

Schengen Area: From Free Movement Zone to Labyrinth

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1. The reintroduction of controls at internal borders

With a statement published on October 18th, the Italian Government announced that it had notified the European Commission, the President of the European Parliament, the Secretary-General of the Council of the European Union, and the Interior Ministers of EU member states and associated Schengen countries about the reintroduction of controls at the land borders with Slovenia from October 21, 2023, to October 30, 2023. This decision was made due to the increased threat of violence within the EU following the escalating crisis in the Middle East and the risk of possible terrorist infiltrations. According to the government, this situation is "further aggravated by the constant migratory pressure to which Italy is subjected, both by sea and by land (140,000 arrivals on Italian shores, +85% compared to 2022). In the Friuli Venezia Giulia region alone, 16,000 people who entered the national territory irregularly have been identified since the beginning of the year."

The choice to reintroduce controls at internal borders for a limited period, using the specific procedure outlined in Article 28 of EU Regulation 2016/399 (the so-called Schengen Border Code), activated in cases requiring immediate action, has also been adopted by other European countries, including Slovenia, Austria, the Czech Republic, Slovakia, Poland, and Germany.

However, the map of the reintroduction of controls at internal borders is much broader and diverse. Indeed, while until the first half of 2015, the Schengen area was characterized by the exceptional and temporary reinstatement of controls at internal borders coinciding with specific events, since the last months of 2015, some member states have effectively reintroduced and maintained such controls continuously until today.

The reintroduction of controls at internal borders, as well as the use of bilateral readmission agreements, has effectively allowed the border authorities of various member states to prevent entry into the territory and carry out rejections and readmissions of migrants and asylum seekers, in violation of numerous national and supranational norms.

According to initial press reports describing the rejection actions at the Italy-Slovenia border, operational practices seem to substantially overlap typical elements provided for in bilateral readmission agreements with elements - apparently adhering to the principles contained in the Schengen Border Code - that characterize rejections at the border. In fact, the traces would have taken place already on Italian territory beyond the border crossings: such a procedure appears in line with what is provided for by bilateral readmission procedures but is in contrast with the Schengen Border Code, which assumes that checks can only be carried out at border crossings communicated to the competent institutions. It is not yet clear whether the individuals subject to readmission/rejection procedures have been issued written administrative measures, and consequently, it is difficult to define the type of procedure to which they have been subjected. However, an operational and applicative promiscuity is already emerging, leading to clear operational and practical advantages in terms of the removal of foreign individuals. Both institutions have characteristics - rejection at the border

being a more streamlined and rapid procedure, readmissions having the ability to act not only at the border crossing - that, when combined, could make rejections easier, more effective, and faster. The purpose of this analysis is to examine, in light of EU law provisions governing the reintroduction of controls at internal borders, the illegitimacy profiles associated with the reinstatement of controls at European internal borders detected so far, as well as to identify the limits resulting from the necessary compliance with national and European provisions, with particular reference to the Italian case.

2. Reintroduction of controls at internal borders: reasons for reinstatement and duration of controls

In accordance with Article 67, paragraph 2, first sentence, of the Treaty on the Functioning of the European Union (TFEU), the European Union ensures that individuals are not subjected to controls at internal borders and develops a common policy on asylum, immigration, and controls at external borders. Based on this, Article 77, paragraph 1, letter a) of the TFEU establishes that the Union promotes a policy aimed at ensuring that individuals, regardless of their nationality, are not subjected to controls when crossing internal borders. Article 77, paragraph 2, letter e) of the TFEU empowers the Union to adopt, through ordinary legislative procedure, measures aimed at abolishing controls on individuals of any nationality when crossing internal borders.

This provision forms the legal basis for the so-called Schengen Border Code (SBC), whose Article 22 states: "Internal borders may be crossed at any point without checks on individuals, regardless of their nationality." The Schengen Border Code generally prohibits the implementation of border controls. However, there are exceptions, as outlined below.

Member States can temporarily reintroduce controls at internal borders in accordance with the provisions of Chapter II of Title III of the Schengen Border Code (Article 25 - Article 35 of the Schengen Border Code). According to Article 25, paragraph 1, of the Schengen Border Code, in case of a serious threat to public order or internal security in a Member State, the latter is authorized, under exceptional circumstances, to reinstate controls at all or some parts of its internal borders for a limited period not exceeding 30 days or for the foreseeable duration of the serious threat, if it exceeds the 30-day period. The overall period during which controls at internal borders can be reintroduced must not exceed six months. However, paragraph 4 of the same Article 25 provides that in the presence of exceptional circumstances under Article 29 of the Schengen Border Code, the overall period of reintroduction of controls can be extended up to a maximum of two years.

It is important to recall that, according to recital No. 26 of the Schengen Border Code, "Migration and the crossing of external borders by a large number of third-country nationals should not in itself be considered a threat to public order or internal security." Furthermore, as provided for in Article 25, paragraph 2, of the Schengen Border Code, "Border control at

internal borders is reinstated only as a measure of last resort and in accordance with Articles 27, 28, and 29."

Building on what is stated in recital No. 26 of the Schengen Border Code and as established by Article 25 of the Schengen Border Code, serious legitimacy doubts must be expressed regarding the choice to resort to the procedure under Article 28 of the Schengen Border Code, which, to be invoked, presupposes the existence of threats to the public order or internal security of a Member State requiring immediate action, resulting in a contraction of the time required for reinstating controls compared to those ordinarily foreseen by Article 27 of the Schengen Border Code.

Regarding the duration of the reinstatement of controls, in principle, it should be noted that the period of introduction of controls at internal borders of the EU is limited. This was confirmed by the European Court of Justice (ECJ) in the judgment of April 26, 2022 (C-368/20 and C-369/20) concerning a preliminary ruling by the Administrative Regional Court of Styria (Austria). According to this judgment, controls at internal borders can be extended beyond the time limits of the Schengen Border Code (six months) only in the presence of a new threat to public security. An additional extension of controls beyond six months with the same justification or simply without justification is not allowed, and it will be necessary to monitor the methods, duration, and reasons put forward for future extensions. The first extension to the reinstatement of controls at internal borders between Italy and Slovenia, covering the period from October 31 to November 19, cites reasons identical to those of October 21. Although the indications contained in the decision of the Court of Justice relate to the six-month extension deadline provided for by the ordinary procedure under Article 25 of the Schengen Border Code, the justifications for an "emergency" procedure must necessarily be more serious and cannot overlook a comprehensive assessment of the various tools deployed to prevent the threat to public order and security.

3. Restoration of controls at internal borders and respect for fundamental rights

It is necessary to emphasize that, in light of the aforementioned considerations and the mentioned judgment of the Court of Justice, the introduction and maintenance of border controls cannot be indiscriminate. On the contrary, a rigorous evaluation of the circumstances in which they are allowed is essential. In any case, as clarified by the Regulation, migration or the arrival of even a large number of third-country citizens cannot, in itself, be considered a threat to public order or security, legitimizing the introduction of controls. It is not insignificant to highlight that the government, in announcing the extension of the restoration of border controls at the Italy-Slovenia border, had placed greater emphasis on the goal of countering arrivals in Italy.

The temporary reintroduction of controls cannot justify any derogation from the respect of the fundamental rights of foreign individuals entering the territory of the Member States, specifically in the case of Italy and the Italy-Slovenia border. In particular, the control cannot

exempt border authorities from verifying the individual situations of foreign individuals intending to enter the territory of the state and intending to apply for international protection.

Practices that persist in some internal border areas, attributable to the reintroduction of border controls, such as those existing at the Italy-France border or between Austria and Slovenia, have already been sanctioned and deemed illegitimate by various national courts of Member States. Similarly, numerous violations have been recognized by the Rome Tribunal regarding informal readmissions from Italy to Slovenia and Greece.

The practices and procedures implemented at the Italy-Slovenia border can thus be evaluated in light of various principles. In particular:

a) The restoration of control cannot result in a prohibition of access to the territory for those intending to seek asylum.

According to Directive 2013/32/EU, establishing minimum standards for procedures in Member States for the recognition and revocation of refugee status, and internal rules, anyone expressing the intention to seek international protection within the national territory, including borders and related transit zones, as well as territorial waters, has the right to access the corresponding procedure.

In particular, Article 8 of the Directive mandates that, irrespective of the actual expression of intent, "Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones at external borders, wish to make an application for international protection, Member States provide them with information on the possibility of doing so. In such detention facilities and at border crossing points, Member States ensure interpretation services to the extent necessary to facilitate access to the asylum procedure."

In the case of an expressed intent (or "submission of the application," to use the directive's terminology), "registration is carried out within three working days after the submission of the application (...)" extendable to six days, according to the same provision, if the application is submitted to authorities not competent for registering the application (Article 6, paragraph 1, Directive).

As clarified by Recital 27 of the Directive, the expression of the intent to seek international protection qualifies the person as an asylum seeker, entitling them to protection and the rights associated with such status, including reception.

The expression of the intent to seek international protection can also be made orally (Article 3 of Legislative Decree 21/2015).

Border police offices have no discretionary power to assess the possibility for a third-country national to access the asylum procedure, and if they receive an expression of intent to access the relevant procedure, they must promptly send the person to the competent police headquarters (Article 26 of Legislative Decree 25/2008).

The person applying for international protection is authorized to remain in the territory of the State until the decision of the Territorial Commission pursuant to Article 32 of Legislative Decree 25/2008 (Article 7 of Legislative Decree 25/08) or until the determination of competence to examine their international protection application based on the criteria provided by EU Regulation No. 604/2013 (the so-called Dublin Regulation). In this regard, the decision of the French Council of State on July 8, 2020, is significant, wherein the French Court highlighted that the refusal of entry motivated by the competence of another Member State under the Dublin criteria requires the prior activation of the 'take charge or take back' procedure with the formulation of the relevant request to the Member State deemed competent.

b) The restoration of border controls cannot exempt border authorities from the information obligations provided by current regulations.

Specifically concerning Italy, current regulations mandate that comprehensive information on the rights of foreign citizens must be provided to all those who enter the border, even if lacking a residence permit (Article 10-ter of Legislative Decree 286/98 and Article 10 of Legislative Decree 25/2008).

Article 10-ter of Legislative Decree 286/98, in particular, states: "(...) The foreigner located during the irregular crossing of the internal or external border or arrived in the national territory following sea rescue operations is taken for the needs of rescue and initial assistance at designated crisis points." Here, "fingerprinting and biometric data collection operations are also carried out, for the purposes of Articles 9 and 14 of EU Regulation No. 603/2013 of the European Parliament and of the Council of June 26, 2013, and information is provided on the international protection procedure, the relocation program to other Member States of the European Union, and the possibility of assisted voluntary return."

As for those expressing the intention to apply for international protection, Article 10 of Legislative Decree 25/2008 states that "(...) at the time of submitting the application, the competent police office receiving it informs the applicant of the procedure to follow, their rights and duties during the process, and the times and means at their disposal to support the application with relevant elements." Additionally, "The personnel of the police office referred to in paragraph 1 receives adequate training for their tasks and responsibilities."

Information obligations regarding the procedure for accessing international protection also exist for individuals subject to EU Regulation No. 604/2013. Article 4 of the Dublin Regulation stipulates that: "As soon as an application for international protection is submitted

(...) in a Member State, the competent authorities of that state inform the applicant of the application of this regulation. (...) The information provided under paragraph 1 is given to the applicant in writing in a language the applicant understands or is reasonably supposed to understand. For this purpose, Member States use the common leaflet drawn up in accordance with paragraph 3. If necessary for the correct understanding of the applicant, the information is also provided orally, for example, in relation to the personal interview referred to in Article 5. (...)"

c) Control cannot result in a violation of the prohibitions on refoulement, direct or indirect, and expulsion, as per Article 19 of the TUI.

In the case of border controls for individuals without a residence permit, individuals for whom there are risks of exposure to inhumane and degrading treatment in the immediate destination, namely Slovenia, and in indirect destinations, taking into account the concrete risks of chain refoulements and readmissions from Slovenia to Croatia and from there to Bosnia and Serbia, and the ongoing violence at the Croatian border, cannot be rejected. Additionally, individuals subject to general expulsion bans, unaccompanied foreign minors, individuals in serious health conditions, pregnant women, parents of children up to six months of age, and family members living with Italian citizens up to the second degree or with an Italian spouse cannot be rejected.

d) Delivery of a reasoned administrative measure and the right to an effective remedy

The delivery of a written and reasoned administrative measure to the rejected foreign individual or those not admitted to the territory is imperative, notifiable to the concerned party and appealable before the judicial authority, also in compliance with Law No. 241/90, Articles 2 and 3. The general principles and domestic legal norms mentioned above find full correspondence in the European Charter of Fundamental Rights, particularly in its Articles 41 (right to good administration) and 47 (right to an effective remedy). The Court of Justice has clarified that the latter provision serves as the reference standard to ensure the respect of defense rights (including the right to be heard and the right to access the file) and the right of access to a remedy before a judicial authority. In particular, in FMS, the Court stated that "Article 47 of the Charter requires Member States to ensure [...] the possibility for a third-country national concerned to submit to a judge any dispute concerning a return decision adopted by an administrative authority. [...] It follows that a national regulation under which the recipient of an administrative return decision cannot challenge its regularity at least before the judicial authority does not comply with the requirements of Article 13(1) of Directive 2008/115 and Article 47 of the Charter" (par. 129-130 Judgment of the Court, Grand Chamber, dated May 14, 2020).

4. Restoration of controls at internal borders and Return Directive

In accordance with Article 32 of the Schengen Borders Code (CFS), in the event of the restoration of controls at internal borders, the relevant provisions of Title II are applied *mutatis mutandis*. Based on this provision, the provisions related to control methods and rejection established by the CFS, including those provided in Article 14, must be applied. Article 14 states that "the rejection of the foreign citizen at the external border can only be ordered by a reasoned decision specifying the precise reasons. The reasoned decision indicating the precise reasons for the rejection is notified using the uniform form attached to the Schengen Borders Code and must be delivered to the foreign citizen, who has the right to appeal. The initiation of the appeal procedure does not have a suspensive effect on the rejection decision."

However, it should be emphasized, as stated by the Court of Justice in the decision in case C-444/17, that based on the Schengen Borders Code, an internal border on which border controls have been restored by a Member State is not comparable to an external border under the same code. In fact, according to the provisions of the Schengen Borders Code, the notions of "internal borders" and "external borders" exclude each other. The code merely provides that, in the event of a Member State restoring border control at internal borders, only the relevant provisions of that code regarding external borders apply.

In particular, the Court, within this procedure, was called upon to rule on the applicability of Directive 2008/115/EC to the situation of a foreign person stopped or discovered during the irregular crossing of an internal border where border controls have been restored. The Court observes, in particular, that the situation of a third-country national already within the Schengen area differs from that of a third-country national stopped at an external border. The conclusion of the Court is, therefore, that the exception to the application of the return procedure provided by the Return Directive (Article 2(2)(a)) does not concern the case of a foreign person stopped near an internal border whose stay in the territory of a Member State is irregular, even if that Member State has restored control at that border due to a serious threat to its public order or internal security.

Also, concerning the relationship between the restoration of controls and the Return Directive, in the recent judgment of September 21, 2023, in case C-143/22, regarding a preliminary question raised by the French Council of State concerning the restoration of controls at internal borders, the Court ruled on the possibility of adopting a rejection measure against a foreign citizen stopped during the crossing of an internal border. The Court states that although the adoption of a rejection measure at an internal border where controls have been restored can be considered permissible, for the adoption of such a measure to be legitimate, the application of the Return Directive and, in particular, the guarantees associated with it, must be ensured. The conclusion of the Court is, therefore, that "the Schengen Borders Code and Directive 2008/115/EC must be interpreted to mean that, if a Member State has restored border controls at its internal borders, it can adopt, towards a third-country national presenting himself at an authorized border crossing point located in its territory where such controls are carried out, a rejection measure, by virtue of a *mutatis mutandis* application of Article 14 of that code, provided that the common rules and procedures

provided by that directive for the purpose of his removal are applied to that national." In particular, the Directive provides that the removal must always be based on a written and reasoned decision, in fact and in law, taking into account the circumstances of the individual case. The Directive also establishes a right to an effective remedy against the rejection/expulsion decision, which, according to the Court of Justice, must necessarily be a judicial remedy (see CJEU, FMS, paras. 125-129). Furthermore, the rejection decision must include, as provided for in Article 7 of the Directive, a period for voluntary departure, ranging from 7 to 30 days. Finally, Article 15 of the Directive provides for the possibility that the foreign person to be removed may be detained, but only under certain conditions and therefore not systematically.

5. Restoration of border controls and bilateral readmission agreements

The experience observed over the years at the Italian-French border has shown a coexistence between procedures related to the restoration of controls at internal borders (issuing a refusal of entry into French territory to the person stopped while crossing the border at the authorized crossing point) and procedures related to the application of the bilateral readmission agreement concluded between Italy and France and signed on October 3, 1997 (for individuals stopped in the border area and readmitted through simplified readmission procedures).

As for the Italian-Slovenian border, before the restoration of border controls, the use of the bilateral readmission agreement and police cooperation for the transfer of individuals from Italy to Slovenia has been subject to careful analysis, as well as decisions by national judges who have identified numerous aspects of illegitimacy.

While waiting to better understand the actions taken by Italian authorities at the Slovenian border after the reintroduction of border controls, and deferring to the aforementioned decisions for a more in-depth evaluation of the illegitimacy profiles of previously used practices, it is useful to reiterate once again that the bilateral agreement between the Government of the Italian Republic and the Government of the Republic of Slovenia on the readmission of persons at the border, signed in Rome on September 3, 1996, appears to be of questionable legitimacy. Despite having a clear political nature, it does not seem to have been ratified by law in accordance with Article 80 of the Italian Constitution. In any case, as a simplified intergovernmental agreement, it does not allow for derogation from the laws in force in Italy.

This statement also raises doubts about the legitimacy of informal readmission procedures and the failure to adopt formal measures by relying on Article 6(3) of the Return Directive (according to which Member States may refrain from issuing a return decision against a foreign person whose stay in their territory is irregular if the same person is taken back by another Member State under bilateral agreements or arrangements in force at the time of the entry into force of this directive).

What is crucial to highlight once again is that the different practices at internal borders and the consequent decisions made by national courts - from the French to the Austrian, passing through the German - lead to the conclusion that respect for fundamental rights and freedoms must be ensured. Formal or informal procedures that often compromise the personal freedom of the foreign person, resulting in their removal from European territory, should not be employed, especially in open violation of the principle of non-refoulement.

6. Restoration of internal border controls and strengthening of police controls

On September 14, the Minister, responding to a parliamentary question and outlining the critical situation related to the reception system in Friuli Venezia Giulia, concluded by highlighting that "...in the context of countering illegal immigration from the Italian-Slovenian border... joint activity between Italian and Slovenian police resumed in September 2022... and thanks to this, it was possible to prevent the entry of about 1,900 irregular migrants into the national territory since the beginning of the current year." Following a generalized civic access request proposed by ASGI, the Administration confirmed the direct involvement of Italian authorities in joint patrols in Slovenian territory with observation and informational support powers, under the bilateral cross-border police cooperation agreement of August 27, 2007, ratified by law 60 on April 7, 2011.

During a hearing before the Schengen Parliamentary Committee, Interior Minister Piantedosi also announced the "establishment of joint police force brigades, based on the successful experience (...) gained with joint patrol services." According to news from November 2, police coordination centers involving Italy, Slovenia, and Croatia will also be established to consolidate collaboration in countering irregular crossings.

In parallel with the reintroduction of controls at internal borders, Italy has activated additional measures that clearly prevent foreign individuals from accessing national territory and the rights that result from such access. The operational opacity characterizing these police interventions is also a cause for concern: the methods by which they are conducted are unclear and difficult to observe, concealing evident critical issues and potential violations of rights.

7. Concluding Remarks

Free movement within the European area is one of the most significant achievements of our time. Its gradual dismantling should be driven by a genuine emergency and contingency, both conditions that seem not to be found in the reasons put forward by Italy and other Member States to the European Commission.

It is also worrisome that, faced with an alleged threat that apparently could involve almost all European countries, states have acted in a scattered and unilateral manner, effectively

promoting an approach opposite to what is indicated in the Schengen Regulation reform proposal. The reform prospects explicitly express concerns about the definitive breakdown of the free movement system and, to keep it effective, significantly reduce the protections for third-country nationals through the introduction of rules that institutionalize practices of dubious legitimacy.

The sacrifice of free movement does not seem justified and could instead be aimed at illegitimate purposes with non-negligible consequences in terms of respecting the fundamental rights of individuals entering the territory from that border area.

As already highlighted, the initial news reported by the press on operations carried out in the aftermath of the suspension of free movement is not encouraging: groups of foreign individuals have been stopped well beyond the border area and handed over to Slovenian authorities on Italian territory.

In judicial proceedings before national authorities, the Ministry of the Interior has tried to justify such actions, stating that individuals handed over to Slovenian authorities never left the sphere of Slovenian sovereignty and that Slovenian authorities would then have to determine the applicable procedure. In response, judges have asserted that borders are not free zones, devoid of spatial delineations and precise rules, where authorities enjoy broad discretion of action.

European case law has also intervened to impose specific limits on intra-EU transfers of foreign nationals, pronouncing itself with reference to those provided for international protection applicants under the Dublin Regulation.

The freedom of movement, a fundamental pillar of the Schengen area, may perhaps reveal its true nature today: an area of freedom for a few at the expense of many.