

## Germany, the Schengen Crisis and Frontex: A Funny Kind of Pro-Europeanism (ARI)

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**Theme<sup>1</sup>:** Is Germany's new position on Schengen a sign of the 'normalisation' of its European policy?

**Summary:** Germany's enthusiasm for the current processes of widening and deepening the Schengen Area has visibly cooled. This has been interpreted as a sign of the country's new euroscepticism. The reality is rather different. Berlin's reassessment of these rather mechanistic processes actually shows a new sense of engagement on behalf of free movement. This engagement is not, however, without its drawbacks.

**Analysis:** The EU's passport-free travel area was always considered a success story. It has proved that an EU-wide project, with decision-making based in Brussels, can be firmly anchored in the popular imagination. Through its widening from an initial five states to today's 25 members, the Schengen Area has overcome the differences between eastern and western Europe and has made real the principle of solidarity between European states. Through the deepening of cooperation from low-key transgovernmentalism in the 1980s to full-blown communitarised policymaking in the last decade, the Schengen project has shown that European governments trust each other sufficiently to work together even on the most sensitive matters. Moreover, the free movement of persons has been perhaps the most emblematic of European projects, regularly cited as a mainstay of the EU's popular legitimacy.

The German government has long regarded Schengen's success as a particular feather in its cap. As befits its position as one of the founding five, Germany has been a strong ideational force in the deepening of the Schengen Area. Its own domestic policies have provided the bloc with a blueprint for many of the 'flanking' immigration and asylum measures introduced to safeguard free movement. As a country which previously had land borders with a vast number of other states –indeed as a country which during the Cold War was the very symbol for the east/west divide– Germany has also led by example on enlargement issues. And, such is the popular support for Schengen in Germany, the country has been prepared to bear the brunt of many of the risks and burdens associated with free movement, for a time absorbing the largest numbers of asylum-seekers in the Schengen Area. This is German leadership in action.

Yet the Schengen Area is no longer an unqualified success story. In the past year the widening process has stuttered to a halt, with Bulgaria and Rumania blocked from joining,

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<sup>1</sup> This analysis reflects the author's personal opinion.

despite having faithfully followed the accession criteria. This reflects concern that crime problems in Bulgaria and Rumania will seep into the rest of the EU and that the sensitive data collected on individuals travelling within the Schengen Area will be misused. The process of deepening is also unravelling. The unforeseen arrival of 25,000 immigrants from Tunisia in March and April has reversed a trend towards political integration which previously seemed ineluctable. At the EU's Justice and Home Affairs Council of 12 May 2011 there was pressure to increase national discretion to reintroduce border controls. Mutual trust and solidarity are in short supply between governments, and all talk of Schengen's popular legitimacy has dried up.

Germany's reaction to this has caused confusion. On the one hand, Germany has articulated its unswerving commitment to free movement, arguing strongly against unilateralism on the part of the bloc's members and stressing the importance of future Schengen enlargement. But on the other, Germany has played a robust part in blocking Bulgarian and Rumanian accession to Schengen. And it has embraced the idea of re-introducing national controls. This is a clear duality: a staunch commitment to Schengen mixed with an apparent readiness to deviate from the Area's founding spirit and principles. It is tempting to view this as a break with the past on the part of a country known for its almost unquestioning support for all things Schengen. In reality, however, it is a simple continuation of the country's past position: its mixed messages on freedom of movement are just the latest sign of the old tension between Germany's European ambitions and its domestic sensibilities.

#### *The German Politics of Schengen*

Successive German Chancellors and Foreign Ministers have been vocal cheerleaders for this European project. Not content with lifting border checks, they have made ambitious prescriptions for common policies on the most sensitive of policies –asylum, illegal immigration, cross-border crime and the management of external borders–. Germany's home-affairs actors at both the federal and regional levels have not shared this enthusiasm. They have viewed the project of free movement as an unnecessary, ideologically-driven and dangerous intrusion into their sphere of expertise. They have resisted putting their operational and legislative discretion at the disposal of a European cause.

In the early days of Schengen, Germany managed to reconcile these two streams. The conditions were propitious: Germany lay on the problematic eastern border of the Schengen Area, meaning that it was principally subject to crime and migration risks coming over its own borders rather than through its Schengen partners to the West and South. Against this background, German home-affairs actors felt able to live with free movement thanks precisely to the European values of 'mutual trust' and 'solidarity'. 'Solidarity' and 'mutual trust' came to mean that Germany would bear the brunt of Schengen's problems so long as other Schengen states gave it the discretion to do so. Insofar as common flanking measures were deemed necessary, these often echoed existing German rules. Germany thus met its commitment to a European project without actually giving up real discretion over its own domestic policies.

This compromise has been progressively undermined in recent years. Far from concentrating on threats coming over its own remaining borders, Germany is now heavily exposed to problems in other Schengen countries. Today, it is Schengen's southern and eastern members which face the most visible and difficult problems associated with free movement. Moreover, Berlin has few means of influencing how they deal with them.

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Germany's previous emphasis on national discretion leaves Berlin quite impotent. New members are able to cite the old principles of solidarity and mutual trust in order to demand changes in German policy without themselves giving Berlin any say in their policies. It has split Germany's European- and home-affairs communities, with the former viewing Germany's excessive autonomy, and the latter the lack of respect for German autonomy, as the problem.

*Frontex Reform: Germany's Dual Agenda in Practice*

The uneasy duality in the country's current attitude towards the Schengen Area can be illustrated by reference to the ongoing reform of the bloc's external borders policy. For the past 20 years, the Schengen states have been pursuing a coordinated European approach to guarding the Area's external borders. In 2005 an EU agency for the coordination of the bloc's external border controls, Frontex, was established. This agency currently has a handmaiden role to the Schengen states, helping them to help one another. But it has failed to meet expectations, and its reform has been on the table for some time. Within Germany's political class, there are two relatively distinct ideas about how its reform should proceed. One stresses the need to strengthen Frontex in order to end Germany's and other members' disruptive autonomy. The other stresses the need to strengthen Frontex as a means of increasing the autonomy of Germany.

If the Area's border controls are to be made more effective, Germany's European-affairs community believes, the wrangling in Council must end. Schengen governments have been left too much discretion about how to support one another, and have simply not met their commitments to put domestic border resources at the disposal of the EU. There is thus a strong measure of support in Berlin for the Commission's 2010 proposal to amend the regulation establishing Frontex. This proposal would mitigate the agency's reliance on the individual member states, and would give the agency a co-leadership role in the operationalisation of border missions. There would even be something approaching 'compulsory solidarity' as regards the provision of resources and manpower by member states. States like Germany would have to enter binding commitments as regards the manpower and resources it would give to common missions, so that Frontex can mobilise these resources quickly should a crisis emerge.

Germany's home-affairs actors balk at the idea of 'compulsory solidarity'. This kind of supranationalisation and centralisation, they believe, is no guarantee of effectiveness. Just the reverse: it would open the way to free-riding. German home-affairs actors have long criticised the way that supranationalisation and centralisation are confused with convergence and integration. They argue that decisions are usually deferred to central agencies and qualified-majority voting introduced precisely because there is no active consensus between states. Yet the active engagement of all member governments is indispensable if Schengen's borders are to be effectively guarded. This is not just because many kinds of border mission must occur under a national flag if international law is to be observed. There is also a huge diversity of border and migration challenges in the EU, and only concerted engagement by all member states can plug gaps in the response.

Viewed from this perspective, it is imperative that Germany retain discretion over the use of its resources and personnel, for example by stressing that national contributions to the EU's joint activities must be agreed on the basis of short-term, narrow agreements. Only so can Germany turn its donations into a source of leverage, and ensure that the use of its resources is contingent upon demanders improving their domestic provisions. This is the understanding of 'solidarity' that Germany's home-affairs actors promote: they will

gladly give resources to stricken states, but these have to work to ensure that an exceptional crisis-situation does not develop into a relationship of reliance. Of course, this approach will likely result in a tug-of-war between Schengen states. If German support is not forthcoming, *demandeurs* may try to force Berlin's hand by simply acting in bad faith. Greece has, for example, ceased to meet its EU immigration and asylum obligations and Italy has regularised the recent arrivals from Tunisia, facilitating immigrants' movement northwards. But this is why the right to reintroduce national border controls should be expanded –Germany must be able to retaliate and offset such risks–.

This is not to say that Germany's home-affairs actors rule out all further supranationalisation. It is just that they feel supranationalisation needs to encourage engagement from the *demandeurs* rather than bypass it. Its home-affairs actors are quite open to the idea of a stronger Frontex, so long as it concentrates on monitoring national activities and punishing poor practice. Beyond a stretch of unproblematic coastline and a handful of major international airports, Germany guards few borders on behalf of the Schengen Area. If the agency gains greater powers to oversee national border training and resource-building, it will not therefore use them to interfere in the guarding of these few remaining borders so much as give Germany a proxy through which to interfere in the affairs of others. There is thus support amongst Germany's home-affairs actors for the idea of Frontex having a stronger role in risk analysis, and thus in assessing the preparedness of individual member states.

As for the thorny problem of Schengen's legitimacy, Germany's European-affairs community argues that popular support for free movement can only be restored if the work of Frontex is subject to greater oversight and scrutiny from the European Parliament and Fundamental Rights Agency. The emphasis on operational autonomy, they believe, has undermined trust in Schengen's borders. Germany's European-affairs community would therefore support the European Parliament's proposed amendment to Article 5 of the Frontex regulation which would see the curricula for the agency's training work drawn up after consultation with the EU's Fundamental Rights Agency. They would agree that the European Parliament's rights of information should be boosted on the question of Frontex's dealings with non-Schengen countries. And they would welcome a boosted right for the European Parliament to demand information from the Executive Director of Frontex.

Germany's home-affairs actors see this rather differently. Scrutiny carried out by the European Parliament, the Fundamental Rights Agency and other distant EU bodies might just help Berlin control its flakier partners in the south –cooperation with southerners has, after all, been undermined by *demandeurs*' ambivalent commitment to proper standards–. But this scrutiny would do nothing to reconnect citizens with the Schengen Area. Indeed, this kind of scrutiny would likely dent public opinion, since, in the opinion of Germany's home-affairs actors, 'output legitimacy' is the basis for the Schengen Area's popular support. Intrusive and ideological scrutiny by members of the European Parliament and by the bloc's human rights agency would simply disrupt their work. Far from flirting with public engagement, they therefore prefer oblique surveillance technologies which do not rely upon active public support, but could well strengthen it. Many would, for example, support a strong role for Frontex in the EU's new border surveillance system, Eurosur.

**Conclusions:** These positions within Germany may seem irreconcilable, but a compromise does appear to be emerging. For their part, Germany's home-affairs actors are reassessing their old suspicion of free movement. They accept that Schengen is a

reality with which they must live, and they are prepared to engage whole-heartedly in its defence. Their readiness for a strenuous tug-of-war with their counterparts in southern and eastern EU states shows that they are actively committed to making free movement viable. This shift of opinion has brought Germany's home-affairs community closer to its European-affairs community. As for the European-affairs community itself, its commitment to free movement remains undiminished. But German European-affairs actors are beginning to reassess their old commitment to the ways free movement has traditionally been realised. They recognise that the previously mechanistic supranationalisation and enlargement of the Area have not made a sustainable project of Schengen. They increasingly accept the home-affairs community's preferred way of doing things.

To the outside world, of course, this emerging position may seem contradictory. Germany sounds both pro-European, in its commitment to free movement, and sceptical in the cooling of its enthusiasm for the normal processes of deepening and widening the bloc. In reality, the position is rather coherent. Germany's commitment to Schengen, to the Area's widening and deepening, has been strengthened thanks to home-affairs actors' change of heart. It is merely that the thinking about how best to realise these things is being re-evaluated. The German rejection of today's quasi-automatic processes of widening and deepening is not the result of some cooling in the country's pro-Europeanism, but rather evidence of an effort to set European ambitions on a more realistic footing. Germany simply wishes to find a more sustainable means of widening and deepening the Area.

This re-evaluation by the German government is probably no bad thing. After all, widening can only really be considered a success if the states that accede to the Schengen Area actually meet their obligations. Today's sober reassessment suggests that this has not occurred, and members such as Greece have always struggled to respect the rules. If core Schengen members such as Germany are now looking to strengthen their ability to punish or even exclude delinquent member states therefore, it is actually evidence of a more sincere commitment to enlargement. Similarly, the Area's deepening can only be considered a success if the transfers of power to central bodies bring with it convergence and integration between member states. If Germany is today keener on active intergovernmentalism than on supranationalisation this is actually a sign of its greater commitment to deepening. After all, it is through messy political wrangling between governments that the member states will come to a more active consensus and a better understanding of solidarity and trust.

#### *Deficits in the German approach*

There are deficits in this approach of course. German home-affairs actors remain as reluctant as ever to give up their autonomy and national discretion over home affairs. It is simply that they are becoming happier to invade their partners' autonomy in pursuit of a more active understanding of mutual trust and solidarity. This lop-sided understanding of cooperation creates a danger that Germany will bully other member states into accepting its own preferred policies without giving them the proper scope to influence it. After all, Germany has leverage over other Schengen members, particularly peripheral southern and eastern members, which they do not enjoy over it.

These peripheral states are dependent upon Germany for help in dealing with immigration flows to the Union. Germany can withhold this support until demandeur-states agree to change their policies and practices. Demandeurs by contrast have little leverage over Germany. Indeed, in the absence of a system of 'compulsory solidarity' they are dependent upon a measure of enlightened and sympathetic behaviour from Germany.

Eastern and southern member states can but hope that Germany will provide them with support and will review the European border and asylum rules that place a particularly egregious burden on them. If they do not receive help from Germany, they can only force Berlin's hand by disapplying EU rules or regularising illegal immigrants. And whilst this bad faith may force a short-term change from Germany, it is unlikely to encourage it to foster long-term enlightenment.

Germany may of course feel that it is capable of this kind of enlightened behaviour. But the North African crisis suggests otherwise: as soon as there is a popular panic, enlightened thinking goes out the window. Today, it seems, Germany would sooner reintroduce national border controls than come to the aid of its peripheral partners. And, unfortunately, Germany's emerging approach is conducive to popular panic. It all comes back to the thorny question of Schengen's popular legitimacy. If European citizens are jittery, it is because they have little understanding of Schengen, let alone of the flanking measures that safeguard it. This is unlikely to be overcome by boosting the scrutiny powers of the European Parliament and Fundamental Rights Agency –these bodies have limited connection with European publics–. But nor will it be overcome by recourse to low-key security measures such as those espoused by Germany with its emphasis on executive autonomy and discretion.

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