

# Safeguarding the Schengen acquis

## Achievements during the legislative term 2014-2019: the role of the European Parliament

### KEY FINDINGS

A single area **without internal border checks** — the Schengen Area — **requires a common policy on the EU external borders**. Boundaries mean freedom in security.

When the Schengen Area entered into force in 1995, checks at the internal borders were abolished and a single external border was created. Slowly, border control, as well as the rules governing visas and the right to asylum, became common for all Schengen countries. The European Parliament has always insisted on the need that all action happens with due regard for the EU Charter of Fundamental Rights. Parliament has been calling for reliable and fair procedures and for a holistic EU approach to migration.<sup>1</sup> Considerable progress was made regarding safeguarding the EU's Schengen acquis during the legislative term 2014-2019 - most importantly after the migratory crisis of 2015 had made the deficiencies of the European common policy had become evident.

### Legal bases

**Article 3 par. 2 TEU** which demands that the Union “shall offer its citizens an area (...) without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls (...)”.

For the first time in 1999 was enshrined in the **Treaty of Amsterdam (Article 61)**, the conferral to the EU of “flanking measures with respect to external border controls.” Before, already in 1985, five Member States (Belgium, France, Germany, Luxembourg and the Netherlands) decided to create a common area of free movement – a **territory without internal borders**: they signed the first agreement in Schengen – which was followed in 1990 by a **Convention on the gradual abolition**

<sup>1</sup>European Parliament Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)): <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0102>



**of checks on the movement of nationals of the Member States at their common borders.**<sup>2</sup> In its Article 17 the Agreement calls on the Parties to endeavour to **abolish checks on persons at common borders** and transfer them to their external borders. Article 1 of the Convention defines as “external borders” the Member states land and sea borders and their airports and sea ports, provided that they are not internal borders. But also with regard to the **movement of goods**, the Parties shall seek means of transferring the checks currently carried out at the common borders to the external borders or to within their own territories (Article 24 of the Convention).

**Article 67, par 2 TFEU** stipulates that the EU “shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States which is fair towards third-country nationals.”

According to **Article 77, par 1 lit b) TFEU** the EU shall develop a policy to “carrying out checks on persons and efficient monitoring of the crossing of external borders”. Originally a political objective, the **integration of border management at the European level** is now expressly foreseen in EU primary law. The Union therefore is constantly setting out to establish common standards with regard to controls at its external borders and to put in place an integrated system for the management of those borders.

## Objective of the Policy

The objective of the EU in the area is to safeguard the freedom of movement **within the Schengen area** (as it can not be separated from security at external borders) and to effectively monitor and control **persons and goods crossing the external borders**. Also it is to achieving a smooth functioning of the area of Freedom, Security and Justice, while guaranteeing the security of their citizens and the respect of EU and International Laws, as laid out in Article 67 par. 1 TFEU and Article 3 par. 1 and 5 TEU.

“Safe Borders” is not a “technical” problem only, to be solved with better or enhanced technology but a broader issue, demanding solutions in the field of judicial police cooperation, asylum and migration and external EU policy<sup>3</sup> Sophisticated IT-tools and equipment for border control will not be sufficient for citizens to perceive the external borders safe or to stop MS reintroducing internal frontiers to control secondary movements of migrants for political or electoral reasons.

The Lisbon Treaty has given the EU the instruments to agree with the **Ordinary Legislative Procedure** on the issues at stake. However, **new problems have arisen with the reluctance of some MS to apply and implement the Union law adopted with qualified majority**. This has been particularly challenging in the area of asylum and migration and had repercussions on the credibility of the EU but also in the effectiveness of the asylum policy and indirectly on the management of internal borders. If asylum procedures are not properly applied at the external borders, additional problems will arise at the internal borders, such as secondary migration (or movements), violations of fundamental rights and ultimately an increase of nationalistic and anti-immigration political parties.

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<sup>2</sup> Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, p. 19:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2000.239.01.0001.01.ENG&toc=OJ:L:2000:239:FULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2000.239.01.0001.01.ENG&toc=OJ:L:2000:239:FULL)

<sup>3</sup> European Parliament Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration 2015/2095(INI) :

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0102>

## Main legislative instruments in force

The **Schengen Area**, currently comprises 26 European countries -not UK and Ireland, and not Croatia, Bulgaria and Romania, **but 3 non EU-states: Switzerland, Norway and Liechtenstein. Despite Bulgaria and Romania** fulfilling the criteria for the full application of the Schengen acquis and repeated calls from the European Parliament<sup>4</sup> to this end, the Schengen area has - in the absence of the required Council decision - not been enlarged to these two countries. The process regarding **Croatia** is ongoing.

The unprecedented arrival of refugees and irregular migrants in the EU which peaked in 2015, exposed a series of **deficiencies in EU policies on external borders and migration**. But also cross border criminal activities, unrest in the EU neighbouring countries has caused high concern and distress. This affected the functioning of the Schengen rules (acquis), leading even to a temporary suspension of the Dublin system and the introduction of internal border checks by several Member States.<sup>5</sup> Since mid-2016, a **total of ten Schengen States have reintroduced (or prolonged) temporary internal border controls** in their territories on the basis of the Schengen Borders Code (→3.2.) for various reasons. In response to these challenges, the EU has embarked on a broader process of reform aimed at rebuilding its common asylum policies on fairer and more solid ground, strengthening its external borders by **reinforcing the links between border controls and security**, and renewing cooperation with third countries on migration issues. During this legislature 2014 - 2019 very relevant legislation has been adopted: the **Schengen Borders Code** is the main instrument laying down rules on external border crossing; the **EU's Integrated Border Management** has as central pillar the **European Border and Coast Guard/FRONTEX** Briefing on external borders, PE 608.875); furthermore national authorities and EU agencies active in the field of security, border and migration management, such as [EUROPOL](#), [EASO](#) and [EUROJUST](#), use centralised large-scale information systems, more importantly the **Schengen Information System SIS**

The area of free movement without internal border controls is considered to be one of the greatest achievements of the EU altogether. The possibility to travel within the Schengen area without being subject to border controls is highly valued by European citizens.<sup>6</sup> Since 2015, however, in the wake of the massive influx of irregular migrants, several Member States reintroduced and subsequently prolonged their **internal border control**, mainly due to the **secondary movements of migrants** within the area of free movement<sup>7</sup>. To address the identified shortcomings in the management and governance of Schengen, and in particular at the external border, a series of initiatives were put in place in order to restore the **normal functioning of the Schengen area**.

## Schengen evaluation and monitoring mechanism

Schengen evaluation and monitoring mechanism means the verification of the correct application of the Schengen acquis, including in the area of police cooperation. It was necessary to ensure high uniform standards in practice and to maintain a high level of mutual trust between Member States.

<sup>4</sup> European Parliament Resolution of 11 December 2018 on the full application of the provisions of the Schengen acquis in Bulgaria and Romania: abolition of checks at internal land, sea and air borders (2018/2092(INI)):

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0497>

<sup>5</sup> S. Carrera, The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016, study for the LIBE committee 2018, PE604.943, p. 11:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604943/IPOL\\_STU\(2018\)604943\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604943/IPOL_STU(2018)604943_EN.pdf)

<sup>6</sup> Special Eurobarometer on Schengen 4 December 2018:

<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2218>

<sup>7</sup> Member States' notifications of the temporary reintroduction of border control at internal borders:

[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction\\_border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction_border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)

Finally introduced by [regulation 1053/2013](#)<sup>8</sup>, a great deal of detailed information could since be gathered on the application of the Schengen acquis in the Member States. The findings have been both worrisome, illustrating the major shortfalls in different fields of the Schengen cooperation and encouraging the Member States to improve on their national arrangements.<sup>9</sup>

## Schengen Borders Code (SBC)

SBC provides EU States since 2008 with a single set of common rules that govern external border checks on persons, entry requirements and duration of stays in the Schengen Area. [Regulation \(EU\) 2017/458 of 15.3.2017](#) amending regulation (EU) 2016/399 (OJ L 074 18.03.2017, p. 1) as regards the reinforcement of checks against relevant databases at external borders, has been updated following the series of terrorist attacks on EU territory early 2015 which involved cross-border criminal activities and networks, **highlighting** vulnerabilities of the EU external borders **management**. So the Commission proposed **amending the SBC** as regards the reinforcement of checks against relevant databases at external borders (INFOGRAPHIC 1 -Security controls when arriving and leaving the Schengen area). The revision foresees systematic and permanent checks of EU citizens, at all points of entry at the external borders of the EU, including the verification of biometric information against the relevant databases.

It provides for use of the EU-wide databases when performing border checks, in particular the **Schengen Information System (SIS)** and the **Interpol database on stolen or lost travel documents**.<sup>10</sup> If systematic checks have a disproportionate impact on the flow of traffic, Member States can opt to replace them with targeted checks at EU land and sea borders. Such targeted checks could also be applied at air borders, but only for a transitional period (up to six months, exceptionally extended for 18 additional months). The regulation also provides that in cases of doubt as to the authenticity of a travel document or the identity of a third-country national, the checks, where possible, shall include the verification of at least one of the biometric identifiers built into the travel documents.

In the exceptional circumstances where persistent serious deficiencies in a Member State's control of its external borders have been identified and when it is clear that measures taken by the evaluated Member State are not sufficient to ensure the adequate remedy of these deficiencies, border controls may be reintroduced temporarily (**Article 25 and 26 SBC**). However, this is a step of last resort and would be used only if all other measures like operational support from EBCG were ineffective. The following conditions must be met:

- controls can be reintroduced for up to 30 days or for the foreseeable duration of the threat
- controls can last for a maximum of 6 months
- the member state concerned must [notify the Commission](#)<sup>11</sup> and the other member states at least four weeks before checks are introduced.

Internal checks in foreseeable cases under Articles 25-26 SBC do not require the Council's approval, unlike checks introduced in the case of exceptional circumstances under **Article 29 SBC**. Since September 2015, border controls have been reintroduced and prolonged almost 50 times.

<sup>8</sup> Council Regulation of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, : <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1053&from=EN>

<sup>9</sup> [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/schengen-evaluation\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/schengen-evaluation_en)

<sup>10</sup> <https://www.interpol.int/en/How-we-work/Databases/Stolen-and-Lost-Travel-Documents-database>

<sup>11</sup> Recent examples are Austria (12 November 2018 – 11 May 2019), Denmark (12 November 2018 – 11 May 2019), Germany (12 November 2018 – 11 May 2019), France (1 November 2018 – 30 April 2019), Norway (12 November 2018 – 11 May 2019) and Sweden (12 November 2018 – 11 February 2019).

As an example of unauthorised border checks the recent judgment in [Cases C-412/17 and C-474/17 Bundesrepublik Deutschland v Touring Tours und Travel GmbH and Sociedad de Transportes SA](#) can be mentioned: the Court of Justice of the European Union finds that the SBC precludes the obligation to carry out **checks at issue imposed on coach travel operators** traveling to Germany and the issuing of orders prohibiting, subject to the imposition of a recurring fine, operators which infringed that obligation from providing any further transport services under the same conditions. The CJEU ruled that the checks at issue were carried out when the travellers board the coach at the start of the cross-border journey, and so constituted checks within the territory of a MS, which are prohibited where they have an effect equivalent to border checks.

## Schengen Information System (SIS)

SIS is an information sharing system (data base) that helps to preserve **international security** in the Schengen area where internal border controls do not exist. It is the most widely used and efficient IT system of the EU in the AFSJ. Authorities across the EU use the Schengen information system to **enter or consult alerts** for wanted or missing people and objects. It contains over 80 million alerts and was consulted over 5 billion times by authorities in 2017, triggering more than 240 000 hits on foreign alerts (alerts issued by another country). SIS has recently being reinforced through updated rules which will address potential gaps in the system and introduce several essential changes on the types of alert entered.

After the last reform of 2018, the scope of SIS is now defined in three legal instruments, three regulations (replacing SIS II):

- in the field of **police and judicial cooperation in criminal matters**<sup>12</sup>
- in the field of **border checks**<sup>13</sup>
- for the return of illegally staying **third-country nationals**<sup>14</sup>

The 3 regulations introduce additional categories of alerts to the system:

- alerts issued for the purpose of **inquiry checks**, an intermediary step between discreet checks and specific checks, which allow for individuals to be interviewed.
- alerts on **unknown suspects or wanted persons**, which provide for the introduction into the SIS of fingerprints or palm prints discovered at the scenes of serious crimes or terrorist incidents and which are considered to belong to a perpetrator.
- preventive alerts for **children at risk of parental abduction**, as well as **children and vulnerable persons who need to be prevented from travelling for their own protection** (for example, where travel might lead to the risk of forced marriage, female genital mutilation, trafficking of human beings).

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<sup>12</sup> Regulation (EU) 2018/1862 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ L 312, 7.12.2018, p. 56–106 : <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32018R1862>

<sup>13</sup> Regulation (EU) 2018/1861 of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ L 312, 7.12.2018, p. 14–55 : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1861>

<sup>14</sup> Regulation (EU) 2018/1860 of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312 07.12.2018, p.1: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1860>

- alerts for the **purpose of return**, an alert in relation to return decisions issued to illegally staying third-country nationals, thereby improving the exchange of information in relation to return decisions (MS will be obliged to create alerts on return decisions staying illegally on their territory).
- **Biometrics**: SIS will contain palm prints, fingerprints, facial images and DNA concerning, for example, missing persons to confirm their identity.
- **Counter-terrorism**: More information will be shared on persons and objects involved in terrorism-related activities.
- Moreover, the introduction since March 2018 of an AFIS (Automated Fingerprint Identification System) in SIS, and the resulting possibility of making searches using fingerprints, makes it even more difficult for criminals to move unnoticed across Europe.

Concerning the access to data, **Europol** will be able to access and to exchange supplementary information with Member States SIRENE Bureaux. In addition, MS must inform Europol of any hits when a person is sought in relation to a terrorist offence. For the purposes set out in its mandate, **EBCG Agency** will also have access to the alert categories in SIS. The list of objects for which alerts can be issued, including false documents and high-value identifiable objects, as well as IT equipment will be expanded. Introduction of alerts in the SIS as regards entry bans for third-country nationals becomes compulsory. Since the proposal involves the processing of personal data that may impact individuals' fundamental rights, the proposal puts in place safeguards in order to uphold the principles set out in the Charter of Fundamental Rights of the EU, and in particular its Article 8 (protection of personal data).

Each Member State operating SIS has set up a **national SIRENE Bureau**, operational 24/7, that is **responsible for any supplementary information exchange** and coordination of activities connected to SIS alerts. The cooperation between Member States may be one-to-one or one-to-many and always needs to be linked to a specific SIS alert.

**Bulgaria, Romania and Croatia** are not yet part of the area without internal border checks (the 'Schengen area'). However, since August 2018, Bulgaria and Romania started using fully SIS. A Council Decision is still required for the lifting of checks at the internal borders of these two Member States. In the case of Croatia, there are still some restrictions regarding its use of Schengen-wide SIS alerts for the purposes of refusing entry into or stay in the Schengen area.

## Ongoing efforts and overview of recent EU legislative proposals

The **reasons that EU Member States use to justify the reintroduction or prolongation of temporary internal border controls still reflect crisis-mode policy-making**<sup>15</sup>. To remedy the situation and "safe Schengen", the [Commission presented in September 2017 a proposal](#) for a **regulation amending the Schengen Borders Code as regards the rules applicable to the temporary reintroduction of border controls at internal borders**, thus encouraging MS to use police checks and cooperation instead of internal border controls. The objective of the proposal is:

- to ensure that the time limits applicable to the temporary border controls at internal borders enable Member States to take, when necessary, measures needed to respond to a serious threats to internal security or public policy;

<sup>15</sup> Full list of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)

- to introduce better procedural safeguards in order to ensure that the decision on temporary border controls at internal borders or their prolongation is based on a proper risk assessment and is taken in cooperation with the other Member States concerned.

Council so far has informed that there is no room for compromise from their current mandate. The EP will therefore end its first reading by vote in Plenary on 4 April 2019.

## Not an achievement: fences at external borders of the Schengen Area

Prior to mid-2015 and the outburst of the so-called European humanitarian refugee crisis, only Spain (completed in 2005 and extended in 2009), Greece (completed in 2012) and Bulgaria (completed in 2014) resorted to erecting fences at external borders, so as to prevent migrants and refugees from reaching their territories. The recent developments indicate that spaces of exception and “non-places” became the new normal.<sup>16</sup> Without explicit EU rules on setting up fences at the external Schengen borders, even more countries have erected barriers between the EU and third countries.<sup>17</sup> **Since 2015 we have witnessed a ‘domino effect’ in the construction of external and internal border walls and fences** (see *Map 1-fences and border controls at the external and internal Schengen borders*) which different Member States built with the aim of diverting or preventing asylum applicants from reaching and transiting through the EU: fences have been constructed even within the Schengen area – the fence between Austria and Slovenia. In a meantime, Spanish practices in Melilla have been scrutinised by the European Court of Human Rights in Strasbourg.<sup>18</sup> This case sets an important precedent in the context of border walls and fences in the EU.

Frontex/EBCGA has deployed officers assisting Member States to conduct border controls and surveillance at the Hungarian/Serbian border. In addition, whereas currently the EU does not directly fund Member States to cover the razor wire and metal constructions, EU funding can be used for equipping such fences with surveillance systems, radars, cameras and other equipment. Such funding is allocated to research projects and security budgets from the External Borders Fund and Internal Security Fund-Borders. The recent Transnational Institute (TNI) report indicates that “from 2007-10, EU funds contributed to the deployment of 545 border surveillance systems covering 8,279 kilometres of the EU’s external borders and 22,347 items of border surveillance equipment.”<sup>19</sup> Should border walls and fences benefit from such additional EU financial support?

## Conclusions

In its resolution on the annual report on the functioning of the Schengen area in 2018<sup>20</sup> Parliament sought to draw attention to the fact that although the EU had adopted so many measures to strengthen its external borders, including border controls, there had been no corresponding reaction in terms of the removal of internal border controls.

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<sup>16</sup> S. Carrera, *The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016*, study for the LIBE committee 2018, PE604.943, p. 25:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604943/IPOL\\_STU\(2018\)604943\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604943/IPOL_STU(2018)604943_EN.pdf)

<sup>17</sup> Examples are listed in S. Carrera, *The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016*, study for the LIBE committee 2018, PE604.943, p. 26 cf.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604943/IPOL\\_STU\(2018\)604943\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604943/IPOL_STU(2018)604943_EN.pdf)

<sup>18</sup> Applications No. 8675/15 and No. 8697/15 N.D. v. Spain and N.T. v. Spain: <https://rm.coe.int/third-party-intervention-n-d-and-n-t-v-spain-by-nils-muiznieks-council/1680796bfc>

<sup>19</sup> Ch. Jones, (2017) “Market Forces: The development of the EU Security-Industrial Complex” TNI Report, 25 August 2017: (<https://www.tni.org/en/publication/market-forces-the-development-of-the-eu-security-industrial-complex>). The same report highlights, that various projects for militarising EU borders are ongoing including via use of drones and other semi-automated systems.

<sup>20</sup> European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0228+0+DOC+XML+V0//EN&language=EN>

As President Emmanuel Macron put it in his “Letter to the Citizens of Europe”, while the EU has been founded on internal reconciliation, the European Union has forgotten to look at the realities of the world. Borders mean freedom in security. He therefore proposes to **rethink the Schengen area**: with obligations of responsibility (stringent border controls) and solidarity, meaning a single asylum policy with the same acceptance and refusal rules. He requests **a common border force and a European asylum office**, strict control obligations and European solidarity to which each country will contribute under the authority of a **European Council for Internal Security**.

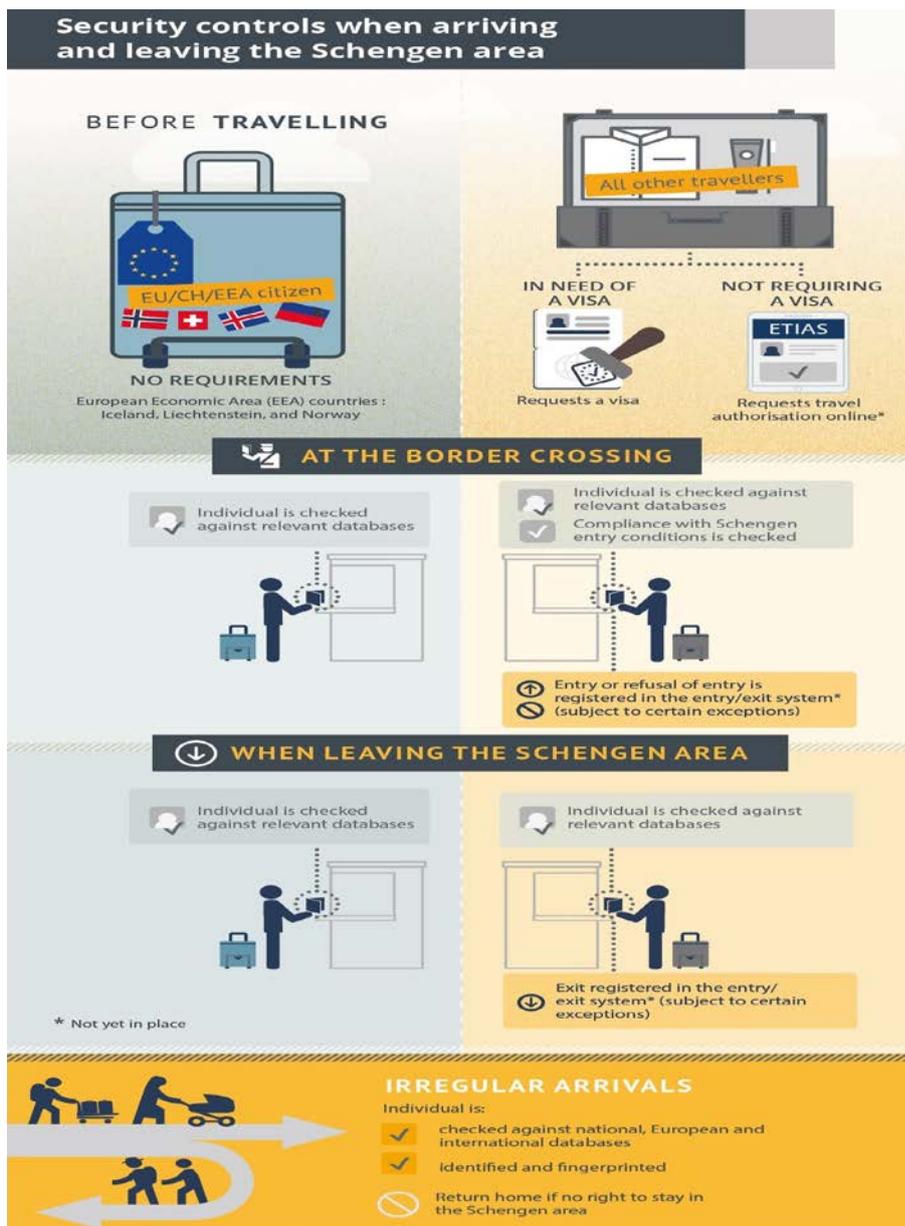
Map 1: Fences and border controls at the external and internal schengen borders



Source: UNHCR (2017)

	SCHENGEN AREA
	BORDER FENCE
	TEMPORARY BORDER CONTROL

## Infographic 1 - Security controls when arriving and leaving the Schengen area



Source: Council of the European Union (2018)

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