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## **WORKING DOCUMENT**

on Border management and visa-policy, including the role of Frontex and other relevant Agencies (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration)

Committee on Civil Liberties, Justice and Home Affairs

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## Introduction

Since the establishment of the Schengen area as an area without internal border controls, the Member States (i.e. the Schengen Member States) have developed step-by-step a common policy towards the Schengen external borders.

The inherent logic of such a system has always been that the abolishment of internal border controls has to go hand-in-hand with compensatory measures strengthening the external border and the sharing of information, in particular through the Schengen Information System (SIS).

The rapporteurs believe that the integrity of the Schengen zone and the abolishment of internal border controls are dependent on having effective management of external borders with high common standards applied by all the Member States at the external borders and an effective exchange of information between them.

Having an effective management of external borders where everyone's fundamental rights are respected, and the possibility to apply for asylum is granted, will ensure an organised management of migration flows into Europe and security for those in need of protection.

The rapporteurs agree that the EU needs to strengthen external border protection and further develop the Common European asylum system. These measures are necessary to enhance the capacity of the Schengen area to address the new challenges facing Europe and preserve the fundamental principles of security and the free movement of its citizens. In particular, the proper registration and identification of persons seeking protection within Europe as well as proper security checks are necessary.

Border management policy has witnessed considerable developments over the past decade, with the creation of instruments and agencies such as the Schengen Information System, the Visa Information System and the border agency Frontex. After a short period of consolidation, the challenges linked to the influx of refugees and migrants have triggered a new period of activity, with a shift towards more direct operational support and moves towards increased activity in border management policy.

The rapporteurs reiterate the UNHCR's call that respect for fundamental rights, and in particular obligations as regards international protection and *non-refoulement*, can only be ensured if operating procedures and plans reflect those obligations in practical, clear guidance to border personnel, including those at land, sea and air borders, as well as sea captains and crews. Border personnel should be given the means, in terms of knowledge and skills, to identify and respond effectively to people seeking asylum. <sup>1</sup>

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<sup>1</sup> <http://www.unhcr.org/4cb567319.pdf>

## EU BORDER POLICY

### 1. The Schengen Borders Code

The Schengen borders code (SBC; Regulation (EC) N° 562/2006)<sup>1</sup> provides for the absence of internal border controls and establishes rules governing border control of persons crossing the external borders. According to the SBC, two situations need to be distinguished: the regular border control which takes place at border crossing points (A) and "border surveillance" (B), defined as "*the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks*" (Art. 2(11)).

(A) At border crossing points, third-country nationals ('TCNs') are subject to a so-called "thorough check" (Art. 7(3)) in which the border guard checks whether the entry conditions are fulfilled. According to Art. 5(1) the entry conditions for third-country nationals are:

- the possession of a valid travel document and the possession of a valid visa, if the third-country national requires a visa ;
- they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence;
- they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;<sup>2</sup>
- they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States.

Third-country nationals who do not fulfil all conditions are to be refused entry (Art. 13(1)).

Article 5(4) specifies that by way of derogation from paragraph 1 "*(c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national*

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<sup>1</sup> latest consolidated version: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1442302411928&uri=CELEX:02006R0562-20131126>

<sup>2</sup> Consultation of the SIS is obligatory when third-country nationals wish to cross the border. Since 9 April 2013 SIS II has entered into operation and its legal basis applies (Regulation (EC) No 1987/2006; <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1442302832746&uri=CELEX:02006R1987-20070117>). One of the possible alerts on a person is an alert to refuse entry. According to Art. 24 of the SIS II Regulation on the Conditions for issuing alerts on refusal of entry or stay such an alert "may also be entered when the decision referred to in paragraph 1 is based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of third-country nationals." (paragraph 3) Recent Council conclusions "*Invite[s]* Member States to take all the necessary measures in order to ensure that entry-ban decisions issued in accordance with Article 11 of the Return Directive are always inserted in the Schengen Information System pursuant to Article 24(3) of the SIS II Regulation; (see Council document 11648/15)

The application of this Article is due to be reviewed by the Commission three years after the start of operation. "On the basis of that review, the Commission shall, using its right of initiative in accordance with the Treaty, make the necessary proposals to modify the provisions of this Article to achieve a greater level of harmonisation of the criteria for entering alerts." (paragraph 5)

*interest or because of international obligations.[...]"*

The "Practical Handbook for Border Guards (Schengen Handbook)" (adopted in the legal form of a Commission recommendation) <sup>1</sup> specifies that "*a Member State shall not refuse entry and let the third-country national enter into its territory in the following cases:*

*a) on humanitarian grounds, on grounds of national interests or because of international obligations (for example, if a person asks for asylum or is otherwise in need of international protection);"* <sup>2</sup>

It is in this way that the SBC incorporates the general obligation that it should apply "*without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement" (Art. 3).*

The handbook further contains a chapter 10 on "*Asylum-seekers/applicants for international protection*" which outlines that all applications for international protection (including asylum) lodged at the border must be examined. The handbook also details the procedures which are to be followed at the border.

(B) As borders may only be crossed at border crossing points (Art. 4), the purpose of border surveillance is "*to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.*" (Art. 12(1)) The way in which border surveillance is to take place is described in the SBC and in the handbook in a general way. It makes reference to stationary and mobile units and the objective "*to apprehend individuals crossing the border illegally*" (Art. 12(4)). In practice, different methods are used at the borders which include patrolling (including with dogs), cameras (including thermal cameras), fences, helicopters, planes, boats etc.

Persons apprehended and without the right to stay shall be "*made subject to procedures respecting Directive 2008/115/EC*" (Returns directive) (Art. 12(1)). Although it is not specified in Article 12 the provision on the rights of refugees in particular as regards non-refoulement apply.

The UNHCR has urged the EU to adopt more sensitive border management that ensures compliance with this principle: "*The practice of building fences to serve as a deterrent and push-backs at the border remain serious concerns. A focus on ensuring access to an effective means of pursuing claims for protection is needed, in line with international and European obligations. This should be pursued through relevant fora and with competent bodies,*

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<sup>1</sup> 06/11/2006 - Commission Recommendation [establishing a common "Practical Handbook for Border Guards \(Schengen Handbook\)" to be used by Member States' competent authorities when carrying out the border control of persons](#)(C(2006)5186) - amendments contained in:

- 25/6/2008 - [Commission Recommendation C\(2008\) 2976 final](#)
- 29/9/2009 - [Commission Recommendation C\(2009\) 7376 final](#)
- 8/9/2010 - [Commission Recommendation C\(2010\) 5559 final](#)
- 20/6/2011 - [Commission Recommendation C\(2011\) 3918 final](#)
- 14/12/2012 - [Commission Recommendation C \(2012\) 9330 final](#)
- 15/06/2015 - [Commission Recommendation C \(2015\) 3894 final](#)

<sup>2</sup> (C(2006)5186) as amended by C(2015) 3894

*including Frontex."* <sup>1</sup>

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<sup>1</sup> <http://www.refworld.org/docid/52ea55234.html>

## Surveillance at sea

In May 2014, the EU adopted Regulation (EU) No 656/2014 which establishes rules for the surveillance of the external sea borders in the context of all sea operations coordinated by Frontex, contains the EU rules governing surveillance at sea.<sup>1</sup> The text of the Regulation essentially makes reference to the international obligations to which the Member States have already signed-up to.<sup>2</sup>

Equally while stressing that the objective is "*to ensure the efficient monitoring of the crossing of external borders including through border surveillance*" reference is made to the fact that "*border surveillance is not limited to the detection of attempts at unauthorised border crossings but equally extends to [...] arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea [...]*". (Recital 1)

On the basis of the Regulation, maritime and aerial assets participating in Frontex joint operations therefore "*must comply with the obligation to render assistance to any vessel or person in distress at sea*"<sup>3</sup> even if the purpose of the operation is surveillance of the external sea borders. Frontex has, through joint operations Triton and Poseidon, contributed to the rescuing and saving of many lives in the Mediterranean.

## Internal Borders within the Schengen area

The very first sentence of the SBC provides for "*the absence of border control of persons crossing the internal borders between the Member States of the European Union.*" (Art. 1)

There are, however, provisions in the SBC which allow Member States, on a temporary basis, to reintroduce border control if certain conditions are met. Generally such a measure is only possible "*exceptionally*" and as "*a last resort*" where "*there is a serious threat to public policy or internal security in a Member State*". There are two procedures, one for what can be called "normal" situations and one for situations of urgency.

Article 24 of the SBC sets out the procedure for "normal" situations which is based on the concept of prior notification, including to Parliament, and consultation. After the reintroduction of border control the Member State concerned has to present a detailed ex-post report "*outlining, in particular, the initial assessment and the respect of the criteria referred to in Articles 23a, 25 and 26a, the operation of the checks, the practical cooperation with neighbouring Member States, the resulting impact on the free movement of persons, the effectiveness of the reintroduction of border control at internal borders, including an ex-post assessment of the proportionality of the reintroduction of border control.*" (Art. 29)

Article 25 sets out the procedure for urgent situations: "*Where a serious threat to public policy or internal security in a Member State requires immediate action to be taken, the Member State concerned may, on an exceptional basis, immediately reintroduce border control at internal borders, for a limited period of up to ten days.*" (Paragraph 1) A number of Member States have recently relied on this provision to reintroduce partial border control at

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&rid=1>

<sup>2</sup> See Annex I.

<sup>3</sup> Commission answer to written question P-008016/2014 of Carlos Coelho

their internal borders. The period may be prolonged to a total of two months. During negotiations on the most recent revision of the SBC in the context of the Schengen Governance Package, the Parliament insisted on the insertion of the following recital: “*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.*”

The SBC also now contains an additional "Specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk" (Art. 26). According to this provision, "*in exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control as referred to in Article 19a, and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced in accordance with paragraph 2 of this Article for a period of up to six months. That period may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.*" (Paragraph 1)

Finally, it is important to note that the abolition of border control at internal borders does not affect:

- the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. To distinguish between border and police control the latter:

- (i) do not have border control as an objective,

- (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime,

- (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders,

- (iv) are carried out on the basis of spot-checks;

- security checks on persons carried out at ports and airports

- the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

### Schengen evaluation and reform

Respect of the rules governing the Schengen area by Member States is not subject to the normal regime in which the Commission alone acts as "guardian of the treaties". Initially the Schengen acquis was subject to a peer review system among Member States. The Parliament was always critical of such a mechanism as it considered that mechanism to be weak given the limited interest one Member State has in criticising a peer. In 2013, the mechanism was revised,<sup>1</sup> as part of the Schengen governance package, when it was strengthened and given a

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<sup>1</sup> Regulation 1053/2013

more European dimension.

In the same way as for legislation in the area of asylum and immigration, the rapporteurs reiterate that, in order for EU law to be effective, it is essential that measures agreed at EU level are properly implemented by the Member States.

The rapporteurs acknowledge the Commission's proposal for targeted reform of the Schengen Borders Code. It is noted that the Commission proposes to introduce systematic controls of EU nationals, against relevant data bases at external borders of the Schengen area, making full use of technical solution in order not to hamper the fluidity of movements.

## **2. Frontex**

The European Agency for the Management of Operational Cooperation at the External Borders (Frontex) was set-up in 2004.<sup>1</sup> Its tasks are to coordinate operational cooperation between Member States in the management of their external borders, to assist Member States on training of border guards, to carry out risk analyses, to participate in the development of research relevant for the control and surveillance of external borders, to assist Member States in circumstances requiring increased technical and operational assistance at the external borders, to set up a European Border Guard, to provide Member States with the necessary support, including, upon request, coordination or organisation of joint return operations, to deploy border guards from the European Border Guard Teams to Member States in joint operations, pilot projects or in rapid interventions, to develop and operate information systems that enable swift and reliable exchanges of information regarding emerging risks at the external borders, and to provide the necessary assistance for the development and operation of a European border surveillance system (EUROSUR).

The Frontex Regulation provides for the rules governing joint operations. In application of these rules several joint operations were launched, including, currently, in the Mediterranean Triton (Central Mediterranean), Poseidon (Eastern Mediterranean) and Indalo (Western Mediterranean).

### Commission Proposal for a European Border and Coast Guard

In the context of the last revision of the Frontex Regulation in 2011, during which the Commission committed itself to carrying out a feasibility study regarding the creation of a European system of border guards,<sup>2</sup> of the Stockholm Programme which invited the Commission "to initiate a debate on the long-term development of Frontex" and of the results of that feasibility study,<sup>3</sup> on 15 December 2015, the Commission presented – as part of its "Borders Package" – a proposal for a Regulation on the European Border and Coast Guard (COM(2015)671) which - if adopted - will replace Frontex.

The overall rationale of the proposal is to reinforce the management of the Schengen external border. The European Border and Coast Guard is meant to ensure a European integrated

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<sup>1</sup> Regulation 2007/2004; latest consolidated version here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004R2007-20140717&qid=1440684387423&from=EN>

<sup>2</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-344>

<sup>3</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/border-crossing/docs/20141016\\_home\\_esbg\\_frp\\_001\\_esbg\\_final\\_report\\_3\\_00\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/border-crossing/docs/20141016_home_esbg_frp_001_esbg_final_report_3_00_en.pdf)



border management at the external borders with a view to managing migration effectively and ensuring a high level of internal security within the Union, while safeguarding the free movement of persons therein.

The new European Border and Coast Guard would be composed of the national authorities of Member States which are responsible for border management, including coast guards, and the European Border and Coast Guard Agency. The task of the European Border and Coast Guard would be to implement the European integrated border management in accordance with the principle of shared responsibility. The mandate of the new Agency would be significantly enlarged. It would become responsible for establishing an operational and technical strategy for the implementation of an integrated border management at Union level, for overseeing the effective functioning of border control at the external borders of Member States, for carrying out vulnerability assessments and to ensure that deficiencies in the management of the external border by national authorities are addressed, for providing increased operational and technical assistance to Member States through joint operations and rapid border interventions, for ensuring the practical execution of measures when a situation arises requiring urgent action at the external borders, and for organising, coordinating and conducting return operations and return interventions.

Among the main new proposed powers are that the Agency would have at its disposal a rapid reserve pool of a minimum of 1 500 border guards which Member States would be obliged to provide. It would also have a technical equipment pool and the right to intervene. In urgent situations that put the functioning of the Schengen area at risk and when deficiencies have not been remedied by the Member State concerned, the Agency would be able to step in to ensure that action is taken on the ground even where there is no request for assistance from the Member State concerned. Such a decision would be taken by the Commission (as an implementing act) after consulting the Agency. The Agency would also get new powers for relations with third countries and a stronger role in return operations. The budget of the Agency would consequently be further increased gradually from EUR 238 million in 2016 to EUR 322 million in 2020. It is also proposed that the Agency would gain an additional 600 personnel by 2020.

The proposal is complemented by proposals to amend the legal bases of the European Maritime Safety Agency (COM(2015)667) <sup>1</sup> and the Community Fisheries Control Agency (COM(2015)669) so as to strengthen their cooperation with the Agency and to set-up the European cooperation on coastguard functions.

The Rapporteurs look forward to negotiations on the proposal within and between the co-legislators in the context of the ordinary legislative procedure in accordance with Article 294 TFEU.

#### Joint operation Triton

The *Mare Nostrum* operation was set up by the Italian authorities after the death of more than 300 migrants near the island of Lampedusa on 3 October 2013. The mandate of the operation was described as follows:

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<sup>1</sup> See Annex II

*The military and humanitarian operation in the Mediterranean Sea foresees the reinforcement of the activity of search and rescue on the high seas, with the aim of increasing the level of security for human life and the control of the migratory flows through the deployment of air and marine resources.*

Its operational area was described as “*the Sicily Straits and the waters south of Lampedusa*” which brought ships close to Libyan territorial waters. The total operational area was 70 000 km<sup>2</sup>.

As a response to calls for the European Union to play a greater role in search and rescue in the Mediterranean, Frontex announced on 31 October 2014 that Operation Triton would start the next day.<sup>1</sup> Its aim is “*to implement coordinated operational activities at the external sea borders of the Central Mediterranean region in order to control irregular migration flows towards the territory of the Member States of the European Union and to tackle cross-border crime.*”<sup>2</sup> Italy is the host country.

Since its launch and following numerous tragic events in the Mediterranean, Triton has evolved regarding its operational area, the assets it may use and its budget. Many lives have been saved at sea as a result of the operation.

Regarding the operational area, this was referred to, in October 2014, as the territorial waters and part of the international waters to the south and southeast of Italy and Malta, but in May 2015 Frontex announced that the operational area would be extended to 138 nautical miles south of Sicily.<sup>3</sup>

The initial funding for the joint operation for its planned duration of three months (until the end of January 2015) was some EUR 9.3 million, i.e. roughly EUR 3 million per month. In February 2015 the Commission announced that Triton had been extended until at least the end of 2015, with an additional estimated budget of EUR 18.25 million for that period. Following the extraordinary European Council on Migration of 23 April 2015 in which heads of state and government committed to “*rapidly reinforce EU Operations Triton and Poseidon by at least tripling the financial resources for this purpose in 2015 and 2016*” the Commission presented a Draft Amending Budget No 5/2015. In this the Commission proposed an additional €26.8 million for the Frontex budget, ostensibly in order to fulfil the commitment of “tripling” the funding of the Triton Operation.

Regarding the assets deployed, the operation started on 1 November 2014 with three open sea patrol vessels, two coastal patrol vessels, two coastal patrol boats, two aircraft, and one helicopter, according to Frontex. In February 2015 the operation had 12 technical assets (two Fixed Wing Aircrafts, one Helicopter, two Open Shore patrol vessels, six coastal Patrol Vessel, one Coastal patrol boat) and five debriefing/screening teams. By May 2015, Frontex stated that Triton had – during the peak summer season – three airplanes, six Offshore Patrol Vessels, 12 patrol boats, two helicopters, nine debriefing and six screening teams.

#### Joint operations Poseidon and Indalo

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<sup>1</sup> <http://frontex.europa.eu/news/frontex-launches-joint-operation-triton-JSYpL7>

<sup>2</sup> <http://frontex.europa.eu/operations/archive-of-operations/NkKUdU>

<sup>3</sup> <http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpbHP>

Since 2007, Operation Poseidon has been taking place in the Eastern Mediterranean. As with the Triton Operation, its budget and scope has been increased. The Spanish press reported the restart of Operation Indalo on June 1st 2015.<sup>1</sup> As with the other joint operations its focus is to control irregular migration and to tackle cross-border crime.

### Solidarity mechanism

Regulation 656/2014 establishing rules for the surveillance of the external sea borders in the context of all sea operations coordinated by Frontex also introduced a solidarity mechanism into the Frontex regulation.

According to Article 12(1) of that Regulation, "*a Member State faced with a situation of urgent and exceptional pressure at its external border shall be able to request*":

- a) the deployment of European Border Guard Teams to provide rapid operational assistance to that Member State;
- b) technical and operational assistance in order to obtain assistance on matters of coordination between Members States and/or the deployment of experts to support the competent national authorities;
- c) emergency assistance under Article 14 of Regulation (EU) No 515/2014 (the ISF Border Fund) to address urgent and specific needs in the event of an emergency situation.

According to Frontex no requests for Border Guard Teams or emergency assistance have been received. There have been, however, eight requests for assistance resulting in Joint Operations Hera, Indalo, Hermes, Aeneas, Triton, Poseidon Sea, 2015 Triton and Poseidon Sea.

In addition, according to Article 12(2) "*a Member State subject to strong migratory pressure which places urgent demands on its reception facilities and asylum systems shall be able to request*:"

- a) EASO for the deployment of an asylum support team to provide expertise, such as in relation to interpreting services, information on countries of origin and knowledge of the handling and management of asylum cases;
- b) emergency assistance under Article 21 of Regulation (EU) No 516/2014 (Asylum, Migration and Integration Fund) to address urgent and specific needs in the event of an emergency situation.

### Eurosur

Eurosur<sup>2</sup> is currently managed by Frontex and can be described as a map of the situational picture at the border which serves to exchange information. It applies to the surveillance of

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<sup>1</sup> [http://politica.elpais.com/politica/2015/06/01/actualidad/1433174438\\_288388.html](http://politica.elpais.com/politica/2015/06/01/actualidad/1433174438_288388.html)

<sup>2</sup> Regulation (EU) N° 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur)  
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1052&rid=1>

external land and sea borders and may be applied to air borders (Art. 2).

According to Article 1 of the Eurosur Regulation it constitutes "*a common framework for the exchange of information and for the cooperation between Member States and the Agency in order to improve situational awareness and to increase reaction capability at the external borders [...] for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants.*"

As per its Recital 2, Eurosur can play an important role in improving the reaction capability of Member States, for example, to detect vessels in distress and "*thereby [to contribute] to reducing the loss of lives of migrants*".

Art. 18 provides for Frontex to make use of existing information, capabilities and systems available in other Union institutions, bodies, offices and agencies, and international organisations, within their respective legal frameworks. Reference is made, among others, to Europol, the European Union Satellite Centre, the European Maritime Safety Agency, the European Fisheries Control Agency, the Commission, the European External Action Service and EASO.

A report on the functioning of Eurosur is due by 1 December 2015 (Art. 22(2)).

### Hotspots

Currently, Frontex is also involved in the new **‘hotspots’ approach or the Migration Management Support Teams**. These teams bring together the European Asylum Support Office, Europol and Frontex – under the control of national authorities – to identify, screen and register migrants on entry to the EU, as well as to organise return operations for those who have no right to stay. Frontex is the lead agency in the EU Regional Task Force headquartered in Catania and responsible for the first such teams in Italy.<sup>1</sup>

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<sup>1</sup> [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_5.12.4.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.12.4.html)

## EU VISA POLICY

Access to the territory of the Schengen area is generally controlled at the external border according to the Schengen Borders Code. In addition, the citizens of many third countries require a visa to enter the Schengen area. For them the question whether they fulfil the criteria for access to the territory is therefore controlled twice, first at the consulate, and second at the border crossing point.

It should be noted, however, that there are basically two different visa regimes: the Schengen short-stay visas, in principle allowing for a short stay defined as 90 days within a 180 days period and regulated by EU law, and national long-stay visas, regulated by national law.

### 1. Third countries whose citizens require a visa to enter the Schengen area

**Regulation 539/01**<sup>1</sup> contains the common lists of countries whose citizens are exempt from the visa requirement if they wish to travel to the Schengen area (so-called positive list) and of those countries whose citizens do require a visa to do so (so-called negative list).

Currently the nationals of the following third countries<sup>2</sup> are exempt from the visa obligation (Annex 2 of the Reg. 539/01): Albania, Andorra, Antigua and Barbuda, Argentina, Australia, Bahamas, Barbados, Bosnia and Herzegovina, Brazil, Brunei, Canada, Chile, Costa Rica, Croatia, FYROM, Guatemala, Holy See, Honduras, Hong Kong SAR, Israel, Japan, Macao SAR, Malaysia, Mauritius, Mexico, Monaco, Montenegro, New Zealand, Nicaragua, Panama, Paraguay, Salvador, San Marino, Serbia, Seychelles, Singapore, Saint Kitts and Nevis, Taiwan, USA, Uruguay and Venezuela.

During the latest review of Reg. 539/01<sup>3</sup> it was agreed to abolish the visa requirement for the citizens from **16 countries from the ACP group** as well as of the **United Arab Emirates, Peru and Columbia**. Before visa free travel is actually established, bilateral visa waiver agreements must be signed with those countries, agreements for which the EP has to give its consent. This process is currently ongoing.

The countries on the positive list are generally countries from which no major migratory or refugee movements emerge. During 2013<sup>4</sup> a **suspension mechanism** was introduced in Reg. 539/01 (see Art. 1a) which provides for the temporary suspension of the exemption from the visa requirement "*in emergency situations*". This is further defined by reference to "*a substantial and sudden increase in the number of:*

(a) *nationals of that third country found to be staying in the Member State's territory without a right thereto;*

(b) *asylum applications from the nationals of that third country for which the recognition rate is low, where such an increase is leading to specific pressures on the Member State's asylum system;*

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<sup>1</sup> Latest consolidated version of Regulation 539/01: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02001R0539-20140609&qid=1414567596659&from=EN>

<sup>2</sup> In some cases the exemption from the visa requirement applies only to holders of biometric passports.

<sup>3</sup> Regulation (EU) No 509/2014: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014R0509>

<sup>4</sup> Regulation (EU) No 1289/2013: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1289>

*(c) rejected readmission applications submitted by the Member State to that third country for its own nationals."*

This suspension mechanism has not been triggered thus far.

Criteria for lifting the visa requirement: Reg. 539/01 is regularly revised. There are a series of criteria which are intended to guide decisions on further visa exemptions. One of the factors to be considered when deciding on whether to lift the visa requirement is the risk of "illegal immigration" (see Article 1 of the consolidated version of Reg. 539/01). Others are "*public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union's external relations with the relevant third countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.*"

## **2. Conditions and procedures for issuing visas**

The vast majority of persons seeking to enter the EU are therefore subject to the visa requirement. The EU Visa Code (Regulation 810/2009) <sup>1</sup> sets out the procedures and conditions for issuing visas for the purpose of short stays and airport transit. It is currently under revision by way of the ordinary legislative procedure.

Article 21 of the Visa Code sets out the conditions for the issuing of a visa. This article makes a cross-reference to the entry conditions as contained in the Schengen Borders Code, thereby implementing the principle of two controls, one in the home country and one at the border:

Art. 21(1) reads: "*In the examination of an application for a uniform visa, it shall be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code, and particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.*"

The entry conditions referred to are: the possession of a valid travel document; the justification of the purpose of the stay, and sufficient means of subsistence; the absence of an alert in the SIS for the purpose of refusing entry, and not being considered a threat to public policy, internal security or the international relations of any of the Member States.

### Procedures:

The Visa Code sets out the different steps of the procedure towards the issuing of a visa. For a visa applicant one of the first relevant provisions concerns the so called territorial competence. Article 6 stipulates that the responsible consulate is that of the Member State in which the applicant legally resides. An exception from this provision is possible for third country nationals legally present but not residing in a jurisdiction.

In the specific situation of Syria, consulates in Damascus are generally closed and not

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<sup>1</sup> Latest consolidated version: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1433773964928&uri=CELEX:02009R0810-20131018>

processing visa applications. Consulates give indications, on their websites, where visa applications might be made (generally in neighbouring countries).

The process then requires applicants to submit the application form, the travel document and the supporting documents. For the latter a whole range of documents are required and they generally serve to verify whether the conditions for the issuing of a visa are met. Among them are documents indicating the purpose of the journey, documents in relation to accommodation, or proof of sufficient means to cover his accommodation, documents indicating that the applicant possesses sufficient means of subsistence both for the duration of the intended stay and for the return, and information enabling an assessment of the applicant's intention to leave the territory of the Member States before the expiry of the visa applied for (see Art. 14(1)).

It is also necessary submit biometrics (photograph and 10 fingerprints in case the VIS is operational in the third country), pay the fee (60 Euros, plus the fee for the external service provider if the Member States works with one which might be up to 30 Euros) and provide proof of a travel medical insurance.

If considered admissible (Art. 19) the application is subsequently examined by the responsible consulate according to the conditions laid down in detail in Art. 21. The examination might then lead to a visa being issued or to a visa being refused. According to Art. 32 "*a visa shall be refused*" if one of the conditions is not met. Exceptionally a Member State shall issue a visa with limited territorial validity (Art. 25) among others "*when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations,*

*(i) to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled;*"

### **3. Humanitarian Visas**

The Visa Code in force has provisions on "humanitarian visas". First of all, a Member State may deviate from the normal **admissibility criteria** for a visa application "on humanitarian grounds" (Art. 19). Secondly, a Member State "shall" issue a **visa with limited territorial validity** when it "considers it "necessary on humanitarian grounds, for reasons of national interest or because of international obligations". (Art. 25) (For full text of these provisions see the annex to this document). Apart from these provisions, no specific procedure is foreseen for the lodging of a humanitarian visa under the current EU Visa Code. In that respect, there is no systematic information available as to the use of national visa on humanitarian grounds or of how the provisions of the Visa Code are being used and implemented.

One reason why a number of asylum seekers cannot come to the EU by plane or other routes is because they may not have valid travel documents, their documents may not be recognized by Member States' authorities, and/or visas and thus the airline companies will not allow them to fly, as airline companies are themselves responsible for the costs of returning persons without a valid travel document. <sup>1</sup>

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<sup>1</sup> COUNCIL DIRECTIVE 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data

Humanitarian visas provide persons in need of international protection with means of accessing a country in order to apply for asylum. The issuing of humanitarian visas would allow people to travel safely through existing routes and, upon arrival in that country; they are subject to the normal asylum procedures and rules.

The rapporteurs reiterate that Member states should make use of existing possibilities to provide for humanitarian visas at EU embassies and consular offices in countries of origin transit countries or so-called "hot spots" in third countries.

#### **4. The Visa Information System (VIS)**

All visa applications are stored in the **Visa Information System** (VIS Regulation 767/2008) <sup>1</sup> which is being rolled-out step by step worldwide. In the VIS, a range of personal data taken from the visa application form (including name, nationality, place and date of the application, details of the person issuing an invitation, main purpose(s) of the journey) and the biometrics of the applicant are stored. Any visa application is linked to the biometrics of the applicant (10 fingerprints plus the photo), thereby allowing for verification that the visa holder is indeed the person to whom the visa was issued and also to identify undocumented persons on EU territory for the period of time for which that data is stored (generally five years) .

The VIS is not only used by consulates but may be accessed by a range of authorities for different purposes. These are mainly border authorities (in order to verify the identity of the visa holder and/or the authenticity of the visa and/or whether the entry conditions in accordance with Article 5 of the Schengen Borders Code are fulfilled) but also asylum authorities (for determining the responsibility for asylum applications and for examining the application for asylum) and the authorities competent for carrying out checks at within the territory of the Member States as to whether the conditions for entry to, stay or residence on the territory of the Member States are fulfilled (for the purpose of the identification of any person who may not, or may no longer, fulfil the conditions for the entry to, stay or residence on the territory of the Member States) (see chapter III of the VIS Regulation).

#### **5. Visas and the Dublin Regulation**

According to the Dublin Regulation (Regulation 604/2013) the possession of a visa is one of the criteria for the determination of the Member State responsible for the examination of an application for international protection lodged in a Member State (Art. 12). The fact that a Member State issued a visa renders that Member State responsible for the applicant, and overrides the criteria of an irregular border crossing (Art. 13).

#### **6. Revision of the Visa Code**

On 1 April 2105, the Commission presented its proposals for a revision of the existing Visa Code in order to seriously shorten and simplify the procedures for those wanting to come to the EU for short stays, bring cost savings and reduce bureaucracy, whilst maintaining the same level of security. The Rapporteurs acknowledge that negotiations are underway within the Parliament to establish its position on those new proposals.

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<sup>1</sup> Latest consolidated version: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008R0767-20131018&qid=1434032795878&from=EN>



## ANNEX I

### **Law of the sea on search and rescue**

International maritime law establishes the obligation to render assistance unequivocally.

United Nations Convention on the Law of the Sea (UNCLOS) (concluded in 1982; entry into force on 16 November 1994) to which also the EU adhered in 1998

Part VII of UNCLOS deals with the high seas. Its Article 98 establishes the duty to render assistance.

#### *Article 98 Duty to render assistance*

*1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:*

*(a) to render assistance to any person found at sea in danger of being lost;*

*(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;*

*(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.*

*2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.*

International Convention for the Safety of Life at Sea (SOLAS) (1974). Implementing measures at the level of the EU are in Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security.

International Convention on Maritime Search and Rescue (SAR) (adopted on 27 April 1979, entry into force on 22 June 1985). The aim was to develop an international SAR plan so that no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organisation and, when necessary by co-operation between neighbouring SAR organisations.

## ANNEX II

### European Maritime Safety Agency (EMSA) <sup>1</sup>

The objective of the Agency is "ensuring a high, uniform and effective level of maritime safety and prevention of pollution by ships within the Community" (Art. 1). Within the operational services delivered by EMSA are the following that might be relevant for the present discussion: <sup>2</sup>

#### - Traffic monitoring

"The services are being developed to include meteorological and oceanographic data, as well as a number of automated behaviour algorithms to be used for different monitoring and surveillance purposes. These algorithms are configurable and provide alerts responding to user defined policies."

#### - Search and rescue

"EMSA provides an advanced Search and Rescue service to the EU Member States. The service is called the 'Enhanced SAR SURPIC' (Search and Rescue Surface Picture) and it can be used by maritime Search and Rescue authorities during rescue operations. The SAR SURPIC provides an overview picture of the ships present in any ocean region, worldwide. Nearby ships can then be contacted to go to the rescue of the seafarers in distress. The SAR SURPIC combines information on the position of ships from all available sources, including satellite AIS and LRIT."

#### - Maritime border control

"An operational service has been developed to support the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) operations under the auspices of the European Border Surveillance System (Eurosur). The service includes system-to system interfaces for real-time vessel position information exchange and automated vessel behaviour monitoring. Vessel information originates from both terrestrial and satellite-based systems as well as other available positioning data, and is correlated against satellite aperture radar and optical imagery derived vessel detections."

Frontex uses the "Earth Observation for Integrated Maritime Services" provided by EMSA.

"EMSA provides vessel detection and target activity detection information derived from very high resolution radar and optical satellite images. This information is used in combination with data from other EMSA maritime information systems to support a common maritime picture."

A three-year agreement between Frontex and EMSA was signed on 3 May 2013. The press release states that the information provided by Frontex to the Member States based on EMSA

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<sup>1</sup> Regulation (EC) No 1406/2002 of 27 June 2002 establishing a European Maritime Safety Agency; latest consolidated version: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1442302024594&uri=CELEX:02002R1406-20130301>

<sup>2</sup> [www.emsa.europa.eu](http://www.emsa.europa.eu)

services will be used for various purposes such as:

1. Surveillance of targeted ports and coasts;
2. Tracking of suspect vessels over high seas;
3. Monitoring sea areas for environmental purposes.