relates to things in the world.¹⁴⁹ Thus, the

¹⁴⁶Innenminister Friedrich will mit einem Veto in Brüssel die Aufnahme von Bulgarien und Rumänien in den Schengen-Raum verhindern, DER SPIEGEL (Mar. 3, 2013).

¹⁴⁷See inter alia, European Parliament, Costs of non-Schengen, *supra* note 6, at 9; European Parliament, Schengen Border Controls, *supra* note 6, at 11; European Commission, Schengen Strategy, *supra* note 6, at 3.

¹⁴⁸Daniel Thym, *Travel Bans in Europe: A Legal Appraisal*, VERFASSUNGSBLOG (Mar. 9, 2020), <https://verfassungsblog.de/travel-bans-in-europe-a-legal-appraisal/>.

¹⁴⁹See in particular Edmund Husserl's phenomenology of space, Stephan Günzel, *supra* note 63, 109–112.

experience of space represents one of the constituents of human cognition. At the same time, experienced space has a concrete material dimension. The materiality of border posts, barriers and tollhouses are not merely material objects, but also concepts that have specific meanings: They signify the limits of the political realm and the operation of the law. A transformation of this materiality, for example, the abolition of border controls, thus restructures the meaning of political concepts through everyday lived experiences and changes the way citizens experience the Union: they do not *see* different Member States separated by border controls, but a single area. Conversely, the *longue durée* reintroduction of border controls transforms the way citizens relate to the Union. As border controls in the Schengen area become the new normality, citizens might accord priority to national security over free movement within the Schengen area and their sense of Union citizenship, of being part of a broader community of Union citizens that transcends their national community, might dwindle. To bring some empirical bearing on this argument: When asked in a Eurobarometer poll in 2018, more than two-thirds of Union citizens—sixty-eight percent—considered the abolition of border controls one of the main achievements of the Union and more than half of the respondents mentioned that they were aware of the temporary reintroduction of border controls by their Member State.¹⁵⁰

The abolition of controls at internal borders does not mean that the EU, as a legal space, constitutes an abstract and borderless space which, in contrast to Member States' legal orders, is not based on territory.¹⁵¹ Quite the contrary: The abolition of internal border controls goes hand in hand with the establishment and fortification of a *common* external border and, thus, constitutes a common bounded space that is more than the mere sum of Member States territories. The abolition of internal border controls thus constitutes an essential element of the EU's territorial claim and EU law's territorial grounding.¹⁵²

The second consequence of the preceding analysis on the link between Union citizenship and the abolition of internal border controls concerns the implications for the interpretation of EU law. More precisely, the interpretation of public policy and internal security as derogations from the general principle of the absence of border controls. With prolonged reinstatements of border controls, the Schengen area clearly is in crisis. At the root of this crisis are the security concerns of

¹⁵⁰The views on the Schengen area, however, vary between Member States. While eighty-seven percent in Luxembourg, eighty percent in Poland, eighty percent in Slovakia, seventy-nine percent in both Lithuania and the Netherlands, as well as seventy-seven percent in both Germany and Greece citizens consider the Schengen area as one of the main achievements of the EU, respondents in the UK were the least likely to agree with that statement with forty-five percent. In the UK there was, however, a high proportion of "don't know" answers with thirty-five percent. Moreover, the absence of passport controls ranks as the single most positive aspect of the Schengen area in the perception of respondents, ahead of easier trade and cross-border travel. See European Commission, *Special Eurobarometer 474 Report* (Dec. 2018), 39–40, 48, <http://www.europeanmigrationlaw.eu/documents/EuroBarometer-Schengen-FullReport.pdf>.

¹⁵¹As argued, for example, by Alain Supiot, who comprehends the EU as space. For him, the EU "no longer defines itself as a single territory or a group of discrete territories" but rather as an "area of freedom, security and justice . . . designed to include an indeterminate and indeterminable number of new member States." Supiot contrasts the legal order of states, which is territorially bound, with the legal order of the EU, which is not territorially bound. Thus, the extending reach of EU law consequently results for Supiot in the "dissolution of the singularity of territories into an abstract, measurable and negotiable space." See Alain Supiot, *supra* note 56, 390–91. Still, Supiot views the area of freedom, security and justice exclusively in terms of the internal market rules, in other words as a market space, which, as we discussed above, is both historically and normatively unconvincing.

¹⁵²This claim of the EU to its "own" territory does not mean that Member States territories are replaced by a common Union territory. Rather, the relation between Union territory and Member States territories is reflexive: Similar to Union citizenship, Union territory depends on and is an accessory to Member territories, yet at the same time modifies the legal meaning and conceptualization of Member States territories. The EU's territorial claim, as Josef Weinzierl points out, does not imitate state territory by claiming ultimate authority over a distinct junk of the earth, but rather opens "national territories and to create a transnational, mutually integrating, and yet bounded space." See Josef Weinzierl, *Territoriality Beyond the State: The EU's Territorial Claims and the Search for Their Legitimacy*, 22 *GERMAN L. J.* 650, 672 (2021). For a conceptual analysis of the notion of Union territory, see, Stefan Salomon, *Constructing Europe: A Spatial-Theoretical Analysis of the Construction of Territory in International Law and EU law* (unpublished PhD thesis, 2019).

Member States, or, to be more precise, the view that border controls are an adequate instrument to respond to Member States' concerns of long-term threats, whether perceived or real. In the past two decades, this view changed considerably. While Member States rejected the reintroduction of border controls in the immediate aftermath of 9/11, because the "fight against terrorism would be a long-term activity" and the Schengen Borders Code allows temporary reintroduction of border controls only,¹⁵³ since 2015 some Member States are increasingly convinced that border controls represent adequate measures to respond to long-term threats.¹⁵⁴ However, it is not just Member States themselves that advance this view. Even the Commission seems to consider the derogations in the Schengen Borders Code almost exclusively from the perspective of Member States' security concerns.

Yet, if one sees free movement in the internal market and borderless travel in the AFSJ as two sides of the same coin—Union citizenship—the case for a unified approach towards the concept of public order and public policy is not hard to make. It would mean that the derogations under the Schengen Borders Code are interpreted in line with EU free movement law, subjecting Member States to greater scrutiny, requiring a genuine and sufficiently serious threat to a fundamental interest of society. Although Member States are allowed a margin of discretion in the application of this concept, it is not exempt from judicial review, must be interpreted strictly, and its scope cannot be determined unilaterally without control by the Union institutions. An interpretation of the public policy and internal security exception in line with the case law on Union citizenship, would not only allow for a restoration of borderless travel in Europe, it would also result in a consistent and uniform interpretation of both the AFJS and the internal market objective, doing justice to Union citizenship as the "fundamental status of nationals of the Member States",¹⁵⁵ under both articles.

Although the Court has held that the same language in different legislative instruments does not necessitate the same interpretation, it has on prior occasions interpreted the concepts of public policy in AFSJ legislation applicable to third-country nationals, in the same way as under the Citizenship Rights Directive.¹⁵⁶ The argument that an interpretation in line with the Citizenship Rights Directive is not possible, as it would automatically apply to third-country nationals who do not benefit from the right to free movement, ignores that this is precisely the reason for which rules with regards to external borders have been adopted. To treat third-country nationals differently in this regard would amount to a case of unjustified discrimination.¹⁵⁷ In fact, in the instances in which the Court of Justice has interpreted the concept of public policy or public security differently, the Court was concerned with the interpretation of these exceptions in AFSJ legislation governing the first access of third-country nationals to Union territory.¹⁵⁸

This does leave open the question on how to relate the public policy and public security exception to Article 72 TFEU and Article 4(2) TEU, which state that Member States remain responsible for their own internal and national security. In the internal market, it is standing case law, that where harmonizing measures have been adopted, national legislation is checked against that

¹⁵³See Groenendijk, *supra* note 37, at 166.

¹⁵⁴See Pola Cebulak & Marta Morvillo, *supra* note 4.

¹⁵⁵Case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-06193, para. 31.

¹⁵⁶Case C-554/13 Z.Zh and O., ECLI:EU:C:2015:377, Judgment of 11 June 2011, para. 60. Case C-601/15 PPU J.N. v Staatssecretaris van Veiligheid en Justitie, ECLI:EU:C:2016:84, Judgment of 15 Feb. 2016, para. 65.

¹⁵⁷See also the Opinion of Advocate General Sharpston at para. 59, Case C-554/13 Z.Zh and O. (Feb. 12, 2015).

¹⁵⁸Case C-544/15 Sahar Fahimian v. Bundesrepublik Deutschland, ECLI:EU:C:2017:25, Judgment of 4 Apr. 2017, paras 40–42; Joined Cases C-381/18 & C-382/18 G.S. and V.G. v. Staatssecretaris van Justitie en Veiligheid, ECLI:EU:C:2019:1072, Judgment of 12 Dec. 2019 para. 63, ECLI:EU:C:2019:1071; Case C-380/18 Staatssecretaris van Justitie en Veiligheid v. E.P., ECLI:EU:C:2019:1071, Judgment of 12 Dec. 2019, para. 45.

secondary legislation and a Member State can no longer invoke the Treaty provisions.¹⁵⁹ In a number of recent decisions, the Court of Justice held that Article 72 TFEU cannot be validly invoked when EU secondary law already sufficiently takes into account the security concerns of Member States. Much like the Court has subsumed arguments on national constitutional identity under the public policy exception, the Court limited the possibility to invoke Article 72 TFEU as a self-standing exception.¹⁶⁰

In the infringement case *Commission v Poland and Hungary*, which concerned the failure to implement Council decisions that aimed at relocating asylum seekers from Italy and Greece to other Member States, Poland, Hungary, and the Czech Republic invoked Article 72 TFEU to justify their non-compliance. In an earlier action for annulment against one of these decisions, Poland had already unsuccessfully argued that the Council decisions violated the principle of proportionality, as it did not allow the Member States to fulfil their obligations under Article 72 TFEU. Here, the Court had answered that the Relocation Decisions allowed for the refusal of a candidate based on public policy or public security concerns.¹⁶¹

The Court replied, first, that although Member States remain competent to adopt measures to ensure law and order and security on their territory, the adoption of such measures still falls within the scope of Union law: “It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. As such measures fall within the scope of Union law, the Court is competent to adjudicate on the compatibility of these measures with Union law.”¹⁶² In this regard, the Court leaves no doubts that the derogations in Article 72 TFEU refer to “exceptional and clearly defined cases” and must be interpreted strictly.¹⁶³ The CJEU made clear that Article 72 TFEU “cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities”¹⁶⁴ and that it precludes Member States from peremptorily invoking Article 72 TFEU “for the sole purposes of general prevention.”¹⁶⁵

In *Commission v Hungary*, another infringement procedure, Article 72 TFEU was invoked once again, this time in conjunction with Article 4(2) TEU. Hungary argued that the large number of persons seeking international protection posed a risk to its public order and internal security, allowing it to depart from EU asylum legislation. The CJEU rebuked that argument as too general, holding that Hungary failed to demonstrate, “to the requisite legal standard,” that it was necessary for it to derogate from secondary legislation.¹⁶⁶ The Court emphasized that the legislation in question provided for the specific situation in which Member States are confronted with an exceptionally large number of third-country nationals. The fact that there was a proposal pending to amend these provisions, does not in itself justify the conclusion that the concerns that Article 72 TFEU aims to protect have not been sufficiently taken into account. As regards Article 4(2) TEU, the Court put the bar even higher, requiring that national measures

¹⁵⁹The Tedeschi-principle, Case 5/77, *Carlo Tedeschi v. Denavit Commerciale s.r.l.*, 1977 E.C.R. 1555. Cf. *mutatis mutandis*, Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107, Judgment of 26 Feb. 2013, paras 43–45.

¹⁶⁰See e.g. Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693; Case C-391/09, *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, 2011 E.C.R. I-03787.

¹⁶¹Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v. Council*, ECLI:EU:C:2017:631, Judgment of 6 Sept. 2017, para. 306.

¹⁶²Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary, Czech Republic*, ECLI:EU:C:2020:257, Judgment of 2 Apr. 2020, para 143.

¹⁶³*Id.* at paras. 143–44.

¹⁶⁴*Id.* para. 145.

¹⁶⁵*Id.* para. 160.

¹⁶⁶Case C-808/18, *Commission v. Hungary*, ECLI:EU:C:2020:1029, Judgment of 17 Dec. 2020, paras 216–18, 261.

taken by reference to this article must be necessary to “effectively safeguard[. . .] the essential State functions.”¹⁶⁷

It is submitted that the provisions of the Schengen Borders Code take sufficient account of the Member States internal security concerns. Member States can unilaterally reintroduce controls for a maximum period of eight months. Articles 25-28 Schengen Borders Code. For the specifically serious threats provoked by systemic deficiencies in the management of the external borders, Article 29 Schengen Border Code provides an answer. More importantly, the Council already considered that temporary border controls do not constitute adequate measures to respond to threats of a prolonged nature.¹⁶⁸ To interpret Article 72 TFEU any differently would, as the Court held in *Commission v Poland and Hungary*, “impair the binding nature of European Union law and its uniform application.”¹⁶⁹

Only in the most of exceptional of circumstances affecting the Member States’ powers to ensure internal security recourse can be had to Article 72 TFEU and Article 4(2) TEU. Such a reading is in line with Advocate General Jacobs’ interpretation of that other derogation clause in primary law: The internal market emergency clause in Article 347 TFEU. Advocate General Jacobs argued that “serious internal disturbances affecting the maintenance of law and order” would necessarily entail “a breakdown of public order on a scale much vaster than the type of civil unrest which might justify recourse to Article 30 TFEU.”¹⁷⁰ Recent case law supports a similar reading of Article 4(2) TEU.

In *Quadrature du Net*, the Court of Justice interpreted the objective of safeguarding national security (Article 72 TFEU) in light of Article 4(2) TEU. The Court stated that Article 4(2) TEU refers to the Member States’ “primary interest in protecting the essential functions of the State and the fundamental interests of society and encompasses the prevention and punishment of activities capable of seriously destabilizing the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities.”¹⁷¹ The Court argued that this went beyond the objectives safeguarding public security in the secondary legislation at issue, the e-privacy Directive — Directive 2002/58. Threats to national security, the Court of Justice argued, would be distinct “by their nature and particular seriousness, from the general risk that tensions or disturbances, even of a serious nature, affecting public security.”¹⁷² Only in such circumstances can threats to national security justify measures that are more far-reaching than normally permitted by secondary legislation.¹⁷³ These measures, however, still need to comply with the basic criteria set forth in Article 52 of the EU Charter on Fundamental Rights. Although in this case the question evolved around the safeguarding of a fundamental right, a similar interpretation must apply to a limitation of the right to move freely across internal borders of Union citizens.

F. Conclusions

In this Article we argued that the rules on the absence of border controls and Union citizenship are closely connected and must be considered together. The history of the abolition of border controls shows that the objective of the abolition of border controls was not merely to further economic

¹⁶⁷*Id.* para 262.

¹⁶⁸See Groenendijk, *supra* note 327, at 166.

¹⁶⁹*Commission v Poland and others*, C-715/17, at para. 143.

¹⁷⁰Opinion of Advocate General Jacobs at para. 47, Case C-120/94, *Commission of the European Communities v. Hellenic Republic* (April 6, 1995).

¹⁷¹Joined Cases C-511/18, C-512/18 & C-520/18, *La Quadrature du Net and Others v. Premier ministre and Others*, ECLI:EU:C:2020:791, Judgment of 6 Oct. 2020, para. 135.

¹⁷²*Id.* at para. 136.

¹⁷³*Id.*

integration, but also to foster a European political identity. Key policy documents from the 1980s show that the abolition of physical border controls was considered crucial in transforming the way citizens relate to the Union. The current Treaty framework formally links Union citizenship to an area without internal border controls where Union citizens can move freely. Thus, the rules on Union citizenship and the Schengen *acquis* are quite clear: Union citizens have, in principle, a right to move freely across internal borders without being subject to border controls.

Yet, present day reality stands in stark contrast to the development and the current state of Union law as discussed in this Article. Long gone are the days in which the Commission criticized border controls as an impediment to the “broader and deeper Community envisaged by the original Treaties” and an “outward sign of an arbitrary administrative power [by Member States] over individuals and as an affront to the principle of freedom of movement within a single community.”¹⁷⁴ Despite President von der Leyen calling Schengen the linchpin for fully restoring the four freedoms,¹⁷⁵ both the tone and (in)action of the Commission point in the opposite direction. Commissioner Johansson recently remarked at the Second Schengen Forum that she does “not intend to remove the unilateral right of Member States to introduce internal border checks when that is indeed necessary and justified as measures of last resort against a concrete threat,” which was confirmed in the Commission’s new strategy for Schengen.¹⁷⁶

Despite the connection of the Schengen *acquis* with citizenship rights and the strict conditions on reintroducing border controls in the current Treaty framework, current practice emaciates these strict conditions and gives undue room to the sovereignty concerns of Member States, couched in security terminology. Not only does this wrongfully consider border controls as an adequate measure to tackle long-term security threats, which is doubtful in itself; more importantly, it undermines one of the core achievements of European integration of the last three decades—an area without internal border controls in which Union citizens can move freely. Moreover, it risks changing the understanding of citizens as *Union* citizens. The construction of the area without internal frontiers was not an exclusively top-down process driven by political elites, as the literature on Schengen describes it. The legal construction of the area without internal border controls was also driven by citizens and remains so till this day.¹⁷⁷ Examples of citizens asserting their free movement rights as Union citizens include, for instance: The protests and road blockages by truck drivers against border controls in the 1980s that eventually resulted in the conclusion of the Saarbrücken agreement; the strategic litigation of Members of the European Parliament to get rid of border controls in the *Wijsenbeek* case in the 1990s;¹⁷⁸ and cases that are currently pending before the Court of Justice.¹⁷⁹

Although it is cause for hope that the Commission’s new Schengen Strategy acknowledges that Schengen is a symbol of Europe’s interconnectedness and the ties between the peoples of Europe, it requires an interpretation of the Schengen rules in line with the Treaties’ objectives and origins

¹⁷⁴Commission White Paper, *supra* note 11, paras. 24, 47–48.

¹⁷⁵European Commission, *State of the Union Address by President von der Leyen*, (Sept. 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.

¹⁷⁶Although Commissioner Johansson added that “in a common Schengen area, the actions of one Member State can have repercussions on the whole area. We need therefore common and coordinated decisions.” Considering the failure of the Commission to effectively exercise its supervisory role, it seems like mere lip service. See European Commission, Press Release, *Commissioner Johansson’s concluding remarks at the Second Schengen Forum*, May 17, 2021, https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-concluding-remarks-second-schengen-forum_en.

¹⁷⁷The development of the Schengen rules as result of bottom-up processes, whilst not the topic of this Article, certainly calls for further academic investigation.

¹⁷⁸See Morijn, *supra* note 79, 178–79.

¹⁷⁹Joined Cases C-368/20 & C-369/20, N.W. [pending].

to more forcefully protect borderless travel in Europe. It is time to draw the conclusion from the incorporation of Schengen into the EU legal framework and to give full effect to Union citizenship some twenty years after its establishment. To think that the establishment of the internal market was any less controversial or politically sensitive, is historically wrong. It was the Commission, backed by a Court determined to give full effect to the Treaties, that allowed for the success of the Single Market project. Let it take an equally principled role in the protection of the Schengen area and citizens' rights. Failing to do so, it will once more be up to the Court of Justice to ensure the full effect of Union law and protect the rights of Union citizens under the treaties. This time, however, it is not so much about establishing those rights, as about protecting the achievements of Schengen and the rights of Union citizens.

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