

CHAPTER III

THE PROPOSAL FOR SCHENGEN AGREEMENT'S AMANDAMENT

In this chapter, the author is going to analyze the proposals for Schengen Agreement revision from French and Spain as well as the other Schengen Agreement's member states and European Commission. This chapter will analyze the results of ministers meeting after the Paris attack, the proposal in the European commission as well as the regulation from European Union by analyzing the proposals. The author believes that it will help to understand what kind of rules or amendments the countries want to revise and the reasons why.

A. French and Spain Demanded for Re-Write Schengen Agreement

France which supported by Spain has proposed for the permit of more border checks toward people who suspected as terrorist or has links with terrorism. The demand was spoken by the Interior Minister of French, Bernard Cazneuve after the terrorist attack on Charlie Hebdo (Reuters, 2015).

However, the leaders of EU in the Brussels meeting have different set of mind, the leaders believe that the existing agreement should not be undermine, and more strengthening the agreement is more needed than to to change the agreement. On January 11, 2015, the Spanish interior minister, Jorge Fernando Diaz, by revising Schengen agreement to propose to introduce border control. *"We will insist*

on establishing control at the borders, although this means that we will possibly have to modify the Schengen agreement,” The minister had stated. (Sputnik, 2015)

B. Interior Ministers Meeting

On November 20, 2015, the leaders of European Union held a meeting regarding the brutal attacks of terrors in Paris, Brussels and Copenhagen. The meeting was held by Justice and Home Affairs Council have attended by the representatives from 28 countries which are: Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and United Kingdom.

The meeting also attended by 3 representatives from European Commission Mr. Frans Timmermans as the first vice-presidents and the other two as members of European Commission (Commission, Justice and Home Affairs Council Participants, 2015). The Council answered and proved their solidarity for France and the other countries that being infiltrated by the terrorists and pays tribute to the courage and decisive actions of the French authorities.

It was agreed that the attacks were of violation for the European freedom, democracy as well as its rule of law. The Council high lined that it is very important for the immediate implementation of statement in the counter-terrorism created by the European Council back in February 12, 2015 in addition to the particular measurement such as EU Passenger Name Record (PNR), firearms, controls of

external borders, information sharing, terrorist financing, criminal justice response to terrorism and violent extremism.

1. Passenger Name Record (PNR), the council urged to finalized EU PNR before 2015 which is including internal flights, providing a long data period which PNR data able to retained and not only limited by crimes of a transnational issue.

2. Firearms, it stated that the council welcomed the adoption of regulation on common deactivation standards on November 18, 2015, committed to increase the operational cooperation trough Europol under the EU policy Cycle particularly with the Operational Action Plan Firearms, the council also invited Europol and Frontex to aid the member states in bordering the Western Balkans region to increase the controls of external borders and help to identify the smuggling of firearms as well as to enhance the cooperation with the countries in the area.

3. Strengthening controls of external borders, the members state shall initiated to implement systematic and coordinated checks at external borders including the people who enjoyed the freedom of free movement, the member states also shall upgrade the system of Schengen's border control by March 2016.

Due to the crisis of the migration, the systematic registration should be implemented including fingerprints of the thirds country that an individual illegally whether migrants or applicants for the sake of international protection, with the help of Frontex and Europol.

4. Information sharing, the council decided to increase the cooperation of law enforcement. The member states will make sure the national authorities to enter

data systematically on any suspected terrorists group into SIS II under article 36.3, the member states also will make it faster for the fully implementation of *Primum acquis* (interconnection and consultation of national databases on DNA, fingerprints and vehicle registration). On January 1, 2016 European Counter Terrorist Centre (ECTC) launched by Europol to increase the information sharing and cooperation between member states to monitor and to investigate terrorist, illegal firearms' trafficking and the terrorist financing, the new Europol Regulation should be consistent with the objectives of ECTC. `

Member states is going to support CT experts to the ECTS to form cross-border investigation support unit, be able to provide fast and comprehensive supports to the investigation of terrorist incidents in the EU, the member states invited the Commission to propose Europol to be reinforced with relevance resources to support ECTC to submit proposal to enable Europol to systematically cross-check the database of Europol against SIS II, the Commission also invited to launch efforts to be able to exchange and to use information of the relevant databases with regard to security checks. The Member States will also use the capabilities to improve the overall level of information exchange between CT authorities in the EU.

5. Financing of terrorism, the council invited European Commission to create proposals to strengthen, harmonize and improve the cooperation between Financial Intelligence Units (FIU) through embedment of FIU.net network for the exchange of information in Europol furthermore to ensure fast access to a particular information.

In order to enhance the effectiveness and efficiency of the fight against money laundering and terrorist financing in conformity with Financial Action Task Force (FATF) recommendations, the council is also committed to ensure a swift and effective freezing of terrorist assets throughout the Union, autonomous EU decisions or in line with UN Security Council Resolutions.

6. Criminal justice response to terrorism and violent extremism, the Council agrees with the October 22, 2015 signing in Riga by Council of Europe Convention on the Prevention of Terrorism and of its additional Protocol on Foreign Terrorist Fighters and welcomes the intention of the Commission to present a proposal to update the Framework Decision on Combating Terrorism before the end of 2015 to collectively implementing into EU law UNSC (United Nations Security Council) Resolution 2178 (2014) and other Protocol to the Council of Europe Convention. The council also invites commission to implement the council conclusion regarding to enhance the criminal justice response to radicalization that cause terrorism and other violent extremism.

C. European Commission Proposal

The proposal aims to amendment to regulation (EC) No. 562/2006 of the European Parliament and of the Council of March 15, 2006 on establishing Schengen Borders code, the community code that governs the movement of people across borders.

The proposal is the responds of the calls from the Council conclusions of 9 and 20 November as the result of the terrorist threat in Europe that happened in Paris, Copenhagen and Brussels the minister of the interiors invited European Commission to present proposal for Schengen Borders Code revision which

includes to provide systematic controls of EU citizens which can be done with the verification of biometric information, against relevance database at the external borders of the Schengen zone.

The legal basis for the proposal is Article 77 (2) (b) of the Treaty of Functioning of the European Union, the proposal also amends regulation (EC) No. 562/2006 of the European Parliament and of the Council of March 15, 2006 establishing a community code on the rules governing the movement of the persons across borders or Schengen Borders Code based on the Treaty establishing the European Community, namely articles 62(1) internal borders and (2)(a) external borders.

Since action in the area of freedom, security and justice is one of area of competence between EU and the member states in the article 4(2) TFEU. According to the subsidiarity principle is suitable from article 5(3) TEU which the Union should act only when the objectives of the being proposed action achieved adequately by the member states whether at the central level or regional and local level, but can rather by reason of the scale of the proposed action, better achieved at the level of Union.

Furthermore, the objective of the proposal is to amend the Schengen Borders Code, provide systematic borders controls of people enjoying free movement at external borders against relevance databases. The controls at the external borders that carried out by all the member states who has abolished all internal border control, help to prevent any threat to the internal security of the

member states. The Union may adopt any measures in accordance with the principle of subsidiarity.

The proposal intends to use systematic checks on people who use the free movement when they cross the external border to verify or make sure the person will not become threat to the internal security or against the public order. The obligation should be applied at all the external borders which include air, sea, and land borders in both entry and exit.

The amendment that proposed respects the fundamental right and principles according to Charter of Fundamental Rights of the European Union regarding the right to respect of private and family life (article 7) , the protection of personal data (article 8) and the freedom of movement and residence (article 45) the amendment proposal will guarantee that the travel documents of people who enjoy the freedom of movement under the Union Law should to be checked to ensure that the people do not hide their identity, they also being checked for the purpose of internal security and public policy, the amendment that being proposed lines with the border checks purpose of border check that is to prevent any kind of threats to internal security and public policy of member states.

This is outlined the following regulation in the proposal :

The Proposal for a Regulation of the European Parliament and of the council amending regulation No.562/2006 (EC) as regards to the reinforcement of checks against relevant databases at external borders. The European Parliament and the council of the European

Union having regard to the treaty on the functioning of the European union, and in particular article 77(2)(b) , having regard to the proposal from the European Commission, after the transmission of the draft legislative act to the national parliament, acting in accordance with the ordinary legislative procedure, have adopted this regulation :

Article 1

Regulation (EC) No 562/2006 is amended as follows:

(1) Article 7 is amended as follows:

(a) paragraph 2 is replaced by the following:

"(2) On entry and on exit, persons enjoying the right of free movement under Union law shall be subject to the following checks:

(a) verification of the identity and the nationality of the person and the validity and authenticity of the travel document, by consulting the relevant databases, in particular:

(1) the Schengen Information System;

(2) the Interpol database on stolen and lost travel documents;

(3) national databases containing information on stolen, misappropriated, lost and invalidated travel documents

(b) verification that a person enjoying the right of free movement under Union law is not considered to be a threat to the internal security, public policy, international relations of any of the Member States or to public health, including by consulting the relevant Union and national databases, in particular the Schengen Information System.

Where there is doubt on the authenticity of the travel document or on the identity of its holder, the checks shall include the verification of the biometric identifiers integrated in the passports and travel documents issued in accordance with Council Regulation (EC) No 2252/2004*.

Where, at external land and sea borders, the checks referred to in points a) and b) of the first subparagraph would have a disproportionate impact on the flow of traffic, Member States may carry out those checks on a targeted basis based on an assessment of the risks related to internal security, public policy, international relations of any of the Member States or a threat to public health.

Each Member State shall transmit its risk assessment to the Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004 and report every

three months to the Commission and to that Agency on the application of the checks carried out on a targeted basis.

(b) In paragraph 3(b), point (iii) is replaced by the following:

"(iii) verification that the third-country national concerned is not considered to be a threat to public policy, internal security or international relations of any of the Member States, including by consulting the relevant Union and national databases, in particular the Schengen Information System;"

(c) In paragraph (3)(c), point (iii) is deleted.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties. (European Parliament, 2006)

As the responds for proposal amendment of some rules in Schengen Agreement on December 2015, the Council agreed the negotiation of position for the proposed regulation to reinforce checks against relevant databases at external borders. The proposals imposed the obligation is also for the member states to conduct systematic checks towards all people including the people who enjoy the freedom of movement under EU law.

When a person crosses the external border against database on lost and stolen document and in order to verify the person does not pose as a threat for security, the obligation also apply at all the external borders not only in the land border but also at the sea and air borders in both entry and exit.

While a systematic checking of database of all persons who enjoy the free movement right could lead to inharmonious impact on the course of traffic at the sea and land borders, member states may implement on only for the targeted checks against databases to proof that it does not lead to risks related to the internal security, the public policy, or the international relations of the member states or a threat to any public health. Regarding to the borders in the air, the council agreed that the member states were allowed to use the possibility they only can use it during a transitional time of 6 months from the entry into force of the amended regulation (European Commission, 2016).

D. EU Regulation

A new regulation proposed by European Parliament and of the council on March 9, 2016 regarding the Union Code its rules regarding the movement of persons across borders (Azzopardi, 2016). The 2016's regulation is the consolidated regulation from the Schengen Borders code regulation in 2006 regarding the free movement of persons across the Schengen border areas (European Parliament, 2016).

Table 1 The Articles of Schengen Borders Code for the Re-instate of Internal Borders

New Article (Regulation (EU) 2016/399)	Former Article (Regulation (EC) 562/2006)	Procedures and measures	Duration of controls
Article 25	Article 23	General framework for the temporary reintroduction of border control at internal borders	Timelines, in accordance with Articles 27, 28 or 29.
Article 26	Article 23a	Criteria for the temporary reintroduction of border control at internal borders	N/A
Article 27	Articles 24	Procedure for foreseeable events (regular procedure): Advance notice to other MS and EC	Up to 30 days or "for the foreseeable duration of the serious threat" if longer; Renewable for periods of up to 30 days up to a maximum of six months
Article 28	Articles 25	Cases requiring urgent action (emergency procedure): Immediate (unilateral) action without prior notification by the MS	Up to 10 days; Renewable for periods of up to 20 days, up to a maximum of two months
Article 29	Articles 26	Prolonging border control at internal borders (prolongation procedure): Council recommends (on the basis of a Commission proposal) that one or more MS should reintroduce controls.	Up to six months, renewable three times up to a maximum of two years

On March 9, 2016 European parliament and European Union Council submitted a new regulation regarding the rules of free movement persons across borders or Schengen Borders Code in which the regulation will come into force on 12 April 2016. The provision that being adopted in the regulations in the Title II are:

1. Crossing of external borders and conditions for entry

It puts the rules that govern the movement of persons who move across the borders, the article 2 also defines the definitions for the purpose of the regulations. The scope of the regulation is applied to all the individuals who cross internal and

external borders of the member states, the regulation respected the fundamental rights including the fundamental rights of the European Union (the Charter) and other relevant international, such as Convention relating to the status of refugees at Geneva on July 28, 1951.

It stated that the external borders are not opened for 24 hours per day but only in the fixed hours. Therefore, the member states shall inform the commission regarding their border crossing points, for the third-country nationals, they could stay for no more than 90-days in any 180-days period on the member states territory. The individual also has the valid documents and does not pose a threat to national security.

2. Control of external borders and refusal of entry

In the border checks, the border guards shall respect human dignity and shall not discriminate persons on their sex, races, religion, disability, age and sexual orientation. The border checks on the person consisted of the individual who crosses across external borders shall be the subject of checks by border guard. The relaxation on the border checks when there is an exceptional circumstance, such as when the circumstance leads to traffic and the border crossing points become overwhelmed. The travel documents shall be stamped regularly on both entry and exit, if the travel documents have no entry stamp, the authorities could assume that the person is no longer fulfill the conditions to stay inside the member states. Under the border surveillances, any person who enters illegally will be subjected to procedures respecting Directive 2008/115/EC.

3. Staff and resources for border control and cooperation between member states

Accordance to articles 7 to 14, member states shall dispose an appropriate staffs and resources to carry out border control on the external borders. The member states shall guarantee that the border guards are specialized and trained professionally. As established by Regulation (EC) No 2007/2004, European Agency for the Management of Operational Cooperation at the External Borders of the Member States ('the Agency') established and developed the common core curricula for border guards, the member states also encouraged to teach border guards the languages necessary to conduct their task.

Accordance to articles 7 to 16, member states shall help each other and maintain the cooperation for the effectiveness to implement the border controls by sharing information.

4. Specific rules for border checks

Specific rules for different border checks and the means of transport that used to cross external borders. The specific rules that used in Annex VII will applied to the following person: Head of states and their delegation members, aircraft pilots and the crews, cross-border workers, the holders of diplomatic passports and international organizations members, minors, offshore workers, seamen and rescue services.

5. Specific measures in the case of serious deficiencies related to external border control

European commission suggest to all the member states to take certain specific measures, such as to launch the deployment of European border guards teams with the regard of Regulation (EC) No 2007/2004. Furthermore, added with Title III Internal Borders is consisted of the following:

6. Absence of border control at internal borders

On the crossing internal borders, any person may cross the internal borders without border checks however with the absence of the border checks shall not change that the exercise of police power is not the same with the exercise of border checks. Whereas the police does not have border controls as the objective, based on the general information and experiences towards the possible of threats to the public security, the police also combats in the possible of cross-border crimes.

7. Temporary reintroduction of border control at internal borders

If there is serious threats to public policy or internal security in a member states, the member states may reintroduce border control for its internal border for 30 days however when the serious threats exceed the 30 days period of time, the reintroduce of border may extended for foreseeable time. The reintroduction of border control shall accordance to Articles 27, 28 and 29. The total period of time for the reintroduction is no more than 60 days however under special circumstances can be extended with maximum 2 years.