

An Assessment of the State of the EU Schengen Area and its External Borders

A Merited Trust Model to Uphold
Schengen Legitimacy



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Abstract

This Study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the state of play of the EU Schengen area and the latest legal and policy developments with direct relevance to the Schengen *acquis*. It analyses the impact of these developments, and the role of 'declared crisis', on the Schengen Borders Code, Luxembourg Court standards and EU Treaty principles and fundamental rights. The Study calls for an approach based on 'merited or deserved trust' to uphold the legitimacy of the Schengen area. Such an approach should focus on the effective and timely enforcement of EU rules and Treaty values – chiefly the rule of law and fundamental rights – instead of expanding intra-EU policing and the proliferation of technological surveillance and databases leading to the (in)securitisation of people's freedom of movement.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LIST OF ABBREVIATIONS

AB	Advisory Board
AFSJ	Area of Freedom, Security and Justice
AI	Artificial Intelligence
BMS	Shared Biometric Matching Service
BMVI	Instrument for Financial Support for Border Management and Visa Policy
CAT	Convention Against Torture
CCV	Community Code on Visas
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CIR	Common Identity Repository
CIRAM	Common Integrated Risk Analysis Model
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
COM	European Commission
CVM	Cooperation and Verification Mechanism
DG HOME	Directorate-General for Migration and Home Affairs, European Commission
DG IPOL	Directorate-General for Internal Policies of the Union, European Parliament
DG NEAR	Directorate-General for Neighbourhood and Enlargement Negotiations, European Commission
DPA	Data Protection Authority
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard Agency
ECA	European Court of Auditors
ECDC	European Centre for Disease Prevention and Control

ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
EES	Entry/Exit System
EIBM	European Integrated Border Management
EP	European Parliament
EPRS	European Parliament Research Service
ESP	European Search Portal
ETIAS	European Travel Information and Authorisation System
EU	European Union
EUAA	European Union Agency for Asylum
eu-LISA	European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
Eurodac	European Asylum Dactyloscopy Database
EUTFA	EU Emergency Trust Fund for Africa
FRA	European Union Agency for Fundamental Rights
FRO	Frontex Fundamental Rights Officer
Frontex	European Border and Coast Guard Agency
FSGW	Frontex Scrutiny Working Group
GDPR	General Data Protection Regulation
IA	Impact Assessment
IBM	Integrated Border Management

ICCPR	International Convention on Civil and Political Rights
IMM	Independent Monitoring Mechanism
IPCAN	Independent Police Complaints Authorities' Network
IOM	International Organisation for Migration
IT	Information Technology
JHA	Justice and Home Affairs
JO	Joint Operation
KMar	Royal Netherlands Marechaussee
LEA	Law Enforcement Authority
LIBE	Committee on Civil Liberties, Justice and Home Affairs, European Parliament
MEP	Member of the European Parliament
MID	Multiple Identity Detector
MRCC	Maritime Rescue Coordination Centre
MS	Member State
MSF	Médecins Sans Frontières
MTV	Mobile Surveillance Security
NDICI	Neighbourhood, Development and International Cooperation Instrument
NGO	Non-governmental Organisation
OLAF	European Anti-Fraud Office
PACE	Parliamentary Assembly of the Council of Europe
PICUM	Platform for International Cooperation on Undocumented Migrants
PNR	Passenger Name Record
S&D	Progressive Alliance of Socialists and Democrats
SAR	Search and Rescue
SBC	Schengen Borders Code

SEMM	Schengen Evaluation and Monitoring Mechanism
SIR	Serious Incident Reporting
SIS II	Schengen Information System II
SOP	Standard Operating Procedure
SPC	Single Point of Contact
SRA	Strategic Risk Analysis
TCN	Third-country National
TE	Thematic Evaluation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TPD	Temporary Protection Directive
UN	United Nations
UNHCR	United Nations High Commissioner for Human Rights
VA	Vulnerability Assessment
VIS	Visa Information System
WHO	World Health Organization

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EXECUTIVE SUMMARY

This Study examines the state of play of the functioning of the EU Schengen area and its external borders. It analyses how declared crises and emergencies affect the state of play, functioning and legitimacy of the EU Schengen system. The Study provides a detailed assessment of the latest EU decision-making dynamics and key policy developments, legislative initiatives and case law with direct relevance to the Schengen *acquis*. Particular attention is paid to their impact on the founding principles of the EU Treaties, as well as issues related to legal coherency, consistency and fundamental rights.

Key Findings

Is Schengen really in crisis?

- Schengen is not in crisis; nor is it dysfunctional or 'not working'. The Schengen Borders Code (SBC) and the new Schengen Evaluation and Monitoring Mechanism (SEMM) have substantially diminished the discretion or margin of appreciation by Member States' Ministries of Interior in the Schengen regime. The SBC and the SEMM have established an EU-led supervision, checks and balances and evidence-based model for the Schengen area in comparison to the previous intergovernmental, non-transparent working methods. It is against this background – in the name of various crises, and fears-based and generalised 'threats' to public policy and internal security that – some EU Member States' ministries have chosen to act systematically and instrumentally 'outside the law' and their legal commitments under the Treaties in the scope of EU internal and external border policies (*Section 1* of this Study). Their disobedience has remained largely unchallenged at EU enforcement levels, leading to injustices and impunity.
- Against this background, 'in the name of saving Schengen and free movement', the EU is moving towards increasing (in)securitisation of the Schengen area, with the Commission recommending EU Member States to over-use so-called compensatory measures consisting of increasing and systematising intra-EU policy checks, surveillance and expedited expulsions, as well as the exponential development and constant purpose-reconfiguration of EU home affairs databases, and their interoperability.
- The Study identifies the following cross-cutting challenges to the functioning of the Schengen system: First, a systematic lack of compliance; second, an enforcement gap; third, Schengen diplomacy and data-mushrooming; and fourth, policy laundering.

I. Systematic lack of compliance with EU law and fundamental rights violations at EU internal and external borders

- Some Member State governments and Ministries of Interior are systematically not complying with their current legal obligations and responsibilities under the Schengen Borders Code (SBC) – in the spirit of loyal and sincere cooperation, as well as Article 2 of the Treaty on the European Union (TEU) rule of law and fundamental rights principles. This relates both to their obligations under EU rules applicable to situations when reintroducing and prolonging internal border controls, as well as those related to the implementation of EU external border controls and surveillance activities, including in the scope of EU agencies such as Frontex joint operations.

- Since 2015 a group of six Member States have unlawfully reintroduced ‘internal border controls’ on the basis of grounds such as ‘secondary movements of third-country nationals’, terrorism and crime, the Covid-19 pandemic or even the Ukraine war (*Section 2.1. and Annex 1 of the Study*). All of them have exceeded the prescribed time limits foreseen in Article 25 of the SBC. In their latest Notifications, these same Member States have artificially repackaged and provided further information in a failed attempt to justify the novelty of the grounds behind the prolongation of internal border checks. The Study shows, however, that these are not new grounds and that they continue to use the same grounds as before’. As the Luxembourg Court confirmed in the case *NW* of April 2022, Article 72 TFEU does not allow Member States to reintroduce internal border controls beyond Article 25 SBC time limits, and these can only be applied again when they are truly new and clearly distinct from the phenomenon initially identified (*Section 2.2. of the Study*).
- The necessity, adequacy and proportionality of these measures remain, after almost 8 years unproven, with a noticeable lack of evidence. None of these Member States have properly justified why internal border controls have been effective measures to deal with the phenomena that they expressly mention in their notifications, nor have they substantiated the actual impacts or effects that these ‘borders’ have actually had after so many years. Internal border controls have become for this group of misbehaving Member States ‘permanent precautionary measures’ dealing with largely abstract ‘threats’ and ‘risks’, with some of them even quoting Frontex risk analysis and Europol annual reports, rather than sound and verifiable evidence.
- The Notifications have also failed to provide solid evidence on why intra-EU mobility of asylum seekers is a ‘threat’ to their ‘public security and public order’. They have also failed to justify the compatibility of the links (which they have constructed) between asylum and criminality with the general principle prohibiting penalising or criminalising asylum seekers in international and EU refugee law, as well as non-discrimination based on national or ethnic origin. Among the most relevant challenges described in their Notifications is the incapacity or unwillingness for some of these EU Member States to correctly implement EU asylum law standards, chiefly access to procedures and reception conditions. As the Luxembourg Court held in the Case *M.A. v Lithuania* of 30 June 2022, the unauthorised nature of entry and residence of an asylum seeker, or generalised assumptions or considerations, do not constitute a legitimate ground for Member States to justify the existence of a ‘sufficiently serious threat’ to public order and public security (*Section 2.3. of the Study*).
- The Study brings together and synthesises existing evidence showing the systematic nature of the use of: First, illegal expulsions without an individual assessment and with documented cases of violence – *pushbacks* – at EU external borders in the Schengen area; second, ‘delegated containment’ by the EU and some Member States indirectly supporting (through monetary and technical aid and equipment, such as boats and border/maritime surveillance information sharing) neighbouring non-EU countries such as Libya to prevent asylum seekers from leaving their territories and intercepting them at sea – *pullbacks* (*Section 3.1. of the Study*); and third, this has been happening in parallel with the progressive erecting of disproportionate border fences and walling, accompanied by border surveillance technologies and tools, which are not explicitly excluded from receiving indirect support by EU funding programmes when it comes to related surveillance and technological tools linked to these border fencing sites (*Section 3.2.*).
- Inhuman and degrading treatment or punishment, and the violation of the right to asylum, are *the norm* in the context of those activities. The analysis shows that these illegal practices,

which run contrary to the Schengen Borders Code, EU asylum and returns laws and the EU Charter of Fundamental Rights, as well as international law obligations, have with time become an established or institutionalised policy, and in some cases even formalised or indirectly prescribed in national legislation.

- The EU Frontex (European Border and Coast Guard, EBCG) Agency has faced responsibility issues related to fundamental rights violations in the scope of its supportive and coordination role in joint operations in some of the EU Member States engaging in pushbacks, pullbacks and border fencing practices. While several steps have been taken to ensure effective fundamental rights monitoring of Frontex activities, such as a new Fundamental Rights Strategy, clarifying the role of the Fundamental Rights Officer (FRO) and the hiring of Fundamental Rights Monitors, crucial recommendations put forward by the European Parliament Frontex Scrutiny Working Group (FSWG) still remain largely unaddressed. These include, for instance, the effective applicability and operationalisation of Article 46 of the Frontex Regulation and the immediate suspension of its operational activities in EU Member States engaging in fundamental rights violations (*Section 3.3. of the Study*).

II. An EU enforcement gap

- The violations of EU legal standards enshrined in the SBC and the EU Charter of Fundamental Rights have been affected by an EU enforcement gap resulting in the impunity of relevant EU Member State authorities and actors (*Section 4 and Annex 3 of the Study*). The European Commission has been reminded unanimously by the Luxembourg Court, the European Court of Auditors, the European Parliament and civil society that, because of its role as guarantor of the EU Treaties, it must effectively play its role to effectively enforce the law and launch infringement proceeding in cases of EU Member States' misapplication. The Study calls for a more structured, effective and transparent approach to the use of infringement proceeding in the Schengen area.
- With regard to the reintroduction and reiterated prolongations of internal border controls the European Commission did not exercise the powers conferred to it by the SBC, and has not issued an Opinion on the proportionality and necessity of these measures, nor did it take any of the six Member States before the Luxembourg Court. Similarly, the Commission has not initiated formal infringement proceedings within the scope of the Schengen Borders Code against any relevant EU Member State engaging in pushbacks, pullbacks or border fencing.
- The European Parliament has expressed serious concerns about the slow or outright reluctance by the Commission to initiate infringement proceedings and to accelerate them when deemed necessary, for example when dealing with fundamental rights situations. The European Commission has strategically decided not to perform its envisaged enforcement role as 'guarantor of the Treaties' and formally and publicly call on EU Member States to respect the law. The effectiveness of informal, 'soft' or diplomatic tools, including the informal pre-infringement tool EU Pilot, or even EU funding, have proved to be largely ineffective in addressing EU Member States' lack of compliance. Furthermore, these non-formal instruments are affected by a lack of transparency and embedded lack of accountability preventing effective democratic scrutiny.

III. Schengen diplomacy and venue mushrooming

- Instead of choosing to enforce EU law, the European Commission developed and expanded 'Schengen diplomacy' venues and tools under the notion of European Integrated Border Management (EIBM). Priority is given here to 'political dialogues' and the proliferation of exchange of knowledge venues between various EU and national actors which is not directly informed by evidence-based knowledge and effective enforcement. These venues include for instance a Schengen Forum, a Schengen Council, a Schengen Coordinator and tools such as the EIBM Policy Cycle, the Schengen Barometer and the Annual State of Schengen Reporting.
- These venues and tools, in fact, function in a 'disintegrated' arena of national actors and authorities involved in border controls, maritime and border surveillance and coast guard-related functions. This disintegrated border management is often linked to checks and balances characterising specific Member States' national constitutional/administrative systems, and their different interests and priorities in border management-related issues. Their labelling as 'integrated governance' is therefore largely misleading. They also foster an understanding of border management which focuses on a risk, proactivity and predictive analysis rationale drawing from Frontex Risk Analysis and the CIRAM 2.0 Model. However, risk analysis is not knowledge or evidence, it is an estimation of future possible events and trends based on futurology and predictive data – including Artificial Intelligence – which raises highly serious and unmountable concerns from the perspective of data quality, accuracy and human rights compliance (*Section 5.2.*).
- The overall lack of effectiveness of these *diplomacy-driven* tools to uphold Schengen rules remains doubtful and contested. The six Member States (Austria, Denmark, France, Germany, Norway and Sweden) have continued to conduct unlawful internal border controls for over 7 years already. Similarly, pushbacks and pullbacks, border fencing policies and the policing of civil society actors engaged in SAR in the Mediterranean are continuing unchallenged.
- The new version of the Schengen Evaluation and Monitoring Mechanism (SEMM) provides an excellent tool of professional – peer-to-peer – evaluation and brings about key innovations synthesised in *Section 5.3 and Box 4* of this Study. However, SEMM is intrinsically distinct from a proper EU enforcement tool. There is no evidence showing that SEMM results – including those related to fundamental rights – are followed up by infringement proceedings by the Commission. Further, it is not clear why the Commission would limit launching infringement proceedings only to issues related to 'serious deficiencies or systematic issues' in the context of SEMM, and not to all issues where Member States are shown to be not applying EU law. The new reinforced role granted to the Commission to politically steer the SEMM, instead of prioritising technical evaluations, raises similar concerns that politics will win out over effective enforcement. It is not clear how all the upcoming evaluations under the revised SEMM will systematically and uniformly cover fundamental rights (including privacy and data protection) criteria. It is also worrying that EU agencies such as Frontex, and its Vulnerability Assessments, fall outside the scope of SEMM evaluations, as the SEMM would also ensure a much needed evaluation of Frontex activities and operations, including those related to data processing. This would also clarify the relationship between SEMM and the Frontex Vulnerability Assessments which remain at present highly uncertain (*Section 5.3. of the Study*).
- The Study highlights the importance of establishing an Independent Monitoring Mechanism (IMM) under EU law, including in the current reform of the Schengen Borders

Code, to ensure that the border controls and border surveillance compliance with fundamental rights and the rule of law by EU Schengen Member States and their authorities, as well as relevant EU agencies are monitored. Here too, the cases of Croatia and Greece show that an ad hoc approach for setting up national monitoring mechanisms through EU funding is not an appropriate way to achieve more uniform, independent and effective EU fundamental rights monitoring at EU external borders. Furthermore, the EU Fundamental Rights Agency 2022 Guidance on 'Establishing national independent mechanisms to monitor fundamental rights compliance at the EU external borders', should be made mandatory and conditional for EU Member States if they are to be granted EU funding on issues related to border management (*Section 5.4. of the Study*).

- The Schengen enlargement debates covering Bulgaria, Romania and Croatia have shown once more that evidence resulting from the evaluation results of their readiness to join the Schengen area have become involved in politics. These debates have prioritised some EU governments fears-based arguments related to intra-EU mobility of asylum seekers and imposed additional criteria for accession to the Schengen area; the debates have also shown the large disregard of the lack of compliance with EU Charter of Fundamental Rights in external borders controls and surveillance and their pushback practices by the Croatian authorities (*Section 5.5.*).

IV. Policy laundering

- The von der Leyen Commission has produced an enormous body of new legislative initiatives of direct or indirect relevance to the Schengen regime. This crisis-led policymaking is characterised by 'policy laundering' consisting of two main dynamics: First, speed and worst regulation; and second, ad hoc legalisation and exceptionalism (*Section 6 of the Study*).

First, speed and 'worst' regulation:

- New legislative proposals have been prepared and adopted by the Commission in a highly speedy, expedited and accelerated fashion. Some of them have been put forward without an accompanying Impact Assessment (IA) such as the 2020 EU Pact on Migration and Asylum, including the revision of the Eurodac database; or the 2021 Instrumentalisation Proposal. Others have been accompanied by an IA, but they have not provided evidence justifying the necessity, proportionality and impacts of the chosen options, e.g. Impact Assessment accompanying the 2021 Commission Proposal reforming the SBC. In a noticeable number of cases Schengen-related legislative acts have not been substantiated on a meaningful assessment of their effectiveness, consistency and fundamental rights compliance, as required by EU Better Regulation Guidelines, and the 2016 Inter-Institutional Agreement on Better Law Making between the Commission and the European Parliament.
- The Commission has put forward a huge body of secondary legislation proposals, of a level of complexity that is simply overwhelming. They are also accompanied by key linkages and substantial cross-references and consecutive amendments to other secondary legislation proposals and existing laws dealing with different EU policy areas which are often beyond the Schengen *acquis* and Article 77 TFEU (e.g. proposed reform of the Eurodac Regulation, and its Interoperability with other EU databases). The resulting picture has been described as a 'legislative nightmare' featuring hyper-complexity which runs contrary to legal certainty and makes democratic accountability, any meaningful proportionality and value added test, and the consistent implementation of the European Parliament's role increasingly challenging, if not completely unfeasible in practice.

Second, *ad hoc* legalisation and exceptionalism

- Some of the same new legislative proposals envisage elements which seek to normalise, and in some cases even legalise *ad hoc* and provide ‘flexibility’ for the current misbehaviour and illegal practices by some EU Member States and their Ministries of Interior or Justice. For example, the Commission proposal calling for the expansion of the number of grounds or exceptions under the Schengen Borders Code (SBC) allowing Member States to reintroduce and prolong internal border controls to areas as wide as ‘migration’ or ‘public health’ – which are currently not foreseen by the SBC – or unreasonably extending the deadlines beyond the current time periods under Articles 25 and 28 of the SBC (*Section 6.1.* and *Table 2* of this Study).
- Another instance relates to the initiative to allow for crucial derogations and exceptions to individuals’ rights and safeguards under the SBC and the asylum *acquis* under both the Instrumentalisation proposal (*Section 6.2.*) and the Proposal for a Screening Regulation (*Section 6.3.*), which can be expected to lead to *de facto* arbitrary detention, the unlawful penalisation of refugees and asylum seekers, the criminalisation of migration and arbitrary interferences to privacy. The Study shows that the presentation of new legislation creates an illusion or false expectation that with a new legal reform EU Member States will actually comply with the law and the Commission will then effectively enforce it.
- The inclusion of the ground related to intra-EU mobility by asylum seekers and refugees is particularly problematic in the proposed reform of the SBC. It would legalise a practice which could make internal border controls permanent in nature. It also runs contrary to the current provisions of the SBC and the EU Treaties’ objectives laid down in Article 77 TFEU, which requires an internal area free from internal border controls and where ‘migration’ does not constitute a legitimate ground for derogating free movement. Crucially, the potential inclusion of this new exception in the SBC disregards the fact that some intra-EU mobility by refugees and asylum seekers may in fact be legitimate and should be allowed by EU Member States. Moreover, as stated above, the Luxembourg Court has ruled in the Case *M.A. v Lithuania* of 30 June 2022 that the unauthorised nature of entry and residence of an asylum seeker, or generalised assumptions or considerations, do not constitute a legitimate ground for Member States to justify the existence of a ‘sufficiently serious threat’ to public order and public security.

(In)securitisation

- In the name of ‘saving Schengen’, the Commission proposals have favoured an (in)securitisation agenda through reiterated calls recommending EU Member States to expand intra-EU police identity checks and surveillance, intra-EU expedited expulsion arrangements and the proliferation of systematic surveillance technologies and interconnected IT surveillance systems including the ‘Interoperability of EU databases’. These measures prioritise policing Schengen over questions related to asylum and refugee protection and upholding the rule of law and fundamental rights principles enshrined in the SBC and the EU Treaties, including the EU Charter of Fundamental Rights.
- An example of the risks inherent to these proposals relates for instance to persistent calls by the Commission for Member States to use police checks and police joint operations instead of formal ‘internal border controls’, which has also found a prominent place in the Commission’s proposal for a Police Cooperation Code. None of these proposals have been accompanied by corresponding police oversight mechanisms and complaint tools. As a

2023 ruling by the Dutch Court of Appeal against the Royal Netherlands Marechaussee (KMar) has confirmed (*Section 7.1. of the Study*), the Commission's priority to expand policing of the Schengen area and fund intra-EU travel surveillance tools fundamentally disregards the reality of over-policing at the expense of people's liberties. These illegal practices include racial profiling and structural discrimination behind police identity checks targeting certain groups and EU citizens which is contrary to the absolute prohibition of racial/ethnic discrimination as confirmed by the EU Anti-Racism Action Plan 2020-2025.

- An additional 'alternative measure' to internal border controls advocated by the Commission focused on expedited intra-EU expulsions and readmissions between relevant EU Member States. There is an enormous lack of accountability and transparency of all the already existing bilateral readmission arrangements and agreements between EU Member States facilitating the readmission of third-country nationals and asylum seekers, and their compliance with existing EU standards, chiefly the 2008 EU Returns Directive and EU asylum law (*Section 7.2. of the Study*). The above-mentioned 2021 proposed reform of the Schengen Borders Code would, however, allow for lowering existing standards by granting Member States the possibility to derogate existing standards and procedural guarantees – including the possibility to grant permits for humanitarian or compassionate reasons, under the EU Returns Directive. This runs contrary to the conclusions reached by the Luxembourg Court in the 2019 Case *Abdelaziz Arib*, where it held that intra-EU expulsions are subject to the Returns Directive even in cases where Member States reintroduce internal controls.
- An additional instance of (in)securitisation relates to the reiterated legislative reforms of the Eurodac database allowing for ever-growing access by law enforcement and police authorities to the data of asylum seekers and refugees, and its interoperability with other security-focused EU databases; databases such as the new version of the Schengen Information System (SIS) II, or the forthcoming so-called Entry/Exist System (EES) and the European Travel Information and Authorisation System (ETIAS). While these initiatives have been officially justified as facilitating or quickening mobility, speed in this context is to the detriment of liberty and fundamental rights of those who move. These technology-driven tools nurture an *asymmetry* in access rights by data citizens compared to those granted to national authorities and EU agencies. They are guided by large-scale and indiscriminate surveillance logic which leads to arbitrary interferences to the fundamental rights to privacy and data protection of data subjects in the EU.
- Interoperability, and the ecosystem of EU databases on which it relies (or newly creates), bring about major changes fostering the hybridisation or blurring of boundaries between constitutionally and legally distinct EU and national policies of asylum, migration, borders, police and criminal justice. They have pushed for a law enforcement or policing rationale running contrary to the EU data protection principles of purpose limitation and data minimisation. They also nurture the criminalisation of refugees and asylum seekers in the EU, which is directly incompatible with the prohibition to penalise them irrespective of their unauthorised entry or residence status. The major reforms of EU databases have not been adopted based on fundamental rights and privacy assessments justifying their proportionality and legitimacy in democratic societies, or their effectiveness and necessity.
- The proliferation, expansion and interconnectedness of EU IT information systems constitute a magnifying glass of the challenges and structural limitations experienced by the European Data Protection Supervisor (EDPS) and national Data Protection Authorities

(DPAs) at times of ensuring effective monitoring and supervision of EU data protection standards (*Section 7.3. of the Study*)

Based on the above, the Study recommends, in *Section 8*, a **merited or deserved trust model** to address these cross-cutting challenges to the Schengen area. Such model starts from the premise that EU Member States and EU agencies must comply with the law and EU Treaty principles, chiefly the rule of law and fundamental rights, and the EU must effectively enforce them, as these are preconditions for the legitimation of the entire Schengen area, as well as EU border, asylum and migration policies.

1. INTRODUCTION

1.1. Schengen: A Brief Historical Background

The Schengen system was originally developed outside the European Community (EC) framework. It found its origins in an intergovernmental arrangement between representatives of five Member States – France, Germany, Belgium, Luxembourg and the Netherlands – aimed at advancing more quickly toward the objective of lifting internal border controls between them. The launch of the Schengen Agreement, and its adoption on 14 June 1985, signalled the frustration of those states' Ministries of Transport and Foreign Affairs about the lack of progress and limited scope of free movement provisions to be negotiated in view of the adoption of the Single European Act (SEA). A key driving force behind this initiative was **the transport industry who called for the lifting of barriers to intra-EU trade and overcoming queues by abolishing internal border controls.**

However, **the matter of 'free movement' – particularly by third-country nationals – soon became an issue of major concern for EU Member States' Ministries of Interior.** This was particularly so during the negotiations of the 1990 Schengen Convention (CISA), which implemented the Schengen Agreement and came into effect in 1995. The CISA was largely informed by the input of a network of Working Groups bringing together national police experts giving priority to an internal security and law enforcement agenda¹. The **CISA constituted a strategic response by representatives of national Ministries of Interior to counterbalance and constrain the European Commission's free movement agenda and timetable laid down in its 1985 White Paper on the completion of the internal market**².

In response to the Commission's agenda, Member States' Ministries of Interior representatives argued that the proposed lifting of internal border controls constituted a direct challenge to national sovereignty which required a set of so-called **compensatory or flanking measures aimed at ensuring 'security' that the lifting of internal border checks was supposed to create in relation to 'criminal activities'**. This set of measures, first laid down in the 1990 Schengen Convention, gave especial emphasis to **policing the intra-EU mobility of non-EU nationals and asylum seekers.**

This logic has been particularly successful and remained largely unchallenged until recent times, and still lies at the heart of the EU Dublin System of sharing of responsibility over asylum applications. The Schengen compensatory measures originally included a common visa policy – and a negative list of countries whose nationals require a visa before entering the Schengen territory, cooperation for external border controls and surveillance, cross-border police and customs cooperation and information sharing, as well as the creation of a large-scale information system

¹ D. Bigo (1996), *Polices en Réseaux: l'Expérience Européenne*, Presse de Sciences Po, Paris; K. Groenendijk, E. Guild and P. Minderhoud (2002), *In Search of Europe's Borders*, Brill, Immigration and Asylum Law and Policy in Europe, Volume: 5.

² European Commission, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM/85/0310 FINAL, Milan, 28-29 June 1985.

named the Schengen Information System (SIS)³. The progressive expansion of the Schengen *acquis* which followed led to **a complicated, fragmented and uncertain regime** developing outside and in parallel with the Treaties. The Amsterdam Treaty in 1999 aimed to end this foundational anomaly, by providing for the incorporation of the Schengen *acquis* into the EC Treaties.

1.2. The Progressive Europeanisation of the Schengen Area

The EU Schengen governance system is currently composed of a robust and high-quality EU legal framework. Since the transfer of the Schengen *acquis* to EU competence in 1999, and especially after the entry into force of the Lisbon Treaty in December 2009, **the EU has progressively equipped itself with a Union-led or more EU-driven approach covering Schengen cooperation** which consists of a harmonised set of codified EU rules along with a solid evaluation and monitoring system⁴. This EU supervision model has been the main cause behind a series of controversies which have essentially shown **continued deep frictions with EU Member States' Ministries of Interior nationalistic and intergovernmental agendas** which have persisted since the early 1990s.

This was illustrated for instance in the **French-Italian governments controversy in the spring of 2011**⁵. Following an increase in the number of unauthorised entries by nationals of some North African countries in light of emerging tensions and instability of what came to be known as the 'Arab Spring', the Italian authorities started issuing humanitarian residence permits allowing beneficiaries to move freely inside the Schengen area, and in the first instance to France. This provoked a diplomatic row between the two Schengen countries, with the French government reacting by unilaterally reintroducing internal border controls with Italy.

Instead of launching infringement proceedings against both governments, and despite evidence showing the incompatibility of both the Italian and French government actions with EU Schengen rules⁶, **the European Commission decided to propose a new legislative package under the title 'Schengen Governance Package' in mid-2011**⁷. The Schengen Governance Package proposed a fundamental overhaul of two central components of the Schengen *acquis*, i.e.: the codified set of

³ The fact that Schengen cooperation is mainly about *policing* is shared by den Boer, who has emphasized that the underlying philosophy of Schengen is that 'the removal of internal border checks implies lower levels of security', and 'Policing as such resides under the compensatory measures by means of which the so-called security deficit is to be kept under control.', page 200. Den Boer, M. (2011), *Policing Schengen*, in J. P. Burgess and S. Gutwirth (eds), *A Threat Against Europe? Security, Migration and Integration*, VUBPress, pp. 191-212.

⁴ S. Carrera (2012), 'An Assessment of the Commission's 2011 Schengen Governance Package: Preventing abuse by EU member states of freedom of movement?', CEPS Paper in Liberty and Security Series, Brussels. <https://www.ceps.eu/ceps-publications/assessment-commissions-2011-schengen-governance-package-preventing-abuse-eu-member/>

⁵ S. Carrera, E. Guild, M. Merlino and J. Parkin (2011), 'A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair', CEPS Paper in Liberty and Security Series, Centre for European Policy Studies, Brussels. <https://www.ceps.eu/ceps-publications/race-against-solidarity-schengen-regime-and-franco-italian-affair/>

⁶ S. Carrera (2012).

⁷ Commission Communication, 'Schengen Governance – Strengthening the area without internal border controls', COM(2011)561, 16.9.2011, Brussels.

rules covering border controls/surveillance in the Schengen areas – the Schengen Borders Code (SBC)⁸, and the 'Schengen Evaluation and Monitoring Mechanism' (SEMM)⁹.

The reform, despite the hesitations of some EU Ministries of Interior¹⁰, was successfully adopted in 2013. It essentially meant securing **a stronger EU supervisory approach or more EU-level checks and balances and evidence-based decision-making over the previous EU Member States' Ministries intergovernmental-driven model that had so far prevailed in the Schengen governance** as regards the rules and practices covering internal border checks and evaluations of the implementation of the Schengen *acquis*.

The new Schengen Borders Code (SBC)¹¹ provisions **significantly reduced the margin of manoeuvre for EU Member States to have the discretion to unilaterally reintroduce – and indefinitely prolong – internal border controls and derogating free movement**. Similarly, the new Schengen Evaluation and Monitoring Mechanism (SEMM)¹² provided an EU-wide-model, led this time by the European Commission, consisting of a professionalised assessment and peer-to-peer evaluation system going far beyond the previous intergovernmental or Member States-led SEMM. The previous SEMM was under the exclusive hands of the EU Justice and Home Affairs (JHA) Council, where the Commission participated exclusively as an 'observer' and the European Parliament was completely excluded.

It is against this background that the Schengen controversies that emerged in the years that followed need to be examined and assessed. Previous European Parliament Studies have consistently argued and demonstrated how Schengen is in fact not in crisis; nor it is dysfunctional or 'not working'¹³. These same Studies have concluded that **there is therefore no need for any 'contingency plan', nor does it show any inadequacy of the existing rules calling for legislative reform.**

The post-2013 shapes of the SBC and the SEMM secured a stronger EU supervision and substantially diminished the discretion of Member States' Ministries of Interior and the EU JHA Council in the

⁸ Commission Proposal for a Regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011)560, 16.9.2011, Brussels.

⁹ Commission Proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, COM(2011)559, 16.9.2011, Brussels.

¹⁰ 'EU countries say 'No' to commission powers on border control', EUobserver.com, 13 September 2011. Retrievable from [EU countries say 'No' to commission powers on border control \(euobserver.com\)](http://euobserver.com)

¹¹ European Parliament/Council of the EU, 2016. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1, 21.3.2016.

¹² Council of the EU, Council Regulation (EU) 2-22/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, and repealing Regulation (EU) No 1053/2013. OJ L 160/1, 15.6.2022.

¹³ E. Guild, E. Brouwer, K. Groenendijk, and S. Carrera (2015), 'What is happening to the Schengen borders?', CEPS Paper in Liberty and Security Series, Brussels. <https://www.ceps.eu/ceps-publications/what-happening-schengen-borders/>

overall functioning of the Schengen Governance¹⁴. This more EU-driven approach has effectively meant ‘less intergovernmentalism’. **It has effectively meant a diminished or constrained role for Member States’ Ministries of the Interior** as regards respect of the conditions under which internal border controls can be lawfully reintroduced and prolonged, and specific grounds, timelines and evidence, as well as an assessment of the exact ways in which Member States’ national authorities are delivering SBC rules and administrative guarantees on the ground.

Crucially, **the European Parliament and EU democratic accountability were also ‘winners’ during the 2011-2013 legislative Schengen reform**. For instance, EU Member States in reintroducing internal border controls committed to keep the European Parliament informed and notified of the key elements and evidence justifying the legitimacy of derogating Schengen border free mobility under Articles 27, 28 and 29 SBC. Moreover, the Parliament acquired the status of *de facto* co-legislator on this and any subsequent SEMM legislative reforms.

This was the output of **the so-called Schengen Freeze controversy** dating back to 2012¹⁵, where the Parliament decided to suspend cooperation with the Council on a number of key JHA security-driven legislative files. This followed the Council Presidency’s unilateral decision to change the legal basis for negotiating the new SEMM from Article 77 TFEU - which includes Parliament as co-legislator - to Article 70 TFEU. However, Article 70 TFEU only envisages the need for Parliament to be informed of the content of the evaluation results and not to ‘consent’ or have a say in the legislative procedure for adopting the SEMM Regulation. A previous European Parliament Study showed that ‘the move, effectively excluding the European Parliament mid-way through a legislative procedure, revealed a **pre-Lisbon Treaty mindset** among Member States in the Council’¹⁶ (Emphasis added).

It is against this recent historical background of increased *EU-level checks and balances and evidence-based policymaking* – after the entry into force of the Lisbon Treaty¹⁷ and the 2013 legislative reform – that **some EU Member States’ Ministries started to act progressively and systematically ‘outside the law’ and in direct contravention to existing Schengen rules and procedures**. This corresponds to the findings of the above-mentioned European Parliament Studies which have showed how **there has been a conscious choice by some EU governments and Ministries of Interior (or the-like) to reverse intergovernmentalism in the EU Schengen cooperation** in a policy area which currently benefits from a high degree of Europeanisation.

¹⁴ S. Carrera, M. Stefan, N. C. Luk, and L. Vosyliute (2018), ‘The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016’. Study requested by the LIBE Committee of the European Parliament. [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)604943](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)604943)

¹⁵ [EP suspends cooperation with Council on five justice and home affairs dossiers | News | European Parliament \(europa.eu\)](#) and [Schengen: MEPs strongly object to Council decision and consider legal action | News | European Parliament \(europa.eu\)](#)

¹⁶ S. Carrera, N. Hernanz, and J. Parkin (2013), ‘The ‘Libsonisation’ of the European Parliament: Assessing Progress, Shortcomings And Challenges For Democratic Accountability In The Area Of Freedom, Security And Justice’. Study requested by the LIBE Committee of the European Parliament. [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493012/IPOL-LIBE_ET\(2013\)493012_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493012/IPOL-LIBE_ET(2013)493012_EN.pdf)

¹⁷ E. De Capitani (2010), The democratic accountability of the EU’s Area of Freedom, Security and Justice Ten Years On, in E. Guild, S. Carrera and A. Aggenschwiler (eds), The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme, CEPS Paperback Book, pp. 23-30.

Over the years, some of these ministries have made use of fears-based arguments alluding to 'uncontrolled migration' or 'secondary movements' of asylum seekers, and even artificial linkages between these and criminality, **to evade their EU law obligations and faithfully deliver their EU legal commitments as the foundations of an EU free movement area. Their disobedience has so far remained largely unchallenged at EU enforcement levels, leading to a high degree impunity and injustice.**

Some of these EU Member State governments have often declared that 'Schengen is in crisis' or that 'Schengen is dysfunctional or not fit for purpose', challenging the free movement rationale deeply engrained in the EU Treaties. In this context, **Schengen has been 'caught in the middle' of unresolved asylum political debates**, with an **EU Dublin system** which remains anchored in structurally deficient and unjust working parameters, and a crisis-led prevailing lens through which these issues continue to be framed in successive EU policies.

From the so-called 2015/2016 European refugee crisis, to the policy responses to the Covid-19 pandemic, up until the recent 'instrumentalisation of migration' episodes with neighbouring countries like Belarus or Turkey, some EU Member States have taken **the opportunity to consciously disregard the law and their legal commitments under the Schengen and EU Treaty rules in the name of one 'declared crisis' to another.** This has been accompanied by reiterated demands for passing new national and EU-level emergency measures and legislative proposals, and by the ensuing attempt of legalising previously 'exceptional' and *ad hoc* measures running contrary to existing EU and national constitutional rule of law, fundamental rights and democratic principles. These developments have negatively impacted on **legal coherence, respect for EU fundamental rights and EU inter-institutional decision-making processes, in a consistent attempt to reverse past intergovernmental dynamics in Schengen cooperation, and expanded a policing rationale** which no longer fits well with **the advanced state of Europeanisation** regarding border management and which is incompatible with the right to asylum in EU law.

1.3. Scope and Methodology

Against this background, this Study questions the official assumption that Schengen is in 'crisis' or 'not fit for purpose', and the actual need for a 'contingency plan' and a legislative reform of the existing EU rules. Rather, the Study shows how **the actual challenges affecting the functioning of the Schengen area are mostly related to some Member States' Ministries of Interior and Justice incapacity or outright unwillingness to comply with EU Treaty values enshrined in Article 2 TEU in the scope of border, migration and asylum policies.** These challenges translate into: First, a systematic lack of compliance and rule of law backsliding; second, an EU enforcement gap; third, prioritising Schengen diplomacy and knowledge mushrooming; and fourth, what we call 'policy laundering' in EU decision-making dynamics.

It is argued that, 'in the name of saving Schengen and to facilitate free movement', the EU is legislating and advising Member States to implement a set of policy actions which actually lead to **the (in)securitisation of the Schengen area through a disproportionate scale of policing and systematic surveillance of free movement.** The European Commission is recommending Schengen countries to implement an over-expansive use of police identity checks/operations and

surveillance, intra-Schengen expedited and substandard expulsions, and the exponential proliferation and interconnectedness – interoperability – of EU databases. This has taken priority over **a merited or deserved trust model prioritising the enforcement of EU law and Treaty values, chiefly the rule of law and fundamental rights, in the context of EU internal and external border, migration and asylum policies.**

The Study examines **the state of play of the functioning of the EU Schengen area.** It analyses the latest and most relevant EU decision-making dynamics and legal and policy developments with direct relevance to the Schengen *acquis*. It pays particular attention to **how fears-based ‘declared crises’ affect the legitimacy of the Schengen system and its alignment with EU law and Treaty principles and standards.** The analysis of key EU legislative and policy developments focuses on two main criteria, **legal coherence and consistency** with EU Treaty principles and compliance with existing EU legal standards, including those judicially developed by the Court of Justice of the European Union (CJEU), and **fundamental rights** as enshrined in the EU Charter of Fundamental Rights. The assessment focuses on **the following key aspects** related to the current shapes of the Schengen system:

1. the SBC provisions on the temporary reintroduction of internal border controls – and their prolongation – by Member States and the respect of key EU law standards in the context of internal and external border controls and surveillance, including those developed by the CJEU, and of the initiatives taken by the Commission to enforce EU Schengen law;
2. the revised ‘Schengen governance framework’ proposed by the Commission, and its linkages with the so-called European Integrated Border Management (EIBM) cycle;
3. the revised Schengen Evaluation and Monitoring Mechanism (SEMM) and its linkages with the Vulnerability Assessments carried out by the European border and coast guard (Frontex) agency;
4. the proposed legislative revisions of the Schengen Borders Code (SBC), and related legislative proposals;
5. the state of play as regards the Schengen enlargement, in particular in light of the recent decisions concerning Bulgaria, Romania and Croatia;
6. the proposed ‘alternative’ measures to internal border checks, notably the expanded use of intra-EU policing and expulsions, as well as the EU IT surveillance databases and their interoperability.

This Study adopts a legal and public policy analysis and a methodological approach informed by desk research of relevant primary and secondary sources, and pays particular attention to the latest key policy developments in this field of investigation.

This has been combined with two more methods:

First, a set of 14 semi-structured interviews with a selection of EU policymakers, comprising representatives from all the relevant European institutions (European Parliament, European Commission and EU Council), EU agencies (EU Fundamental Rights Agency (FRA) and the European Data Protection Supervisor (EDPS)), civil society actors and academics;

and Second, a closed-door Workshop titled '*The role of crises in the unresolved EU asylum reform and the Schengen non-enforcement dilemmas*', which took place in the context of the CEPS 2023 Ideas Lab on 28 February 2023, and which brought together NGOs, international organisations, academics and EU agencies' representatives to discuss the key issues and challenges characterizing the functioning of the EU Schengen area and its latest developments.

The Study takes into account relevant developments up until 30 March 2023.

2. INTERNAL BORDER CONTROLS

2.1. Reintroducing and prolonging internal border controls

Since 2015 **a group of six Member States have reintroduced and subsequently prolonged ‘internal border controls’ beyond what is allowed for in the Schengen Borders Code (SBC)**¹⁸. In the 2022 *State of Schengen Report*, the European Commission reported that internal border controls between Schengen states have been reintroduced more than 280 times since September 2015¹⁹. In particular, five Schengen zone Member States – Austria, Denmark, Germany, Sweden and Norway – have consistently reinstated internal border controls citing the situation at the external borders, the increase of intra-EU mobility of asylum seekers and refugees – often labelled as ‘secondary movements’, and fears of terrorist attacks and criminality (See *Figures 1 And 2* below)²⁰.

In the midst of what came to be known as the ‘2015 European Refugee Crisis’, and after a series of reintroductions of internal controls based on Articles 28 and 25 SBC²¹, on 8 June 2016, the Council, acting under Article 29(2) SBC, recommended that the five Member States ‘maintain proportionate temporary border controls for a maximum period of six months’²². This period was renewed three times: first for three-month periods in November 2016 and February 2017, and finally for six months in May 2017²³. The five countries thus reached the maximum number of prolongations allowed by Article 29(1) for the same cause, which is ‘no more than three times, for a further period of up to six months if the exceptional circumstances persist’²⁴.

These five countries would not be able to avail themselves of Article 29 to reimpose temporary border controls resulting from the ‘migratory crisis and consequent ‘secondary movements of

¹⁸ Carrera et al. (2018), ‘The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016’.

¹⁹ European Commission, Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions -- State of Schengen Report 2022. Brussels, COM(2022) 301 final/2: p. 10.

²⁰ Carrera et al. (2018), ‘The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016’.

²¹ ‘Specific procedure for cases requiring immediate action’.

²² Ibid.

²³ Council of the EU (2016), Council Implementing Decision (EU) 2016/1989 of 11 November 2016 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 306, 15.11.2016, p. 13–15; Council of the EU (2017), Council Implementing Decision (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 36, 11.2.2017, p. 59–61; Council of the EU (2017), Council Implementing Decision (EU) 2017/818 of 11 May 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 122, 13.5.2017, pp. 73–75.

²⁴ As we have noted in a previous study, using Article 29 to reinstate internal border controls seemed ‘a containment policy’ aimed at ‘squeeze[ing] the space for controls down to nothing’. In other words, the SBC Article 29 procedure would satisfy the states’ intention to extend internal border controls to counter unauthorised secondary movements of third-country nationals. However, the Commission considered that the time limits and the maximum number of prolongations would also ensure the return to the normal functioning of the Schengen area.

irregular migrants'. **The European Commission also confirmed this by stating that the 'refugee crisis' could no longer be used as a legitimate justification for retaining internal border controls under the SBC²⁵.** Despite this, **the five countries have unlawfully continued to retain border controls at the internal borders until the present on a number of grounds** which are described in detail in **Annex 1 of this Study**.

France, too, has never suspended internal border control since 2015. High-level events hosted in the country (i.e., the 2015 COP 21, the EURO 2016 Cup, and the Tour de France) and a series of terrorist attacks in Paris (2015) and Nice (2016) were used as grounds to *de facto* re-establish systematic border checks at internal borders²⁶. **The French government has consistently relied on Article 25 SBC and justified the prolongation of temporary internal border controls on terrorism and 'deficiencies at the external borders'** (See Figure 3 below).

Table 1: Internal border controls in place as of 28 February 2023

Country	Duration	Reasons/Scope
Germany	12/11/2022– 11/05/2023	Secondary movements, smuggling, strain on national refugee reception facilities, need to increase security of critical infrastructures; land border with Austria
Denmark	12/11/2022– 11/05/2023	War in Ukraine, smuggling and human trafficking, Russians fleeing conscription, returning terrorist fighters, risk of exploiting by terrorists the migration routes, incidents involving the organised crime; the land borders and ports with ferry connections with Germany and Sweden
Norway	12/11/2022– 11/05/2023	War in Ukraine, need to increase the security of the Norwegian on-shore and off-shore gas facilities, situation at the external border; ports with ferry connections to the Schengen area
Austria	12/11/2022– 11/05/2023	Secondary movements, increase in irregular migration flows, smuggling activities, illegal entry of potential terrorist threats, land borders to Slovenia and Hungary
Sweden	12/11/2022 - 11/05/2023	Increase in irregular migration flows, risk of secondary movements, situation at the external border, all internal borders
France	1/11/2022– 30/04/2023	New terrorist threats, organised criminality and activity of organised groups of smugglers, risk of arrival of persons who could pose a threat among the flow of refugees, irregular migration, secondary movements, the situation at the external border (Ukraine war); all internal borders as well as sea and air borders

Source: European Commission – [Migration and Home Affairs](#)

²⁵ Commission (2017), 'Questions & Answers: Preserving and strengthening the Schengen area', European Commission – Fact Sheet MEMO/17/3408.

²⁶ Carrera et al. (2018), 'The Future of the Schengen area: Latest Developments and Challenges in the Schengen Governance Framework since 2016'.

Figure 1: Schengen notifications Nov 2020–Mar 2023

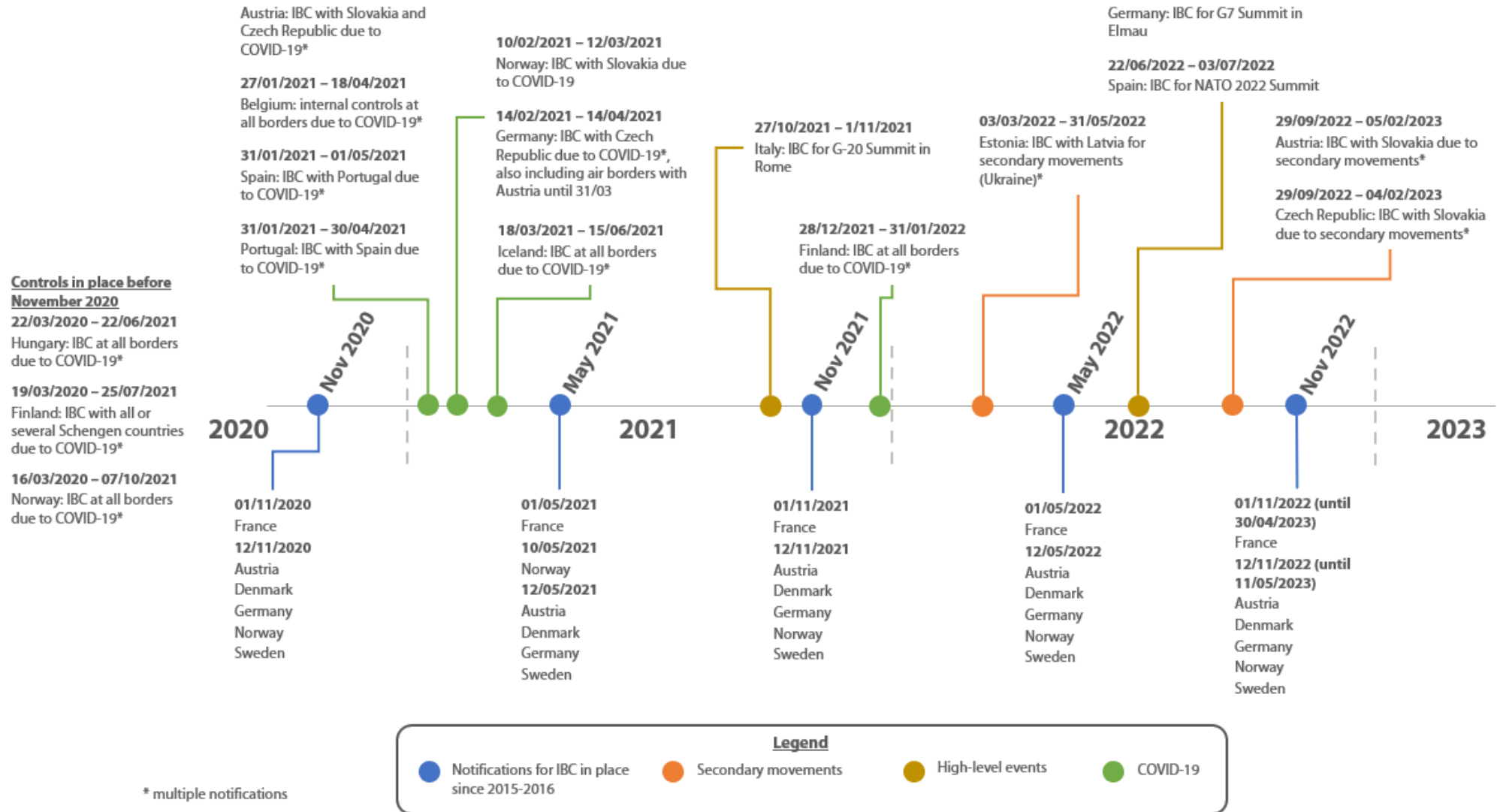


Figure 2: Reintroduction of internal border controls (IBC) by Austria, Denmark, Germany, Norway and Sweden (Sep 2015–Mar 2023)

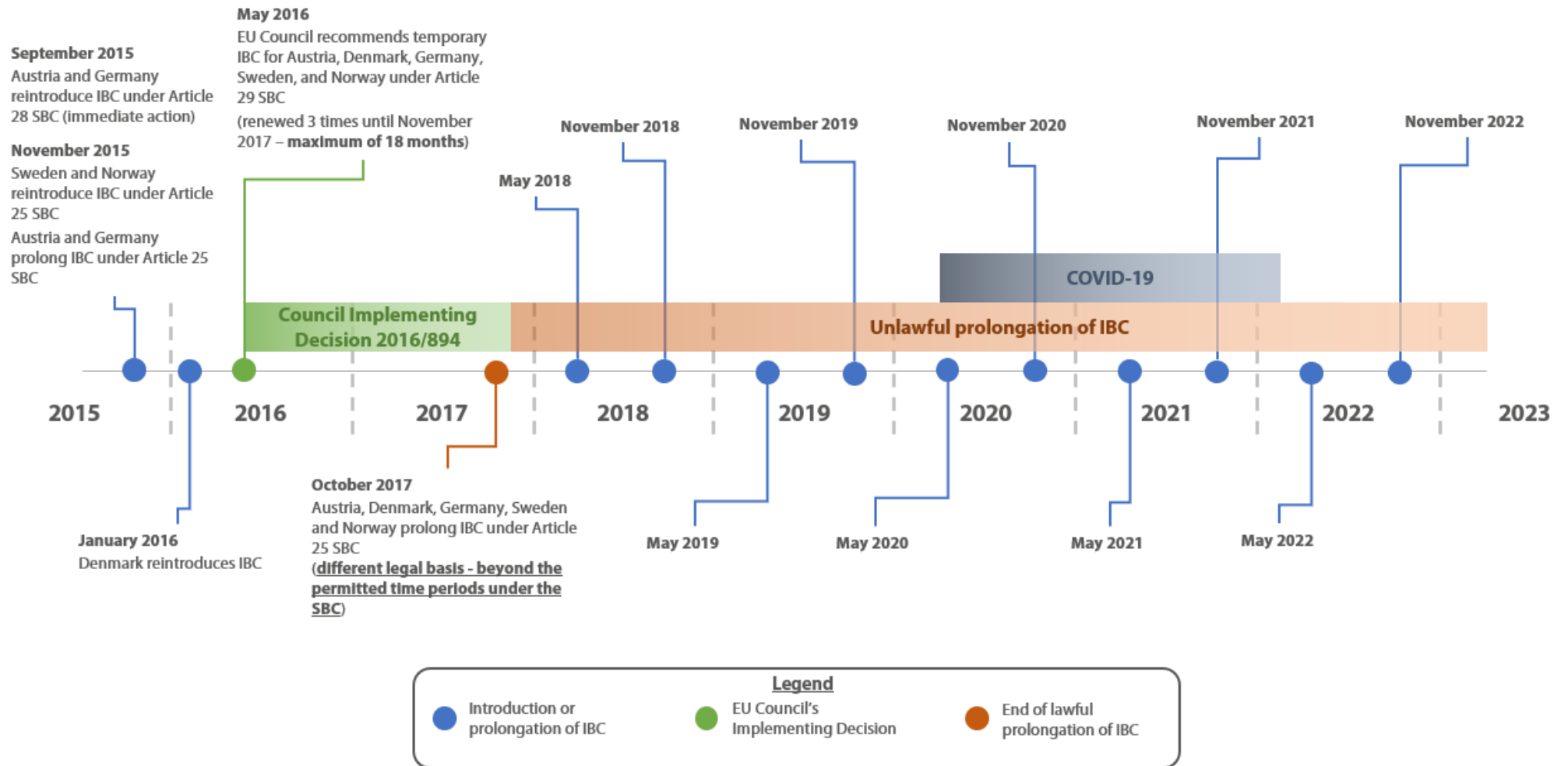
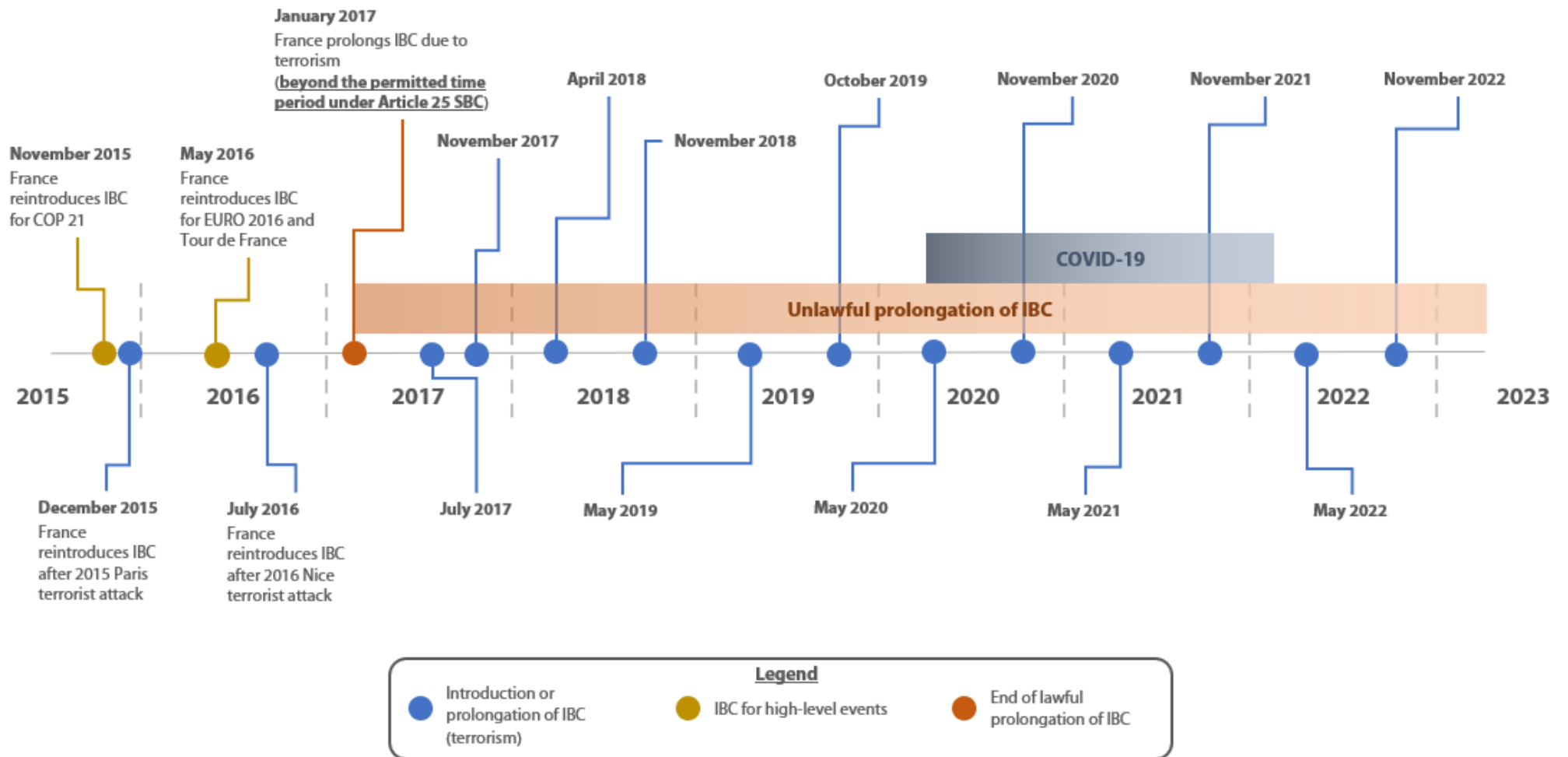


Figure 3: Reintroduction of internal border controls (IBC) by France (Nov 2015–Mar 2023)



2.2. Assessing the lawfulness of reintroduced and prolonged internal border controls

Annex 1 of this Study provides a detailed overview of the latest Member States' notifications. A key finding which remains unanswered in all the notifications is **why do these Member states consider 'border controls' to be effective to respond to all the said phenomena at all.** The failure to lift internal border controls translates into a lack of meaningful evidence and objective data on the actual scope of the issues at stake, with **no sound claim regarding the reached or expected impacts, and why some of them actually constitute 'serious threats to public policy and security' – i.e. asylum seekers' intra-EU mobility.** The country by country overview also shows that while more efforts have been incrementally made to provide further details when compared to the those issued in 2016²⁷, **there is still a noticeable shortage of evidence about the actual reasons for reintroducing internal borders controls and their effects in the latest notifications**²⁸.

The necessity, adequacy and proportionality of these measures remain unproven in light of the phenomenon that they are sought to specifically address. This has been acknowledged by the European Commission Staff Working Document (Impact Assessment Report) accompanying the 2021 Proposal for reforming the Schengen Borders Code²⁹. According to the Commission the relevant Member States are **misusing 'internal border controls' as 'permanent precautionary measures' and they are applied against an 'abstract threat'** and 'as such are often disproportionate and inadequate to address the threats that they are supposed to tackle'.

A similar finding has been underlined by the European Parliament. In its 2018 Annual Report on the Functioning of the Schengen area, the Parliament concluded that the reintroduction of **internal border controls was rather linked to 'a perception of threats to public policy and internal security related to movement of people and terrorism, the numbers of persons seeking international protection and irregular migrants arriving rather than sound evidence of the actual existence of a serious threat or the actual number of those arriving'**³⁰ (Emphasis added). The European Parliament also noticed these Member States' malpractice of 'artificially changing the

²⁷ Guild et al. (2016), 'Internal border controls in the Schengen area: Is Schengen crisis-proof?'

²⁸ When reintroducing or prolonging internal border controls, *as a last resort*, under Articles 25 and 27 SBC, Member States are required to demonstrate 'the extent to which such measures are likely to adequately remedy the threat to public policy or internal security' and the proportionality of these measures (Article 26 SBC). They also must take into account (a) the likely impact of any threats to their public policy or internal security and (b) the likely impact of such a measure on free movement of persons within the area without internal border control.

²⁹ European Commission, Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. SWD/2021/462, 14.12.2021.

³⁰ European Parliament, European Parliament Resolution of 30 May 2018 on the annual report on the functioning of the Schengen area (2017/2256(INI)). 30 May 2018.

legal basis for reintroducing internal border controls beyond the SBC maximum period under the same factual circumstances (Paragraph 10).

In this and subsequent Reports on Schengen, such as those issued in 2021³¹, the Parliament has consistently underlined that many of the prolongations of internal border controls since 2015 have **not been 'sufficiently substantiated and are not in line with the rules pertaining to their extension, necessity or proportionality, and are therefore unlawful'** (Paragraph 2).

The above-mentioned Commission 2021 Staff Working Document continued by emphasising how the last seven years have witnessed 'persistent border checks' and unilateral decisions by these six Member States which have been 'repeatedly prolonged despite the evolution of the situation...' the fact that 'the relevant circumstances have changed'³². **The Commission also questions the effectiveness of 'border controls' to respond to the alleged threats by relevant Ministries**³³, and refers to a 'perceived unsatisfactory level of security due to cross-border crime and terrorism'. Against that background, the Staff Working Document states that according to the findings from the SEMM³⁴, 'it is confirmed that already now there are no major deficiencies in the management of the external borders.'³⁵ This reading seems to correspond with EU official statistics included in Annex 2 of this Study which indicate that the scale of unauthorised or irregular entries through EU external borders is in fact estimated to be between approx. 0.05 and 0.7% of all external border crossings. The Commission expresses in Annex 7 of the Impact Assessment (titled 'Facts on the Evolution of Threats') that:

Some Member States *put the bar very low* when it comes to the definition of what can constitute a threat justifying the reintroduction of border checks. For instance, *Austria* is of the opinion that

³¹ European Parliament, Annual Report on the functioning of the Schengen area European Parliament resolution of 8 July 2021 on the Annual Report on the Functioning of the Schengen area (2019/2196(INI)) (2022/C 99/16). OJ C 99/158. 1.3.2022.

³² Ibid., p. 16.

³³ Accordingly, the Staff Working Document argues that 'the data concerning migration and terrorist attacks as well as the role of border checks in containing Covid-19 demonstrate that border checks are either not justified anymore (in view of the situation at the external borders as concerns the migratory pressure) or are not the most efficient in addressing the identified threats (terrorism, pandemic).', page 37.

³⁴ European Commission, Report from the Commission to the Council and the European Parliament on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to Article 22 of Council Regulation (EU) No 1053/2013. First Multiannual Evaluation Programme (2015-2019). SWD(2020) 327. COM(2020) 779 final. 25.11.2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0779&from=EN>

³⁵ Pages 32 and 112 of the Staff Working Document. In page 112 the Commission quotes the SEMM results by saying that 'Based on the 42 evaluations carried out in relation to external border management, it can be concluded that Member States are to a large extent adequately implementing the Schengen Borders Code and managing external borders in line with the acquis. Decisive progress has also been made to harmonise Member States' strategic approaches towards external border management by the gradual implementation of an integrated border management system. While serious deficiencies were identified in four Member States, those countries swiftly took the necessary measures to address the most important deficiencies. Today, no Member State has serious deficiencies in this area, but specific challenges remain in a few countries that still need to be promptly addressed'.

since the 2015/2016 crisis, the Schengen area does not allow for attaining the objectives set out in Article 3 TEU anymore (Emphasis added)³⁶.

2.2.1. Public Health

Important issues were identified in relation to the **public health grounds**. A previous European Parliament study questioned the legality and proportionality of the internal border controls introduced by Member States to prevent the spread of the Covid-19 pandemic³⁷. The study found that Member States made expansionist use of the notions of public policy and internal security as grounds to justify the reintroduction of border controls and travel restrictions. None of their relevant notifications explained how the Covid-19 pandemic was considered a serious threat to their public policy or internal security. **Most EU Member States' ministries blurred the notions of 'public policy and public security' with that of 'public health', and introduced far-reaching mobility restrictions and travel bans on a mere suspicion and without an individual case-by-case assessment of the scientific evidence.** Member States also failed to meet an *incremental burden of proof* to justify and regularly reassess the proportionality of any free movement restrictions in the name of Covid-19.

The European Parliament reached similar conclusions in a resolution on the 'Situation in the Schengen area following the Covid-19 outbreak'³⁸. It pointed out that 'Member States have provided *little justification* in their formal notifications under the Schengen Borders Code as to how border control is an appropriate means to limit the spread of Covid-19' (Emphasis added). It recalled that the terminology in the SBC is 'unequivocal': **'control at internal borders is to be the exception, a measure of last resort, based on objective criteria, likely to adequately remedy the serious threat to public policy or internal security, strictly necessary and proportionate, with a strictly limited scope and for a strictly period of time'**. The Parliament further noted that **'the Code does not – and the Convention implementing the Schengen Agreement did not – mention public health as a ground for the reintroduction of internal border controls'**³⁹.

Similarly, in a 2022 Special Report⁴⁰, the European Court of Auditors (ECA) found that, in the 150 notifications issued between March 2020 and June 2021, **Member States 'did not provide sufficient**

³⁶ Page 110.

³⁷ S. Carrera and N.C. Luk (2020), In the Name of Covid-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU. <https://www.ceps.eu/ceps-publications/in-the-name-of-covid-19/>

³⁸ European Parliament, Situation in the Schengen area following the Covid-19 outbreak: European Parliament resolution of 19 June 2020 on the situation in the Schengen area following the Covid-19 outbreak, 2020/2640(RSP). https://www.europarl.europa.eu/doceo/document/TA-9-2020-0175_EN.pdf

³⁹ In this context, the Parliament called for 'a Recovery Plan for Schengen, including the ways and means to return to a fully functioning Schengen area without internal border control and contingency plans in the event of a potential second peak, as quickly as possible, in order to prevent temporary internal border controls from becoming semi-permanent in the medium term'. It also urged the Commission 'to exercise appropriate scrutiny (...), to remind Member States of their legal obligations and to adopt opinions; (...) to make use of its prerogatives to request additional information from Member States; (...) to enhance its reporting to Parliament on how it exercises its prerogatives under the Treaties'. The Parliament also expressed regret over the fact that 'the Commission, since 2015, has not published the annual report on the functioning of the area without internal border controls, something it is obliged to under the Schengen Borders Code'.

⁴⁰ European Court of Auditors (2022), Special Report: Free Movement in the EU during the Covid-19 pandemic: Limited scrutiny of internal border controls, and uncoordinated actions by Member States. https://www.eca.europa.eu/lists/ecadocuments/sr22_13/sr_free-movement-phase-i_en.pdf

evidence to demonstrate that the border controls were indeed a measure of last resort, or that they were proportionate and limited in duration' (Emphasis added). Moreover, Member States 'did not always notify the Commission of new border controls, or submit the compulsory ex post reports assessing, among other aspects, the effectiveness and proportionality of their controls at internal borders'. A similar finding was reached by the ECA when assessing Member States notification as from 2020 dealing with 'migration' and 'security', which in ECA's view were equally insufficient for a meaningful proportionality check by the Commission. A review of all Member States' notifications by ECA concluded that:

Our review shows that all notifications *did not provide sufficient evidence* (backed by comprehensive statistical data and comparative analysis of various alternatives to border controls) to demonstrate that the *border controls were indeed a last resort* (Paragraph 37). (Emphasis added).

The World Health Organization (WHO) confirmed **the limited effectiveness of travel bans and border controls to prevent the spread of epidemiological diseases**. For example, in February 2020, WHO stated that '[t]ravel measures that significantly interfere with international traffic may [...] be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures'; these measures, however, 'must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves'⁴¹. The Commission quoted these excerpts and other public statements by WHO officials in the Impact Assessment Report accompanying the proposed amendments to the SBC⁴². This is puzzling because as this Study examines in *Section 6* below, the 2021 SBC proposal would introduce 'public health' ('the existence in one or more third countries of an infectious disease with infective potential') as an explicit ground for the reintroduction of internal border control by Member States under Article 25 SBC.

2.2.2. 'Migration' and Intra-EU Mobility by Asylum Seekers

Intra-EU mobility of asylum seekers is a common ground used by all Member States who have reintroduced border controls since 2015/2016. The alleged numbers of onward mobility of asylum seekers in Austria – which according to the latest Austrian notification correspond with about 56 000 asylum applications between January and August 2022 - are even used by other ministries as their own justification to keep internal border checks. **These are generally and uncritically framed as 'threats to public policy and national security' based on dubious grounds.** While the geographical origin or route of these movements might change across the notifications (the Western Balkans route, the Central Mediterranean Sea, the Belarusian border, etc.), **this is not evidence of the 'novelty' of the same identified phenomenon.** It might signal their

⁴¹ WHO, Updated WHO recommendations for international traffic in relation to Covid-19 outbreak. 29 February 2020. <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>

⁴² European Commission, Commission Staff Working Document, Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, SWD(2021) 462 final, Strasbourg, 14 December 2021.

'renewed' character but clearly **not the existence of new and distinct circumstances and events as required by the Luxembourg Court case-law** (See Section 3.3. below).

Migration-related arguments are rarely presented as the sole or primary justification in the Member States' notifications. In some cases **they are artificially linked – oftentimes incoherently and without a convincing evidence base – to other phenomena such as terrorism and organised crimes**, human trafficking, or even arms trafficking. Denmark constitutes a case in point, for instance, by explicitly linking what they call 'migration routes' to the *possible* arrival of 'radicalised individuals' and terrorist attacks (See Annex 1). **There is no independent and verifiable evidence provided by the Danish authorities to substantiate such far-reaching and paranoid argument.**

In this respect the Commission has argued on page 111 of the 2021 Impact Assessment that 'The available data on migration trends demonstrate that, as of 2018, migratory flows have returned to the levels before 2015... the claims of some Member States that the data show that migratory flows are currently getting back to the levels before the pandemic, cannot be accepted.' As previously argued, the movement of persons as a ground for reintroducing internal border controls must have a much more substantiated content than mere unverified or generalised numbers of unauthorised movements⁴³. Furthermore, **the Member States' 'secondary movements' argument neglects that a substantial number of these persons are in fact asylum seekers and refugees who have a legitimate right to look for protection elsewhere inside the EU.** Annex 2 of this Study shows that a significant number of third-country nationals entering the Schengen area apply for asylum and are in fact granted international protection – including refugee, subsidiary and/or humanitarian protection – either in first instance (approx. 40.7% in 2020 and 38.5% in 2021) or on appeal (approx. 34.8% of the total decisions on appeal). Furthermore, asylum seekers face too many barriers to have access to asylum procedures, move freely inside the EU and seek effective remedies in case of negative asylum decisions.

The nexus creatively drawn by these Ministries between 'asylum' and 'criminality' runs contrary to the prohibition to criminalise or penalise asylum seekers in internal refugee law as enshrined in Article 31 of the UN Geneva Convention, which is in turn envisaged in Article 14.6 of the 2011 EU Qualifications Directive⁴⁴. This non-criminalisation obligation has been interpreted by UNHCR and academia as an emerging general principle of international law not requiring the person concerned to come *directly* from the country of persecution, but as including situations when the person transits – often irregularly - through another country/ies⁴⁵. In light of this, another issue that

⁴³ Guild et al. (2016), 'Internal border controls in the Schengen area: Is Schengen crisis-proof?'

⁴⁴ European Parliament/Council of the EU, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). OJ L 337/9. 20.11.2011.

⁴⁵ According to Costello and Ioffe, 'article 31 cannot be considered to require a person to seek international protection at the first effective opportunity. As such, it is evident that the provision does not provide a basis for safe third country practices. Indeed, to the contrary, it is based on the realization that refugees often transit through a number of countries before they find protection. It follows that an individualised, subjective approach, with consideration to the reality of flight and individual circumstances, ought to be applied to the condition of directness.' Refer to C. Costello

none of the relevant Member States address satisfactorily in their notifications is **how their internal border controls are at all compatible with this duty, and more generally the right to asylum stipulated in the legally binding EU Charter of Fundamental Rights.**

As has been proved in previous studies⁴⁶, irrespective of the EU Dublin III Regulation rule according to which the EU Member State of first unauthorised or irregular entry or asylum should be responsible for assessing the asylum application, **there exist solid legitimate grounds why exceptions to this rule must be allowed by EU Member States.** These include for instance cases where there is proof of structural deficiencies or failures in national asylum systems; as well as situations where there is a proven individual risk of inhuman or degrading treatment by exposing the person to destitution or social exclusion and lack of reception conditions in the receiving Member State. Therefore, **their intra-EU mobility should not transform them into 'irregular immigrants' or 'secondary movements'.**

Another often quoted ground by relevant ministries relates to 'terrorism'. The crux of the matter when examining the proportionality test when ministries make this preventive and risk-based claim is **the need for them to provide accurate evidence – not just based on a 'risk or threat assessment' – on how the reintroduction of borders** actually contributes to dismantling terrorism and terrorist networks⁴⁷. The Commission seems to be widely unconvinced by these arguments. It has questioned the *effectiveness* of border controls to respond to terrorism by saying that '

While the Paris attack was committed by an organised group operating from another Member State, the vast majority of subsequent attacks have been committed by radicalised individuals *who were residing in the territory of the Member State concerned*. It is also striking that in two cases where the culprit crossed the border directly before or after the attack, the borders crossed were at that moment subject to reintroduced border checks that, however, *did not lead to any arrest*⁴⁸. (Emphasis added).

It seems that **Member States continue to nurture artificial and fears-based links between intra-EU mobility of asylum seekers and refugees and 'threats'** as the basis to circumvent their responsibility to comply with the well-established time limits under the SBC. Nonetheless, **their reference to 'terrorist threats' – in some cases dating back several years – would also be insufficient to justify the need for internal border controls.** The relevant Member States making

and Y. Loffe (2021), Non-penalisation and Non-criminalisation, in C. Costello, M. Foster and J. McAdam (eds), The Oxford Handbook of International Refugee Law, Oxford University Press. See also C. Costello (2017), Legal and Protection Policy Research Series: Article 31 of the 1951 Convention Relating to the Status of Refugees. UNHCR. <https://www.unhcr.org/protection/globalconsult/59afed607/34-article-31-1951-convention-relating-status-refugees-dr-cathryn-costello.html>

⁴⁶ S. Carrera, M. Stefan, R. Cortinovis and N. C. Luk (2019), 'When mobility is not a choice: Problematising asylum seekers' secondary movements and their criminalisation in the EU'. CEPS Paper in Liberty and Security Series, Brussels. <https://www.ceps.eu/ceps-publications/when-mobility-is-not-a-choice/>

⁴⁷ Guild et al. (2016), 'Internal border controls in the Schengen area: Is Schengen crisis-proof'.

⁴⁸ The IA adds here that 'The perpetrator of the Berlin attack in 2016 managed to cross the DE/FR border despite reintroduced border checks, before being shot in Italy. Similarly, the perpetrator of the Nice attack in 2020 managed to cross the IT/FR border, without being detected.'

use of that argument should be expected to have identified alternative measures to counter these phenomena without resorting to limiting the free movement of persons.

Member States are only required to submit a report after they have lifted internal border controls⁴⁹. Without any significant evidence in this regard for the group of Member States in question, **the never-ending prolongation of internal border controls constitutes now irrefutable proof that the Member States have not achieved the desired objectives with these measures, which are supposed to be temporary and used as a last resort.** This is even clearer considering that Member States have retained internal border controls far beyond the lawful time limits prescribed by the SBC. Hence, instead of justifying the need for continued internal border controls, **Member States are rather indirectly helping to prove the consensus that internal border controls are an unsuited and ineffective response to the identified 'issues'.**

Similar to the findings from previous European Parliament Studies⁵⁰, it must be noted that, in most cases, **the introduced border controls have continued not to affect the entire or whole land, air and – where existent – sea borders** of the relevant Member States. They have not either consisted of permanent checks on all persons crossing the said borders. However, the fact that **some Member States argue that the internal border controls are not 'systematic' in scope, does not mean that they are in fact systematic in nature and essence.** As a way of illustration, border control in Sweden is limited to the Öresund Bridge, which connects Sweden to Denmark, and consists of spot checks 'unless there is a reason for a more thorough and frequent control'. Similarly, Norway only carries out border checks on the ferry connections to the Schengen area, while it prefers intensified police checks and bilateral cooperation at the border with Sweden.

2.2.3. The War in Ukraine

Following the Russian invasion of Ukraine, all six Member States with internal border controls have also cited the conflict and its consequences as grounds for the reintroduction of internal border controls. Specifically, Denmark and Sweden have indicated Russian citizens' fleeing to avoid conscription as a threat to public policy and internal security (See Annex 1). This is problematic as third-country nationals fleeing for political reasons from their country – and who risk persecution if returned – would likely qualify for international protection in the EU. **Selective internal border controls towards all Russian citizens is also very difficult to relate with the absolute prohibition of discrimination on the basis of national or ethnic origin.**

⁴⁹ This is mentioned by the 2021 Commission Staff Working Document in page 21 which states that 'In general, data both on the intended positive effects of reintroduced border controls as well as the negative effects (also of the long-lasting abstract border checks in place for several years) are difficult to come by. One of the reasons for this lack of data is that Member States are obliged to report on the effects and side-effects of their border controls only once the checks have been lifted again (Article 33 SBC). Therefore, the six Member States which continuously prolonged the checks over the past five years have not yet had to report on the impact of the border controls.'

⁵⁰ Guild et al. (2016), 'Internal border controls in the Schengen area: Is Schengen crisis-proof'.

These claims appear to be disingenuous. The Commission and Council decided not to issue a blanket 'travel ban' on Russian nationals – as some Member States were requesting⁵¹ – but it instead suspended the EU Visa Facilitation Agreement with Russia⁵². The EU High Representative for Foreign Affairs, Josep Borell Fontelles stated, this decision was made so as not to cut off 'those Russians who are against the war in Ukraine'⁵³. The Commission recognises that some Russian nationals might have to travel to the EU for legitimate and essential purposes, especially family members of EU citizens, journalists, dissidents and civil society representatives⁵⁴. At the same time, the suspension of the agreement gives consulates the 'discretion to perform stricter assessments and scrutiny over lodge applications' and 'could lead to visa refusal as well as to the revocation of existing valid visas'⁵⁵.

It is thus unclear why the entry of Russian nationals could be considered *per se* a 'threat' to Member States' security and would warrant the reintroduction of internal border control. Danish and Swedish authorities should therefore be asked to legitimate and substantiate further their position on this matter.

Furthermore, several Member States mentioned the high numbers of persons displaced from Ukraine as an additional reason for internal border control and stronger limits to 'irregular' entries. Both Austria and Germany express concern for the high pressure on their basic care system and their reception facilities (See Annex 1). Austria, in particular, talks about 'the double burden in terms of admission of displaced persons from Ukraine'. Germany, instead, refers to the 'growing strain' on reception facilities due to the arrival of displaced persons from Ukraine and 'the influx of refugees recognised by other Schengen countries', as well as the impact of the Ukrainian conflict on German society, economy and infrastructure.

These statements run directly contrary to the two governments' legal commitments under Council Decision 2022/282 to effectively deliver the EU Temporary Protection Directive (TPD) standards and fully ensure a 'no borders' policy to Ukrainian refugees escaping the war⁵⁶. In

⁵¹ The 'travel ban' on Russian nationals was requested by the Baltics (Estonia, Latvia, and Lithuania), Finland, and Czechia. See J. Treeck, 'EU set to suspend visa facilitation agreement with Russia: Report', POLITICO, 28 August 2022. <https://www.politico.eu/article/eu-set-to-suspend-visa-facilitation-agreement-with-russia-report/>

⁵² Council of the EU, Council Decision on the suspension in whole of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation. 12039/22. 6 September 2022. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_12039_2022_INIT&from=EN

⁵³ New York Times, 'The European Union moves to restrict visas to Russians, but does not ban them'. 31 August 2022. <https://www.nytimes.com/2022/08/31/world/europe/eu-russia-visas.html#:~:text=The%20European%20Union%20moves%20to%20restrict%20visas%20to,in%20Finland%2C%20on%20that%20country%E2%80%99s%20border%20with%20Russia>

⁵⁴ European Commission, Commission presents guidelines on stricter visa processing for Russian citizens. 9 September 2022. https://home-affairs.ec.europa.eu/news/commission-presents-guidelines-stricter-visa-processing-russian-citizens-2022-09-09_en

⁵⁵ Ibid.

⁵⁶ Council of the EU, Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection. OJ L 71/1. 4.3.2022.

both cases, based on what it is clearly stated in their respective notifications, the real challenge seems to lie with the **national ministries' unwillingness to ensure adequate national reception facilities for asylum seekers and refugees** – which also contradicts their obligations under the **EU Reception Conditions Directive⁵⁷**, which **provide an official recognition by the relevant governments justifying EU infringement proceedings**.

The analysis of the notifications reveals that **Member States have been relying on the same grounds – 'renewed grounds' – since they first reintroduced internal border controls under Articles 25 and 27 SBC**. In the cases of Austria, Denmark, Germany, Norway and Sweden, the notifications issued after the expiry of the Council's Implementing Decision of May 2017 often include the same wording **to describe essentially the same 'threats'**. France – who has always relied on Article 25 and not on the Council's Implementing Decision – has also used the same grounds – mostly terrorism – with some minor adjustments to fit the specific circumstances of the time of the notifications and **give a false impression of 'novelty'**.

Only the latest notifications (October/November 2022 and some from April 2022) show some visible – yet not substantially relevant – differences proving the required 'novelty' under Article 25 SBC which can be attributed to the CJEU's most recent judgments (See Annex 1). Even in these cases, however, **there is a lack of objective evidence to prove that the identified threats to public policy and internal security are in fact a 'threat' and that these are 'new'**, as the Member States continue to maintain. A majority of these phenomena are indeed just 'renewed' and thus the adopted internal border controls have exceeded the allowed time limits set in the SBC.

2.3. Luxembourg Court Standards

The analysis of Member States' notifications shows an increasing awareness, and some attempts to adapt their arguments and justifications, in light of the recent ruling by the Court of Justice of the EU (CJEU) in Joined Cases C-368/20 and C-369/20, *NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, referred to from here on as *NW case*, of 26 April 2022⁵⁸.

The main applicant in this case was subject to an internal border control check and was asked to identify himself through the provision of a passport when attempting to enter Austria from Slovenia by car in a couple of instances. When informed by the Austrian police authorities that this constituted a formal 'internal border control' and not a police identity check, **he refused to provide the requested travel documents as in his view this was incompatible with the Schengen internal border-free rules and his EU fundamental right to free movement**. NW was subject to

⁵⁷ European Parliament/Council of the EU. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). OJ L 180/96. 29.6.2013.

⁵⁸ CJEU, 26 April 2022, Joined Cases C-368/20 and C-369/20, *NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*. N

an administrative fine of EUR 34 for not being in possession of a valid travel document while attempting to enter Austrian territory.

The border controls in these proceedings fell within the scope of the reintroduction of internal border checks with Hungary and Slovenia by the Austrian authorities since September 2015 studied in *Section 2.1.* of this Study above⁵⁹. The Luxembourg Court was asked to determine the conformity of the Austrian policy with EU law. The three key issues at stake were: First, the extent to which a 'fresh assessment' of a previously existing 'threat' would be sufficient to enable the fresh application of Article 25 SBC deadlines, or whether it would be instead necessary 'a serious and inherently new threat' for the time period of 6 months envisaged in that provision to apply; Second, whether 'the maintenance of law and order and the safeguarding of internal security' under Article 72 TFEU allowed Member States to derogate EU free movement and not comply with EU Schengen rules.

In light of the **express wording, context and objectives** laid down in the SBC, the Court concluded that **any exceptions to free movement must be interpreted strictly so as not to compromise the very principle that there are to be no internal border controls in the EU** (Paragraphs 64 and 66). If a 'mere reappraisal' of the same 'threat' would suffice to trigger Article 25 SBC procedures the legislature would have so stated that expressly inside the Code (Paragraph 68). It would also render 'pointless' the distinction between Articles 25 and 29 SBC.

Instead, the Court underlined, the EU legislator considered that a period of **six months** was sufficient for the relevant Member State to adopt the necessary measures. In this way, **it refused to accept the Austrian and Danish governments' arguments during the proceedings according to which a 'fresh assessment of the threat' – carried out several months after the preceding assessment and finding that a serious threat to public policy or internal security persists – should be enough to justify a refreshed application of Article 25 SBC.**

The CJEU concluded that **Article 25 SBC period could be only reapplied 'only where the Member State concerned is able to demonstrate the existence of a new – and distinct – serious threat affecting its public policy and internal security'** (Paragraph 79). **The circumstances and events should in such a manner be 'distinct from the threat initially identified'** at times of methodologically determining whether it is the same or a new 'threat'⁶⁰. Therefore, as the Austrian authorities had not demonstrated the existence of a 'new threat', the prolongation of internal border controls, and the penalty mechanism, were unlawful and incompatible with EU law⁶¹.

⁵⁹ During the two months the border controls were founded in Article 25 SBC, and since May 2016 on four consecutive Council Recommendations based on Article 29 SBC, which expired in November 2017. Since October 2017, through consecutive national Decrees, the Austrian authorities prolonged them on a six-months renewal basis based on Articles 25 and 27 SBC until the present day, going beyond the time periods foreseen in the SBC.

⁶⁰ Paragraph 81 of the ruling.

⁶¹ In doing so the Court disagreed with the position expressed by the Advocate General (AG) who took a close view following the *illogical* positions and arguments put forward by the Austrian, Danish, German and French Government lawyers before the Court. The AG expressed the questionable view that a 'renewed threat' would still allow Member States to freshly apply Article 25 SCB 6 month-period subject to a condition of 'enhanced proportionality' considering

As regards the scope of **Article 72 TFEU** as a ground for Member States to derogate the SBC application, the CJEU held that ‘the mere fact that a national measure...internal border controls, has been taken for the purpose of protecting national security or public order **cannot render EU law inapplicable and exempt the Member States from their obligation to comply with EU law**’ (refer to Case C-742/19, 15 July 2021).

The Court added that Article 72 TFEU applies in a list of exceptional and clearly envisaged fields in specific EU Treaties provisions which must be interpreted strictly⁶². It highlighted that Article 72 TFEU does not provide Member States the power to depart from provisions envisaged in EU law ‘on the basis of no more than reliance on the responsibilities incumbent in EU Member States with regard to the maintenance of national security and public order and the safeguarding of internal security’. It concluded that **Article 72 does not allow Member States to reintroduce temporarily internal border controls beyond the time limits enshrined in the SBC.**

Importantly, the judgment confirms that the substance and procedures envisaged in Article 25 SBC form part of a **‘comprehensive framework’** which governs the ways in which Member States exercise their responsibilities and which reflects **‘the fundamental importance that the free movement of persons possesses among the objectives of the European Union’** (Paragraph 89). Here the Court made reference to Article 3.2 TEU and argued that such a ‘framework’ seeks to, and in fact it does, ‘strike a fair balance’ between various interests at issue, i.e. between the freedom of movement on the one hand, and, on the other, migration, asylum, border and law enforcement policies in the wider EU area of Freedom, Security and Justice (AFSJ)⁶³.

It is crucial to highlight, however, that **Article 3.2. TEU is preceded by, and subordinated to, Article 2 TEU** which unequivocally subjects all AFSJ cooperation to EU Member States, EU institutions and agencies to the **Union’s founding values**, including among others, the rule of law, democracy and *with respect of* fundamental rights (Article 67 TFEU) as enshrined in the legally binding EU Charter of Fundamental Rights. **The CJEU missed that it is precisely on the basis of this ‘balance metaphor’⁶⁴ between free movement and ‘security’⁶⁵ that EU principles, including the obligation to ensure the absence of any controls of persons when crossing internal**

the effectiveness of the initial measure. The AG Opinion uncritically accepted that the same or a ‘renewed’ ground would constitute a legitimate basis for prolonging internal border controls, which as the Luxembourg Court has concluded directly collides with the express wording, context and objectives laid down by the EU legislator in the SBC and the Treaties.

⁶² It stated in Paragraph 86 that ‘the only articles in which the FEU Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Articles 36, 45, 52, 65, 72, 346 and 347’. The Court made here reference to the previous Case C-808/18 against Hungary (paragraphs 214 and 215).

⁶³ Article 3.2 TEU states that ‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured *in conjunction with* appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. (Emphasis added).’

⁶⁴ E. Guild, T. Balzacq and S. Carrera (2008), The Changing Dynamics of Security in an Enlarged Europe, CEPS Liberty and Security Series Research Paper No. 12, Brussels.

⁶⁵ Refer to the final results of the ELISE Project available at [Microsoft Word - ELISE final report v002.doc \(europa.eu\)](#)

borders – stipulated in Article 77.1 TFEU – is being fundamentally undermined by EU Member States' ministries such as the one in Austria.

As we have identified above, some of the Member States' notifications publicly released or supplemented after this judgment appear to be more detailed and lengthier than the ones issued beforehand. The typical grounds used by Member States are also expanded to '[provide] additional factual information and [elaborate] on the circumstances and events which give rise to a *new* serious threat to our public order and internal security'⁶⁶.

There is however an effort at 'repackaging' the information included in the notifications to suggest the existence of *new* grounds and conceal the 8-year-long dependency of Member States on the same exact grounds. The *circumstances and events* alluded to by the notifications are clearly not 'distinct from the threat initially identified'. Instead of proving the existence of *new* threats justifying the prolongation of internal border control beyond the SBC limits, these notifications reveal an **unsuccessful effort by the same Member States to try to legitimise the use of 'renewed' grounds through a 'fresh assessment' which according to the NW ruling are clearly incompatible with SBC legal standards.**

Crucially, **none of the relevant Member States properly justify how and why so-called secondary movements constitute a 'threat', for whom and in relation to what.** The use of 'migration' and asylum as a legitimate ground for derogating free movement has been recently rejected by the Court of Justice in its Case C-72/22 PPU, *M.A. v Lithuania* of 30 June 2022⁶⁷. This case dealt with the compatibility of a Lithuanian government law declaring 'martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens'. According to that law, irregularly staying third-country nationals would be deprived of the chance to have access to asylum procedures envisaged in Articles 6 and 7.1 of Directive 2013/32 and the right to seek asylum once in the country. They would be also placed in detention 'for the sole reason that they are staying illegally on the territory of that Member State'.

The Court first reminded the Lithuanian authorities that **any third-country national or stateless person has a right to apply for asylum, at its borders or transit zones, even if s/he is has entered or stayed irregularly in the country.** This, the CJEU held, corresponds with the general objective of Directive 2013/32, to ensure effective access to the procedure for being granted international protection. It added that the right to a procedure is one of the conditions to ensuring the *practical effectiveness* of the right to asylum enshrined in Article 18 of the EU Charter of Fundamental Rights. Therefore, as the national legislation at issue is incompatible with EU law as **it prevents *all* third-country nationals – not only those labelled as 'vulnerable' – from having effective access to these EU rights.**

⁶⁶ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Supplementary letter to the Member States, 8228/22, 16 May 2022. <https://data.consilium.europa.eu/doc/document/ST-8228-2022-ADD-1/en/pdf>

⁶⁷ CJEU, 30 June 2022, C-72/22, *M.A. v Valstybės sienos apsaugos tarnyba* (Lithuania).

Similar to the *NW* Case studied above, it seems that some EU Member States' Ministries of Interior are trying to wrongly **rely on 'threat to public order and national security' – and the so-called maintenance of public order – considerations laid down in Article 72 TFEU in a conscious attempt to instrumentally evade their legal responsibilities under EU law**. For the purposes of this Study, crucially, the Lithuanian lawyers argued that the existence of such a 'threat' was linked to 'the mass influx of migrants at its borders, arriving mainly from Belarus.' The Court rejected this argument as flawed and unsubstantiated.

The CJEU held that **'law and order' measures do not fall entirely outside the reach of EU law**. Similar to what it concluded in the *NW* Case, the Court re-stated that **only in specifically defined cases do the EU Treaties provide Member States the possibility to derogate from their obligations**. The EU Treaties don't have an 'inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law. The recognition of the existence of such an exception..., *might impair the binding nature of EU law and its uniform application*' (Emphasis added)⁶⁸. **It is indeed the uniform and consistent application of EU law by all EU Member States what is at stake**. The Court also added that **Article 72 TFEU must be interpreted strictly** and does not provide a general ground for Member States to depart from their responsibilities on the mere reference to its existence.

A key finding in this ruling for the purpose of this Study is that the Court concluded that 'a power to depart from the provisions of EU law based on no more than reliance on the responsibilities incumbent provides no justification' for Member States to depart from their obligations to deliver EU-level rights. Concretely, the CJEU held in paragraph 73 that:

...the Lithuanian Government has not specified **what effect such a measure would have on the maintenance of public order and the safeguarding of internal security** in the context of the emergency caused by the mass influx of migrants in question. (Emphasis added).

In this same case, when determining the lawfulness of the Lithuanian law provisions allowing the detention of irregularly present asylum seekers in the country, the Court held that **irregularity of stay does not provide a proportionate or valid reason to justify detention**. During the hearing before the Court the Lithuanian Government argued that 'in the exceptional context of the mass influx of aliens arriving from Belarus, the conduct of an individual in M.A.'s position constitutes a threat to public order and national security in the Republic of Lithuania' as well as a threat 'for public order and public security in other Member States of the European Union'⁶⁹.

The Court concluded that **'the illegal nature of presence' of an applicant of international protection cannot be accepted as a legitimate ground for Member States to argue for or demonstrate the existence of a 'sufficiently serious threat' to public policy and/or public order**⁷⁰. The existence of such a 'threat', according to the Court, should **not be based on**

⁶⁸ Paragraph 70 of the ruling.

⁶⁹ Paragraph 85.

⁷⁰ Paragraph 91. Paragraph 90 of the ruling emphasis that 'Accordingly, it cannot be accepted that such an applicant can, for the sole reason that he or she is staying illegally in a Member State, constitute a threat to national security or public order in that Member State, within the meaning of Article 8(3)(e) of Directive 2013/33'.

generalised assumptions or considerations, but rather on 'account of specific circumstances which demonstrate that he or she is dangerous, in addition to being illegally present.'

By doing so, the **Court delinked the administrative condition of irregularity with a biased generalised assumption of 'dangerousness' and 'threat-framing' of so-called onward movements by asylum seekers and refugees inside the Schengen area by EU Member States.** Therefore, the application of this ruling to **the migration and asylum-related arguments** put forward by the group of misbehaving EU Member States and their written notifications calling for the prolongation of internal border controls **should be overall dismissed as unfounded, illegitimate and contrary to EU law.**

3. EU EXTERNAL BORDER CONTROLS AND SURVEILLANCE

This section reviews evidence substantiating allegations and episodes of **fundamental rights violations and SBC systematic misapplication carried out by Member States' authorities and EU agencies while performing external border control and surveillance**. These include, among others, so-called pushbacks and pullbacks practices. While '*pushbacks*' are typically performed by the authorities or other non-state actors of a country of destination to prevent access to the Schengen territory and to an asylum procedure, '*pullbacks*' are undertaken by the authorities or agents of a third country (at the request of or in direct/indirect cooperation with the country of destination) to prevent individuals from leaving or approaching the border⁷¹.

In some specific circumstances, Member States' **refusal to access protection and an individualised assessment at EU external borders** has been accompanied by legislative measures, usually relying on '**state of emergency or public order**' or **crisis-led arguments**, that aim at enabling derogations of existing EU SBC standards and the right to asylum and curtailed key safeguards foreseen by EU asylum legislation, in particular access to effective remedies in the context of asylum procedures⁷².

Related to this, previous years have seen the proliferation of border fences or walls at the EU's external borders aimed at preventing third-country nationals and asylum seekers from entering the Schengen territory; and **arbitrarily expedited expulsions without due process and effective remedial guarantees for the victims have also been conducted**. This phenomenon grew significantly over 2015-2016 during the declared 'European refugee crisis'⁷³ and again in 2021,

⁷¹ Parliamentary Assembly of the Council of Europe, 2019, 'Pushback policies and practice in Council of Europe member States', Doc. 14909 08 June 2019, <https://pace.coe.int/pdf/36bbc67600625a34b5a6ee7b3659c78d869652b6e1bcd494715e3114cce277de/doc.%2014909.pdf> According to the Report (p. 10), 'the notion of 'pushback' may be applied broadly to cases of non-respect of human rights obligations related to refusal of entry into a country of persons seeking protection, the refoulement of those already within a territory, collective expulsion, obligations to carry out screenings, and other hostile action aimed to deny entry into European countries at land and sea borders'.

⁷² Refugee Support Aegean, 'Rights denied during Greek asylum procedure suspension', April 2020, https://rsaegaeon.org/wp-content/uploads/2020/05/RSA_LN_AsylumSuspension.pdf; European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, Brussels, 1.12.2021 COM(2021) 752 final, p. 14. ECRE, 'EU Eastern Borders: Belarus and Poland Enact Brutal Violence and Block Aid Workers, Lithuania Lifts State of Emergency', 14th January 2022, <https://ecre.org/eu-eastern-borders-belarus-and-poland-enact-brutal-violence-and-block-aid-workers-lithuania-lifts-state-of-emergency/>; A. Bielecka 'Poland Finally Lifts State of Emergency at Belarus Border', Human Rights Watch, July 6, 2022, <https://www.hrw.org/news/2022/07/06/poland-finally-lifts-state-emergency-belarus-border>; Minister of Interior Latvia, The state of emergency at the Latvia-Belarus border is extended until 10 May 2023, https://www.iem.gov.lv/en/article/state-emergency-latvia-belarus-border-extended-until-10-may-2023?utm_source=https%3A%2F%2Fwww.google.com%2F

⁷³ Carrera et al., 'The Future of the Schengen area: Latest Developments and Challenges in the Schengen Governance Framework since 2016', ch. 4.

following tensions along the eastern borders between EU Member States (e.g. Lithuania, Latvia and Poland) and the Belarus government⁷⁴.

Pushback, pullbacks, and other related practices that prevent access to the territory and, more broadly, that deny access to asylum and justice, constitute severe infringements of rule of law and fundamental rights standards under international and EU law, including **the prohibitions of *refoulement* and collective expulsions**, enshrined in Articles 18 and 19 of the EU Charter of Fundamental Rights, which are **absolute in nature** and therefore do not **accept any derogations or exceptions by states authorities and migration policymakers** in the name of emergencies or migration policies. In addition, pushbacks are often associated with excessive use of force that may result in violations of the right to integrity and protection from ill-treatment (Articles 3 and 4 of the EU Charter). In extreme circumstances, violent actions linked to pushbacks might even lead to a breach of the right to life (Article 2)⁷⁵.

Article 3 SBC clarifies that **EU border control and surveillance measures must be conducted without prejudice to refugee rights and other people requesting international protection**, in particular as regards the **principle of non-refoulement**. Article 4 of the same Code introduces the duty for national authorities and Frontex to act in full compliance with 'relevant international law', notably the 1951 Refugee Convention and its 1967 Protocol, obligations related to access to international protection⁷⁶.

3.1. Pushbacks and Pullbacks

While pushback practices have been amply documented at specific sections of the EU external borders for a long time, recent years have seen the emergence of a staggering amount of evidence showing the **widespread and, at times, systematic use of violent, informal expulsions and rejections of asylum seekers and undocumented third country nationals at the EU external borders**. Pushback episodes have been routinely reported at several sections of the EU external sea and land borders, including across the Western Balkans, and in the Eastern, Central and Western Mediterranean. This is in direct violation of EU Member States' obligations to ensure a **right to asylum and access to asylum procedures, the principle of non-refoulement and an individualised assessment in order to comply with the prohibition against collective**

⁷⁴ Euronews, 'Poland completes 186-kilometre border wall with Belarus after migration dispute', 07/07/2022, <https://www.euronews.com/2022/06/30/poland-completes-186-kilometre-border-wall-with-belarus-after-migration-dispute>; France24, 'Lithuania completes Belarus border fence', 29/08/2022, <https://www.france24.com/en/live-news/20220829-lithuania-completes-belarus-border-fence>

⁷⁵ FRA, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, 5 December 2016, <https://fra.europa.eu/en/publication/2016/scope-principle-non-refoulement-contemporary-border-management-evolving-areas-law>

⁷⁶ Regulation (EU) 2016/399 of The European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77/1, 23.3.2016, Art. 3-4.

expulsions which applies to every person irrespective of seeking asylum or not, their irregular status or whether they have been considered to enter EU Member States territory⁷⁷.

Back in 2019, the Parliamentary Assembly of the Council of Europe (PACE) adopted a Resolution citing several cases of pushbacks by EU Member States. The Resolution claimed that: ‘as **these practices are widespread, and in some countries systematic**, these ‘pushbacks’ can be considered as **part of national policies** rather than ‘incidental actions’. The Assembly expressed serious concerns about ‘reports and evidence of inhuman and degrading treatment of migrants by Member States and their agencies in the framework of these pushbacks’, through a range of actions that include intimidation, confiscating or destroying migrants’ belongings, the use of violence and depriving migrants of food and basic services⁷⁸.

Along the same lines, the Council of Europe Commissioner for Human Rights has denounced how in several Member States, **pushing back refugees, asylum seekers and immigrants is now an official policy, even formalised in domestic legislation**. In other states, despite denials by the national authorities, there is consistent and credible evidence of pushbacks being an **established or institutionalised practice**⁷⁹.

The FRA, in December 2020⁸⁰, issued a Report on fundamental rights’ compliance at the EU’s external land borders. At request of the EP, the Report pays specific attention to pushbacks and to fundamental rights violations in connection with these practices. The Report underlines how in recent years, **the number of fundamental rights violations reported in connection with border surveillance activities have increased significantly**. According to FRA, ‘the **regularity and seriousness** of alleged incidents constitute a serious fundamental rights concern’.

UNHCR and the International Organization for Migration (IOM) have on several occasions denounced illegal rejections of asylum seekers and refugees at the Schengen external borders and called on the EU and its Member States **to take urgent action to stop pushbacks, collective expulsions, and the use of violence against people on the move**⁸¹. United Nations (UN) human

⁷⁷ S. Carrera (2020), The Strasbourg court judgment ‘N.D. and N.T. v Spain’: a ‘carte blanche’ to push backs at EU external borders?, EUI RSCAS Working Paper, 2020/21, Florence; S. Carrera (2021), Walling off responsibility? The Pushbacks at the EU’s External Borders with Belarus, CEPS Policy Insights, Brussels.

⁷⁸ Parliamentary Assembly of the Council of Europe, ‘Pushback policies and practice in Council of Europe member States’, Resolution 2299 (2019), <https://pace.coe.int/pdf/a6955e47abc67f0dc172df6d1a874060dd0541c35ffb5e496e1cd54384f42b19/resolution%202299.pdf>

⁷⁹ Recommendation by the Council of Europe Commissioner for Human Rights, ‘Pushed beyond the limits Four areas for urgent action to end human rights violations at Europe’s borders’, April 2022, <https://rm.coe.int/pushed-beyond-the-limits-urgent-action-needed-to-end-human-rights-viol/1680a5a14d>

⁸⁰ FRA, ‘Migration: Fundamental rights issues at land borders’, 8 December 2020, p. 16, <https://fra.europa.eu/en/publication/2020/migration-fundamental-rights-issues-land-borders>

⁸¹ ‘IOM Alarmed over Reports of Pushbacks from Greece at EU Border with Turkey’, 11 June 2020, <https://www.iom.int/news/iom-alarmed-over-reports-pushbacks-greece-eu-border-turkey>; ‘IOM and UNHCR Urge Access to Migrants Stranded on Belarus Border’, 22 September 2021, <https://rovienna.iom.int/news/iom-and-unhcr-urge-access-migrants-stranded-belarus-border>; ‘News Comment: UNHCR warns of increasing violence and human

rights mechanisms and bodies, including the Special Rapporteur on the rights of migrants, have denounced fundamental rights violations linked to pushbacks. In a Report issued in 2021, the UN Special Rapporteur documented **a global pattern of routine human rights violations at international borders**, concluding that 'the practice of 'pushbacks' is widespread. He expressed the view that pushbacks manifest **an entrenched prejudice against migrants and demonstrate a denial of States' international obligations** to protect the human rights of migrants at international borders'⁸².

Non-governmental organisations have played a key role in documenting the unfolding and evolution of pushback practices at the external borders, including in remote and difficult to access areas. Civil society organisations in Croatia, Greece, Hungary and Spain have periodically published reports on pushback-related fundamental rights violations⁸³. The Border Violence Monitoring Networks has for instance created an extensive database of episodes of pushbacks and collective expulsions, showing how instances of **inhuman and degrading treatment or punishment are the norm** in the context of those activities⁸⁴.

The European Parliament has condemned 'pushbacks' as practices on several occasions, asking the Commission to 'condemn any use of violence' and to ensure the rule of law is respected across Member States when it comes to migration⁸⁵. Moreover, the Parliament has repeatedly underlined that EU external border control must be carried out in compliance with relevant international and EU law, including the EU Charter of Fundamental Rights. In its **2021 Annual Report on the Functioning of the Schengen area**, the Parliament expressed its 'deep concern... by the persistent and serious reports about violence and pushbacks at the external borders, including from one Member State to another and then to a non-EU country'⁸⁶. The Parliament called on both the

rights violations at European borders', 21 February 2022, <https://www.unhcr.org/news/briefing/2022/2/62137a284/news-comment-unhcr-warns-increasing-violence-human-rights-violations-european.html>

⁸² Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea', 12 May 2021, para. 101, <https://reliefweb.int/report/world/report-means-address-human-rights-impact-pushbacks-migrants-land-and-sea-report-special>

⁸³ See, among others, country reports produced in the framework of AIDA (Asylum Information Database): Country Report Spain, 2021 update, pp. 20-33, https://asylumineurope.org/wp-content/uploads/2022/04/AIDA-ES_2021update.pdf; Country Report: Greece, 2021 update, pp. 32-37, https://asylumineurope.org/wp-content/uploads/2022/05/AIDA-GR_2021update.pdf; Country Report: Poland, update 2021, pp. 19-25, https://asylumineurope.org/wp-content/uploads/2022/05/AIDA-PL_2021update.pdf; Country Report: Bulgaria, update 2021, pp. 21-22, https://asylumineurope.org/wp-content/uploads/2022/02/AIDA-BG_2021update.pdf; Country Report: Croatia, 2021 update 2021, pp. 24-32, https://asylumineurope.org/wp-content/uploads/2022/04/AIDA-HR_2021update.pdf

⁸⁴ The same source identified 'several typologies of torture and inhumane treatment' that are commonplace across the EU during pushbacks: these include excessive and disproportionate force, use of electric discharge weapons, forced undressing, threat of excessive force with firearms, inhumane treatment inside police vehicles and detention with no basic facilities. Border Violence Monitoring Network, 'Black Book of Pushbacks', December 2022, <https://borderviolence.eu/>

⁸⁵ Euronews, MEPs denounce fresh reports of migrant pushbacks at Greece-Turkey border, 16/06/2022, <https://www.euronews.com/my-europe/2022/06/16/meps-denounce-fresh-reports-of-migrant-pushbacks-at-greece-turkey-border>

⁸⁶ Paragraph 17.

Commission and relevant Member States to carry out **'effective, independent and prompt investigations** into any allegations of pushbacks and ill-treatment at the borders and to ensure that **deficiencies are immediately remedied'** (Emphasis added).

To insulate themselves from legal responsibility and liability for grave human rights violations which are inherent to the essence and rationale of pushback practices, including in an extraterritorial context, **some EU Member States have instrumentally experimented with new policy approaches which are predicated on international cooperation, and delegation of deterrence and containment tasks**, e.g. interceptions at sea, countering human smuggling activities and preventing individuals from leaving their territories⁸⁷.

In February 2017, Italy and Libya signed a 'Memorandum of Understanding on Cooperation on Development, Combatting Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security'. In this framework, **the Italian authorities agreed to provide support and financing for 'development programmes' in the regions affected by irregular immigration as well as technical and technological support to the Libyan authorities in charge of countering departures**, including actors presenting themselves as 'Libyan coast guards'.

Through these delegated containment measures, Italy has funded Libyan actors for **training and equipment for carrying out unlawful interceptions** of migrants and refugees departing from Libyan waters⁸⁸. **The EU has played an active role in designing and implementing this delegated containment strategy and supporting the Italian authorities. The European Commission services and the EU External Action Service (EEAS) have indirectly backed up these same priorities through EU funds**, including in the framework of the European Union Emergency Trust Fund for Stability and Addressing Root causes of Irregular Migration and Displaced Persons in Africa (EUTFA), specifically the 'Support to Integrated Border and Migration Management in Libya' (IBM) programme under the EUTFA's North of Africa window, and, later on, with the ensuing financial instrument for Neighbourhood, Development and International Cooperation (NDICI)⁸⁹.

The European Commission has declared that it had nothing to do with the extension of the **Libya SAR zone** and that it was Libya's own decision. However, interviews conducted for the purpose of this Study have said that that it was not only Libyan authorities' decision to extend their SAR zone,

⁸⁷ T. Gammeltoft-Hansen, J.C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', Colum. J. Transnat'l L. 53, no. 2 (2015): 235-84.

⁸⁸ Global Legal Action Network (GLAN), Legal action against Italy over coordination of Libyan Coast Guard pullbacks resulting in migrants, 2018, <https://www.glanlaw.org/single-post/2018/05/08/legal-action-against-italy-over-its-coordination-of-libyan-coast-guard-pull-backs-resulti>; A. Pijnenburg, 2018, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?', European Journal of Migration and Law, 20, pp. 396-426 https://brill.com/view/journals/emil/20/4/article-p396_3.xml?language=en

⁸⁹ This includes the deployment of €59 million project 'Support for Integrated Border and Migration Management in Libya (SIBMMIL)', implemented by the Italian interior ministry. More recently, the Commission has announced the launch of two new actions worth €10 million to support Libya's Maritime Rescue Coordination Centre and 'the training academy for border guards in Libya. See Statewatch, 'EU preparing new efforts to increase Libyan border controls', 7 February 2023, <https://www.statewatch.org/news/2023/february/eu-preparing-new-efforts-to-increase-libyan-border-controls/>

but that **the EU played a key role in this process**. Crucially, in 2017, the EU validated an Action Plan and co-funded a project supporting the Libyan authorities in 'defining and declaring a Libyan SAR Region' and setting up a fully fledged Maritime Rescue Coordination Centre (MRCC)⁹⁰. **The implementation of all these EU funding programmes and their practical impacts on the ground have been affected by a serious lack of any specific human rights monitoring measures ensuring independence, public transparency and democratic accountability.**

The EU's indirect support and aid have occurred despite the fact that **all the relevant EU actors – including those in DG Home Affairs and DG NEAR of the Commission, the EEAS and the Ambassadors to the Political and Security Committee (PSC) in the Council – have at all times known or being informed that the safety and human rights of those who have been returned to Libya could not be ensured at all** by civil society actors like Médecins Sans Frontières (MSF)⁹¹ or international organisations like UNHCR and IOM, which cannot be expected to realistically perform their roles⁹².

Asylum seekers intercepted at sea in Libyan or international waters have been **forcibly returned to Libyan territory where many face torture and inhumane/degrading treatment in Libyan detention camps, which qualify as international wrongful acts and crimes against humanity**. Between 2017 and January 2020, an estimated 40 000 people, including children, have been **unlawfully intercepted at sea and 'pulled back' to Libya**. This trend has been in parallel with the emergence of a pattern of privatised and delegated pushbacks carried out through the involvement of merchant vessels but with the agreement of Italian and Maltese authorities⁹³.

Back in May 2019, a Joint Communication from UN Human Rights Special Procedures to the Italian government on 15 May 2019 states that 'practices whereby countries of destination cooperate with another to prevent migrants and refugees from arriving have been characterised as 'pullbacks' and as violations of the principle of *non-refoulement*, which constitutes **an integral part of the absolute and non-derogable prohibition of torture and other ill-treatment** enshrined in Article 3 CAT and Articles 6 and 7 of ICCPR'.

⁹⁰ Action Fiche (2017). Support to Integrated border and migration management in Libya – First phase.

⁹¹ MSF (2022), Italy-Libya agreement: Five years of EU-sponsored abuse in Libya and the central Mediterranean. <https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean>

⁹² The EU continued funding this action – and adopted a second [Action Fiche T05-EUTF-NOA-LY-07](#) for phase two of the programme, despite the existence of overwhelming evidence provided by NGOs and UNHCR/IOM confirming that human rights and international obligations were impossible to be met once people were returned to the Libyan territories. Refer to Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme Submitted by Global Legal Action Network (GLAN), Association for Juridical Studies on Immigration (ASGI), and Italian Recreational and Cultural Association (ARCI), 2020, retrievable from <https://sciabacaoruka.asgi.it/wp-content/uploads/2020/04/GLAN-ASGI-ARCI-ECA-Libya-complaint-expert-opinion.pdf>

⁹³ Carrera et al., 2021, 'European Union Policies on Onward and Secondary Movements of Asylum-seekers and Refugees. A Critical Mapping of the EU's Migration Management Complex', IT FLOWS Report, p. 36, <https://www.ceps.eu/ceps-publications/european-union-policies-on-onward-and-secondary-movements-of-asylum-seekers-and-refugees/>

Despite the above, Commission President von der Leyen, sent a letter to the Heads of State and Governments on 20 March in which she ‘took stock’ of actions taken at the European Council meeting of 9 February 2023. The letter confirmed the European Commission’s priority **to continue reinforcing Libya search and rescue capacities**, and that ‘the Libyan coastguard will soon receive two new boats to carry out search and rescue operations at sea.’ On 6 February 2023, the Hungarian Commissioner for Neighbourhood and Enlargement Oliver Várhelyi participated in person in **the ‘handover ceremony’ in Italy of EU-financed interception boats to Libyan authorities**. Mr Antonio Tajani, currently Deputy Prime Minister and Foreign Affairs of Italy, and Ms Najla Mangoush, Minister of Foreign Affairs of Libya also participated in this handover ceremony⁹⁴.

This provides additional evidence and specific names of EU and Italian actors who persist in **unlawfully aiding and assisting international wrongful acts and crimes against humanity**. Following the publication of a Report by the **United Nations (UN) Independent Fact-Finding Mission on Libya** on 27 March 2023⁹⁵, UN investigator Chaloka Beyani confirmed that ‘that EU assistance to Libya’s migration department and the coastguard ‘has aided and abetted the commission of the crimes, including crimes against humanity.’ Paragraph 46 of the Report clearly states that:

Based on the substantial evidence and reports before it, the Mission has grounds to believe that *the European Union and its Member States, directly or indirectly, provided monetary and technical support and equipment, such as boats, to the Libyan Coast Guard and the Directorate for Combating Illegal Migration that was used in the context of interception and detention of migrant*. (Emphasis added).

According to the Washington Post, European Commission spokesman Peter Stano declared that ‘Not doing anything is not an answer. And our objective, our joint objective, is to help to improve the situation of the people stranded in Libya. Of course, there are incidents. There are issues which are a source of concern. We try to address them with the partners in Libya, with the international partners.’⁹⁶ **The Commission representative seems to miss the point that it is *not* a matter of**

⁹⁴ European Commission, Commissioner Olivér Várhelyi attends the handover ceremony of EU-financed Search and Rescue vessels to Libya, 6 February 2023, [Commissioner Olivér Várhelyi attends the handover ceremony of EU-financed Search and Rescue vessels to Libya \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/ip-23-100)

⁹⁵ United Nations, Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83, 3 March 2023, [Libya: Urgent action needed to remedy deteriorating human rights situation, UN Fact-Finding Mission warns in final report | OHCHR](https://www.unhcr.org/refugees-and-migrants/press-releases/2023/3/20230303-libya-urgent-action-needed-to-remedy-deteriorating-human-rights-situation-un-fact-finding-mission-warns-in-final-report) Paragraph 46 of the Report states that ‘Based on the substantial evidence and reports before it, the Mission has grounds to believe that the European Union and its member States, directly or indirectly, provided monetary and technical support and equipment, such as boats, to the Libyan Coast Guard and the Directorate for Combating Illegal Migration that was used in the context of interception and detention of migrant’. Paragraph 47 declares that ‘Immigration control by Libya and European States must be exercised consistent with their international law obligations, especially the principle of non-refoulement, and in accordance with the Global Compact for Safe, Orderly and Regular Migration.’

⁹⁶ The Washington Post, EU defends its Libya migrant work as UN points the finger, 28 March 2023, [EU defends its Libya migrant work as UN points the finger - The Washington Post](https://www.washingtonpost.com/europe/eu-defends-its-libya-migrant-work-as-un-points-the-finger/2023/03/28/)

choice for EU or national policymakers to indirectly aid or facilitate crimes against humanity, and not entail responsibility and liability for these crimes.

Delegation of the containment task to Libyan authorities has been accompanied by **a progressive disengagement from Search and Rescue (SAR) operations by Mediterranean states**, including the Italian and Maltese authorities. This strategy has translated into **a tactic of non-intervention or non-response** to distress calls with NGOs involved in SAR activities denouncing neglect of their legal obligations to coordinate these rescues and provide assistance to safety, even though the relevant authorities were duly informed⁹⁷.

This has been coupled with the **continuing policing of NGOs and civil society actors engaged in SAR activities** in the Mediterranean, which has taken a new turn following the Italian government's practices of selective disembarkation of SAR NGO vessels in Italian ports between October and November 2022, the ensuing diplomatic row with the French government over the Ocean Viking affair, and the introduction of a Code of Conduct targeting SAR NGOs in January 2023⁹⁸.

3.2. Border fences and walls

The **number and shapes of border fences at the Schengen external borders and within the Schengen area have increased and developed substantially**. In its 2020 Report on Fundamental Rights issues at land borders, the FRA underlined an increase in the use of fences along both the external and Schengen land borders. Before 2015, only Spain, Greece and Bulgaria had fences at parts of their external land borders. By 2020, however, nine EU Member States had erected border fences for purposes of preventing 'irregular migration' and 'cross-border crime', while Greece and Slovenia were planning to extend their fences⁹⁹.

According to data reported by the European Parliament Research Service (EPRS), by 2022, **12 EU/Schengen Member States had built fences at one or more sections of Schengen external borders**. Between 2014 and 2022, the aggregate length of border fences at the EU's external borders and within Schengen increased from 315 km to 2 048 km. According to the EPRS briefing, **around 13% of the EU's external border (around 12 000 km) is 'fenced off'**¹⁰⁰.

⁹⁷Joint Statement by Alarm Phone, Mediterranean Saving Humans and Sea-Watch, 14 March 2023, <https://sea-watch.org/en/non-assistance-joint-statement/>; <https://ecre.org/14680-2/>

⁹⁸ For an in-depth analysis refer to S. Carrera, D. Colombi and R. Cortinovis (2023), Policing Search and Rescue NGOs in the Mediterranean: Does justice end at sea?, CEPS In-Depth Analysis, Brussels, <https://www.ceps.eu/ceps-publications/policing-search-and-rescue-ngos-in-the-mediterranean/>

⁹⁹ 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 (in response to Greece, completed in 2014) resorted to erecting fences at external borders, so as to prevent migrants and refugees from reaching their territories. See FRA, Fundamental Rights Issues at Land Borders, p. 13; Carrera et al., 2018, 'The Future of the Schengen area', Ch. 4; Dumbrava, 'Walls and fences at EU borders'.

¹⁰⁰ C. Dumbrava, 'Walls and fences at EU borders', EPRS Briefing, 2022, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI\(2022\)733692_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI(2022)733692_EN.pdf)

A recent example of border fencing at the EU external border with the aim of containing mobility of asylum seekers and refugees is the one unfolding at **the Polish, Latvian, and Lithuanian external borders with Belarus**¹⁰¹. This strategy was compounded by the passing of national laws and the adoption of 'emergency' legislative proposals aimed at limiting the entry of asylum seekers and curtailing essential procedural safeguards in the context of border asylum and return procedures (See Section 2.3. of this Study on the Luxembourg Court ruling Case C-72/22 PPU, *M.A. v Lithuania* of 30 June 2022, declaring the Lithuanian law fundamentally illegal)¹⁰².

Amid the above-mentioned tensions at the EU's external borders, in 2021, **several Member States asked the European Commission to allow them to use EU funds to construct border fences**. The construction of such fences was presented as an effective border protection measure against 'irregular migration'. According to a letter sent by Member States 'this legitimate measure should be additionally funded from the EU budget as a matter of priority'¹⁰³. Renewed calls for EU-funded fences resurfaced at the end of 2022, with a group of Member States expressing concerns over the rising number of asylum claims and alleged increase of onward movements within the EU. On 2 February 2023, the Bulgarian government asked the Commission to receive EU funds 'to build a solid fence that will reduce to a minimum the possibility of illegal entry into the territory of the EU'¹⁰⁴.

In its Conclusions of 9 February 2023, **the European Council called on the Commission to 'immediately mobilise substantial EU funds and means to support Member States in reinforcing border protection capabilities and infrastructure, means of surveillance, including aerial surveillance, and equipment'**¹⁰⁵. As a contribution and follow-up to these exchanges, Commission President von der Leyen, sent a letter to the Heads of State and Governments on 20 March in which she 'took stock' of actions taken at the European Council meeting of 9 February 2023. The latter underlined the importance of **making best use of the**

¹⁰¹ Infomigrants, 'Barbed wire borders increase in Europe', 2022/11/17, <https://www.infomigrants.net/en/post/44817/barbed-wire-borders-increase-in-europe>

¹⁰² CJEU, 30 June 2022, C-72/22, *M.A. v. Valstybės sienos apsaugos tarnyba (Lithuania)*. Also see S. Carrera, *Walling off Responsibility? The Pushbacks at the EU's External Borders with Belarus*, CEPS Working Paper, 2021, <https://www.ceps.eu/ceps-publications/walling-off-responsibility/>

¹⁰³ S. Carrera et. al., 2021, 'European Union Policies on Onward and Secondary Movements of Asylum-seekers and Refugees', p. 110.

¹⁰⁴ According to the same source, Austrian government is lobbying for €2 billion in emergency funds from the EU budget to build a much more secure fence along the border with Turkey. In this context, Sources quoted in the article commented unofficially that the authorities in Sofia have accepted that they should orient their policy on the Austrian demands shared by some of the EU countries. This comes after Vienna blocked the admission of Bulgaria and Romania to Schengen on 8 December 2022. See Euractiv, *Bulgaria wants EU money for new border fence with Turkey*, 3 Feb 2023

<https://www.euractiv.com/section/politics/news/bulgaria-wants-eu-money-for-new-border-fence-with-turkey/>; Reuters, 'Fences protect Europe', Hungary's Orban says ahead of EU migration summit 7 February 2023 <https://www.reuters.com/world/europe/fences-protect-europe-hungarys-orban-says-ahead-eu-migration-summit-2023-02-07/>

¹⁰⁵ Suzanne Lync, Jacopo Barigazzi, 'EU vows more cash for frontier policing as border fence debate revives', Politico Europe, 10 February 2023, <https://www.politico.eu/article/euco-eu-crosses-into-the-border-fence-game-migration/>; <https://euobserver.com/migration/156695>

EUR 600 million to be made available by the Commission to substantially support border control and technological equipment in the Member States.

Modern border fence surveillance infrastructures make wide use of smart technologies, such as motion sensors, cameras, and loudspeakers. According to Regulation (EU) 2021/1148 establishing the Instrument for **Financial Support for Border Management and Visa Policy (BVMI)**, EU funding can in fact support 'infrastructure, buildings, systems, and services' required to implement border checks and border surveillance¹⁰⁶. **There is nothing in these financial instruments explicitly prohibiting EU funding to Member States for equipping their border fences with surveillance systems, radars, cameras, databases and other equipment**¹⁰⁷.

Furthermore, the Commission has launched **two pilot projects with Bulgaria and Romania** on preventing irregular arrivals, 'strengthening border and migration management' which can be read as a follow-up to the above-mentioned calls. The Commission and Bulgaria are also finalising a 'needs assessment' to provide financial support with a view to strengthening **the Bulgaria-Türkiye border with 'enhanced surveillance measures'**¹⁰⁸.

Therefore, while the European Commission has been vocal on its policy to not directly fund EU Member States' border fences, arguing that such measures 'are not the most efficient tool to improve border management'¹⁰⁹, the two Pilot Projects constitute just one instance of how the Commission is **indirectly doing so through various EU financial instruments**. This does not therefore exempt the Commission from responsibility in legitimising border fencing **policies instead of declaring them contrary to the Schengen Borders Code proportionality test**.

Indeed, the FRA has underlined that the SBC does not expressly or directly exclude erecting fences, leaving some discretion to Member States on how to implement their obligation to protect the external borders and to prevent unauthorised border crossings¹¹⁰. However, **the Achilles heel of any of these border fences in light of the SBC is indeed their inherent or by-design lack of proportionality, which is a key standard on how border controls and surveillance must be carried out by national authorities in the Schengen area**.

As underlined by FRA, key fundamental rights issues raised by fences relate for instance to 'walling off' access to asylum (Article 18 CFREU). This may be the case in particular if the use of fences results

¹⁰⁶ Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy, OJ L 251/48, 15.7.2021, Annex III, Art. 1(a).

¹⁰⁷ Carrera et al., 2018, 'The Future of the Schengen area', p. 26.

¹⁰⁸ The European Commission launches a pilot project with Bulgaria, 20 March 2023, https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1787; The European Commission launches a pilot project with Romania, 17 March 2023, https://ec.europa.eu/commission/presscorner/detail/%20en/statement_23_1724

¹⁰⁹ Parliamentary question - E-003322/2021(ASW), Answer given by Ms. Johansson on behalf of the European Commission, https://www.europarl.europa.eu/doceo/document/E-9-2021-003322-ASW_EN.html

¹¹⁰ FRA, Fundamental Rights Issues at Land Borders, p. 13.

in a situation whereby there are no effective possibilities for asylum seekers to reach the territory and request international protection, i.e. no or limited border crossing points are accessible and at reasonable distance from each other and there are no gates in the fences that would enable individuals to address national authorities for stating their intention to claim protection or have their entry individually assessed. Furthermore, erecting fences to prevent asylum and legal entry raises an issue of proportionality to the extent that **they may present violent features, – e.g. the use of coil-shaped blades or electric shocks – that unduly and inhumanly put individuals' life at risk or create a risk of disproportionate harm** contrary to the right to integrity of every person (Article 3 CFREU)¹¹¹.

3.3. Frontex and its involvement in fundamental rights violations

An increasing body of evidence of the EU Frontex (European Border and Coast Guard) Agency tacit acceptance or active involvement in pushbacks and interdictions at sea episodes has put the agency in the spotlight. It has triggered a number of political, institutional and legal processes aimed at **investigating and ascertaining the responsibility (actions/omissions) for fundamental rights violations** carried out in the context of its joint operational activities or happening in geographical areas where its operations are deployed at the Schengen external borders.

As part of its mandate, **Frontex coordinates Member States' border controls and surveillance activities through joint operations**. As an example, on 1 March 2020, at the request of the Greek government, the agency launched two Rapid Border Intervention Teams (RABITs) at both the Greek land and sea external borders, stepping up Frontex's already substantial presence in this EU Member State¹¹². Several instances of pushbacks and refoulement to Turkey of asylum seekers by the Greek authorities have been observed at the Greek–Turkish land borders¹¹³. **Violations of fundamental rights that occur within an area where Frontex plays an increasing operational role have raised serious concerns and criticism regarding the responsibility and accountability of the agency for those violations**¹¹⁴.

At the Greek–Turkish sea border, Frontex Joint Operation (JO) Poseidon objectives include border surveillance, 'migrant interception' and identification, operational aspects of cross-border crime and coast guard activities, including Search and Rescue (SAR). **JO Poseidon has been the subject of**

¹¹¹ FRA, 'Fundamental Rights issues at Land Borders', p. 15.

¹¹² Frontex launches rapid border intervention on Greek land border, 2020-03-13, <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-rapid-border-intervention-on-greek-land-border-J7k21h>

¹¹³ Christides, G., S. Lüdke, and M. Popp, 'The killing of a migrant at the Greek-Turkish border', Spiegel International, 8 May 2020, <https://www.spiegel.de/international/europe/greek-turkish-border-the-killing-of-muhammad-gulzar-a-7652ff68-8959-4e0d-9101-a1841a944161>

¹¹⁴ R. Cortinovis, Pushbacks and lack of accountability at the Greek-Turkish borders, CEPS Paper Liberty and Security in Europe, No. 2021-01, February 2021, L. Karamanidou and B. Kasperek, 'What is Frontex doing about illegal pushbacks in Evros?', Respond Blog, 1 August 2020, <https://respondmigration.com/blog-1/what-is-frontex-doing-about-illegal-pushbacks-in-evros>

numerous criticisms throughout the years, with media and civil society denouncing episodes of Frontex **indirect complicity in pushbacks carried out by Greek authorities and systematic fundamental rights violations in this country**¹¹⁵.

Investigative journalism networks have conducted in-depth investigations on the role of Frontex in facilitating and conducting pushbacks at the Greek–Turkish borders. A 2020 joint report by Bellingcat, Der Spiegel, Lighthouse Reports, and others, documented instances where Frontex assets were in range of pushback incidents or where Frontex vessels were involved in pushbacks¹¹⁶. In a Hearing before the LIBE Committee of the European Parliament in July 2020, former Frontex Executive Director Fabrice Leggeri claimed that the reported episodes of illegal rejections were happening in locations outside the operational area covered by the agency's operations, adding that Greek authorities should be considered as 'solely responsible' for any violation¹¹⁷.

Criticisms have also been raised about Frontex's role in indirectly facilitating pullbacks to Libya. According to Amnesty International, 'EU aerial assets [deployed during Frontex operations] have routinely been employed to identify the presence of refugee and migrant vessels at sea and to immediately inform the Libyan authorities of their position'¹¹⁸. **The Libyan coastguard actors can also receive access to information from the EUROSUR Fusion via the EU's satellite-supported 'Seahorse Mediterranean' network**¹¹⁹.

Against this background, over the last years, **several investigations on Frontex activities have been launched at the EU level by the European Ombudsman, the European Court of Auditors (ECA), the EU Anti-Fraud Office (OLAF), and the European Parliament.** A number of judicial

¹¹⁵ Amnesty International. 'Caught in a political game. Asylum-seekers and migrants on the Greece/Turkey border pay the price for Europe's failures', 2020, <https://www.amnesty.org/en/documents/eur01/2077/2020/en/>

¹¹⁶ N. Waters, E. Freudenthal, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks', 23 October 2020, <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-implicit-in-illegal-pushbacks/>

¹¹⁷ LIBE Committee Meeting, 'The situation at the Greek–Turkish border and respect for fundamental rights', 6 July 2020, https://multimedia.europarl.europa.eu/en/libe-committee-meeting_20200706-1645-COMMITTEE-LIBE_vd In an exchange with Members of the European Parliament LIBE Committee, the former Frontex Executive director claimed that some of the incidents were classified by Frontex as 'prevention of departure', a term which the then Frontex Director defined in its reply to as an 'incident type' whereby the detection is made by an EU Member State or Frontex-deployed asset, upon which the Host Member State authorities notify the third country counterparts who, (based on their own decision) may follow up on the call and intercept asylum seekers. Written questions following the LIBE Committee meeting 1 December, <https://www.statewatch.org/media/1709/eu-frontex-written-questions-answers-libe-hearing-1-12-20.pdf>

¹¹⁸ Statewatch, 2021. Submission to the UN Special Rapporteur on the human rights of migrants Input for the report on pushback practices and their impact on the human rights of migrants, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Stateswatch_Submission.pdf

¹¹⁹ M. Monroy, 'A seahorse for the Mediterranean: Border surveillance for Libyan search and rescue zone', 3 January 2018, <https://digit.site36.net/2018/01/03/border-surveillance-technology-for-new-libyan-search-and-rescue-zone/> Refer to European Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), C/2021/2361, OJ L 124, 12.4.2021.

actions have been also brought before the Court of Justice of the European Union (CJEU), as the competent tribunal with jurisdiction over Frontex – See Box 1 below.

The **2021 ECA Report on 'Frontex's support to external border management'** did not cover respect of fundamental rights in the context of the agency activities. The report, however, found that 'Frontex's support for Member States/Schengen associated countries in fighting against illegal immigration and cross-border crime is not sufficiently effective'. It also found that Frontex has not fully implemented its 2016 mandate and highlighted several risks related to the implementation of Frontex's 2019 mandate¹²⁰.

On 13 October 2021, the German website Frag Den Staat published a classified **OLAF report on Frontex**. The report covered the outcome of an investigation carried out in October 2020, when OLAF received information referring to possible irregularities in the Agency's activities¹²¹. According to the report, identified failings by Frontex personnel concerned can be grouped into three main categories; failure to follow procedures and processes, failure in their duty of loyalty and failure in their managerial responsibilities. Specifically, **persons concerned failed to ensure compliance with the applicable Standard Operating Procedures on Serious Incident Reporting, leading to the exclusion of the Frontex Fundamental Rights Officer (FRO)** from the assessment and handling of some incidents and to the failure to initiate Serious Incident Reports for some incidents with a potential fundamental component¹²².

In **November 2020, the European Ombudsman opened an own-initiative inquiry into the implementation of the Frontex complaints mechanism for reporting fundamental rights violations**, and on the role and independence of the Frontex fundamental rights officer (FRO). The Ombudsman's conclusions pointed to a number of shortcomings, including **a very low number of complaints, inadequate transparency** in relation to the mechanism's activities, **delays in implementing** key changes introduced by Regulation 2019/1896, including **the appointment of an FRO and recruiting 40 fundamental rights monitors**¹²³. In **March 2021, the Ombudsman opened another own-initiative inquiry** into Frontex's compliance with its fundamental rights obligations. In the report drawn up following the inquiry, the Ombudsman made suggestions for

¹²⁰ European Court of Auditors, Special Report 08/2021: Frontex's support to external border management: not sufficiently effective to date, <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=58564>

¹²¹ OLAF, Final Report on Frontex CASE No OC/2021/0451/A1, <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/>

¹²² In addition, the report found that persons concerned decided to relocate a Frontex aerial asset to a different operational area of activity, apparently with the intention to avoid witnessing incidents in the Aegean Sea with a potential fundamental rights component.

¹²³ European Ombudsman, Decision in OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Office, <https://www.ombudsman.europa.eu/en/decision/en/143108>. The 2019 revised Frontex Regulation includes a set of fundamental rights provisions: 1) expanded role for the Fundamental Rights Officer; 2) a strengthened Complaints Mechanism; 3) a supervisory mechanism on the use of force; 4) establishment of establishment of fundamental rights monitors (FRM) as statutory staff of Frontex. FRM monitor assess the fundamental rights compliance of Frontex activities, including return operations, provide advice and assistance in this regard, while contributing to the promotion of fundamental rights as part of European integrated border management (Art. 110).

improvement, including **increasing transparency** by publishing summaries of operational plans and summaries of parts of the handbooks to the operational plans, further training for fundamental rights monitors acting as forced return monitors¹²⁴.

In **January 2021 the LIBE committee established a Frontex Scrutiny Working Group (FSWG)**. The FSWG carried out its scrutiny of the agency's activities on the basis of a broad mandate: in fact, it was not only tasked with addressing and further investigating the 'serious allegations of pushbacks and the management concerns regarding Frontex, but also to shed light not only on the cases where the Agency was involved in violations of fundamental rights but also whether it was aware of violations and did not act¹²⁵. The FSWG published its Final Report and Annex on 14 July 2021¹²⁶. The Scrutiny Group 'did not find evidence on the direct performance of pushbacks and/or collective expulsions by Frontex in the serious incident cases that could be examined', which according to interviews conducted for the purpose of this Study highlights that **the inquiry or fact-based capacity of the group should have been stronger**.

The FSWG Final Report concluded that **the Agency disregarded reported fundamental rights violations observed by several reliable actors, failed to adequately respond to internal observations about certain cases of probably fundamental rights violations, and to promptly, vigilantly and effectively follow up on cases of pushbacks in Member States where Frontex conducted joint operations**. The report invited the Agency to be more proactive in order to ensure the fulfilment of its '**negative and positive fundamental rights obligation**', which is clearly set out in the founding regulation (Regulation (EU) 2019/1896) and expressed regret about the significant delay in the recruitment procedure of the Fundamental Rights Monitors.

¹²⁴ European Ombudsman, Decision in OI/4/2021/MHZ on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities, <https://www.ombudsman.europa.eu/en/decision/en/151369>

¹²⁵ M. Del Monte and K. Luyten, European Parliament scrutiny of Frontex, EPRS Briefing, September 2022, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698816/EPRS_BRI\(2021\)698816_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698816/EPRS_BRI(2021)698816_EN.pdf)

¹²⁶ Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations LIBE Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Tineke Strik, 14.7.2021, https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf

Box 1: Bringing Frontex to Court

A number of judicial actions have been brought before the Luxembourg Court against Frontex, as the competent tribunal with jurisdiction on the agency.

- In May 2021, two applicants brought an action for failure to act (**T-282/21 SS and ST v Frontex**) against Frontex before the CJEU in accordance with Article 265 TFEU. The claimants pointed to the agency's failure to fulfil 'its positive obligations under the Charter of Fundamental Rights' or take any action to prevent fundamental rights violations in the context of its operation in the Aegean Sea. They further claimed to having been directly and individually affected by Frontex operations, which resulted in 'unlawful *refoulement*, collective expulsion, and prevention of access to asylum'. In April 2022, however, the Court dismissed the action as inadmissible. Another action for failure to act (**T-205/22 – Naass and Sea Watch v Frontex**) is currently pending before the CJEU.
- In September 2021, an action for damage (**T-600/21 WS and Others v Frontex**), was brought against Frontex on behalf of a Syrian family expelled from Greece in 2016 on a joint return flight operated by Frontex and Greece. The applicants claimed compensation for material and non-material damages as a result of the return operation, alleging among other things that the Agency conducted the return operation in a way that fundamental rights violations could not be noted, nor signalled.
- In March 2022, another action for damages was brought before the CJEU, (**T-136/22 Hamoudi v Frontex**). The applicant claimed that Frontex owed him compensation for the damages he suffered during and in the aftermath of his collective expulsion from Greece in April 2020. According to the claimant, the unlawful collective expulsion to which it was subject is attributable to Frontex, as its 'true author', since it was executed in line with the legally binding Operational Plan for Rapid Border Intervention Aegean, drafted by Frontex's Executive Director. The applicant further claimed that Frontex's Executive Director had unlawfully approved the launching of RBI Aegean, in breach of Art. 46(5) of the Agency's founding regulation, by not exercising his discretionary powers with regards to the very examination of the applicability of this provision to the extremely volatile situation in the Aegean Sea.

In February 2021, the Agency adopted a new Fundamental Rights Strategy as provided for by Article 80(1) of Frontex Regulation (EU) 2019/1896 and appointed a new FRO in June 2021¹²⁷. During an exchange of views with the LIBE committee. In March 2022, the FRO confirmed that the Agency had taken action to address the accusations of violations of fundamental rights at the EU external borders. He posited that change of attitude was happening within the Agency, with more frequent incident reports being filed¹²⁸.

Interviews with NGOs conducted for this Study have expressed concerns regarding the lack of clarity regarding the FRO consultative role in ensuring **the effective applicability and practical/timely operation of Article 46 of the Frontex Regulation**. Article 46 foresees that the Frontex Director 'shall' decide to suspend or terminate – in whole/or part – the agency's operational activities in EU Member States where **there is irrefutable evidence that the conditions for effectively conducting its activities – in particular violations of fundamental rights or international**

¹²⁷ Frontex News, Management Board adopts the new Frontex Fundamental Rights Strategy, 2021-02-15, <https://frontex.europa.eu/media-centre/news/news-release/management-board-adopts-the-new-frontex-fundamental-rights-strategy-lhBJIG>; <https://frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/fundamental-rights-officer//>

¹²⁸ Quoted in Del Monte and Luyten European Parliament scrutiny of Frontex, EPRS Briefing.

protection obligations of a serious nature – are no longer fulfilled, such as in the case of Greece.

In July 2022, Interim Executive director Aija Kalnāja stated at a Hearing of the Committee on Budgetary Control Committee of the European Parliament that most of the recommendations included in the Scrutiny Group Report had been taken on board by Frontex, adding that the agency would complete hiring of Fundamental Rights Monitors by the end of November 2022¹²⁹. On 21 March 2023, the recently appointed Frontex Executive Director, Hans Leijten, took part in a public meeting of the EP LIBE Committee Working Group on Frontex Scrutiny. On that occasion, he underlined the need to restore legality in the work of the agency and provide full transparency and accountability on fundamental rights-related 'incidents' reported at the EU's external borders¹³⁰.

However, an analysis of the state of play of implementation of recommendations formulated by the FSWG reveals that **a set of key issues therein included remain still unaddressed or unclear**¹³¹. For example, a recommendation to immediately suspend all Frontex operations in Hungary, including return-related operations, has not yet been implemented¹³². Additionally, FSWG recommendation to Frontex Executive Director to apply a due diligence procedure in the case of its activities in Greece, in a fully transparent, comprehensive and timely manner, remains 'in progress'¹³³.

Additional key aspects where progress still needs to be made include **further development of Standard Operating Procedures (SOPs) for handling serious incident reporting (SIR)**¹³⁴. This

¹²⁹ European Parliament, Committee on Budgetary Control, 13/07/2022, Exchange of views with the Commission, Frontex management board and Frontex acting Executive Director, 13 July 2022, https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-budgetary-control_20220713-1630-COMMITTEE-CONT

¹³⁰ Committee on Civil Liberties, Justice and Home Affairs, 21 March 2023, recording available at: https://multimedia.europarl.europa.eu/en/webstreaming/libe-committee-meeting_20230321-1630-COMMITTEE-LIBE

¹³¹ 'State of play of implementation of recommendations – Agency comments', 03/01/2023 (on file with the authors).

¹³² On 27 January 2021, Frontex announced that it was suspending its operational activities in Hungary. The decision came after a judgment of the Court of Justice of the European Union of 17 December 2020 which found that Hungary failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals. To date, however, the Executive Director's decision, as well exceptions to that decision, have not been made public. It is not clear whether or which mitigating measures are introduced by Frontex to minimise the risks for fundamental rights violations in the context of joint return operations from Hungary.

¹³³ In his feedback to the LIBE Committee, Frontex FRO stated that he engaged with the Hellenic authorities to establish safeguards for the implementation of the fundamental rights framework in operational activities carried out in Greece. Pursuant to these discussions, the Hellenic authorities drew up an Implementation Plan for the implementation of the safeguards. The Implementation Plan was recognised as a good achievement by the MB and the FRO. 'State of play of implementation of recommendations – Agency comments', 03/01/2023 recommendation n. 24 (on file with the authors).

¹³⁴ Frontex defines a serious incident (SI) as an 'event, caused by an action or failure to act by a person, or by force of nature, which directly or indirectly involves Frontex participants or assets and which: entails a potential violation of EU or international law, in particular related to Fundamental Rights and international protection obligations, and/or Involves a potential violation of the Frontex Codes of Conduct (CoCs), and/or has serious actual or potential negative implications on Frontex's tasks or activities and/or has a serious potential life-changing impact on a participant's health.

includes, in particular, the diversification of information sources in case of incident reporting (rather than relying only on government authorities), and the development of an internal system for protecting whistle-blowers, so as to ensure that confidential reports from Frontex employees and team members are handled in an appropriate way, and protection of identity is guaranteed¹³⁵. It is furthermore unclear the exact weight that the FRO's opinion is given in the Coordination Group meeting when evaluating whether a case needs to be categorised as SIR, and if the FRO has a final say on this matter, or if it should be concluded whether a SIR should fall under a Category 1.

In line with the European Parliament's Budget Control Committee's recommendations of 6 October 2022, **the European Parliament refused to give discharge to the 2020 Frontex budget**. On that occasion, MEPs criticised the 'magnitude of the committed serious misconduct' under the previous executive director of the agency, Fabrice Leggeri, who resigned following the release of the OLAF Report. Additionally, MEPs regretted that Frontex's support for return-related activities in Hungary had not been suspended, given the rule of law situation in the country. With regard to Greece, concerns were expressed about the evidence that former Frontex management was aware of people being illegally pushed back in the country and did not intervene to avoid this¹³⁶.

¹³⁵ Decision of the Executive Director No R-ED-2021-51 Standard Operating Procedure (SOP) – Serious Incident Reporting, 19/04/2021, respectively at pp. 10-11. https://frontex.europa.eu/assets/Key_Documents/SIR_SOP.pdf

¹³⁶ European Parliament, 'Frontex: MEPs refuse to discharge EU border agency over its management in 2020', 18 October, 2022 <https://www.europarl.europa.eu/news/en/press-room/20221014IPR43210/frontex-meps-refuse-to-discharge-eu-border-agency-over-its-management-in-2020>

4. AN ENFORCEMENT GAP

The systematic violations of EU law and fundamental rights analysed in *Sections 2 and 3* of this Study have been affected by **an EU enforcement gap, which has in turn led to a high degree of impunity by relevant Member States**. This 'gap' has not passed unnoticed by various EU institutions, in particular by the Luxembourg Court, the European Court of Auditors and the European Parliament, as well as civil society.

The CJEU dealt indirectly with the European Commission's role in upholding the SBC standards in the above-mentioned *NW Case*. During the oral hearings, the Commission joined the view of the main applicant according to which the Austrian policies contravened or were incompatible with the procedures stipulated in Article 25 SBC. And yet, the Commission did not either issue an Opinion or did it initiate formal infringement proceedings against the Austrian government. **The Luxembourg Court held that it is 'essential' for the Commission to effectively exercise its conferred powers under the Code**¹³⁷.

This was not the first time, however, that the Commission had been found responsible for not enforcing EU Schengen rules in an effective and timely fashion. In the above-mentioned Special Report published in 2022 titled '*Free movement in the EU during the Covid-19 pandemic - Limited scrutiny of internal border controls, and uncoordinated actions by Member States*', **the European Court of Auditors (ECA) concluded that the Commission did not properly scrutinise the reintroduction of internal border controls**¹³⁸.

The ECA underlined that while 'the five Member States with long-term border controls...have still not submitted an ex post report six years after they were reintroduced', **the European Commission took 'no action to acquire information on the implementation of these controls'**¹³⁹. **It did not exercise the powers conferred upon it to enforce the SCB by issuing an Opinion** on the border controls following the Member States' notifications of reintroducing internal border controls in the name of Covid 19. The Commission had issued only one favourable Opinion on the proportionality and necessity of internal border controls for Austria and Germany in October 2015¹⁴⁰, even though, as the ECA underlined, a total of five Member States had exceeded the maximum period¹⁴¹. The ECA Special Report concluded that while the Commission acknowledged that these border controls are neither proportionate nor necessary, and that these contravene EU law provisions, **it decided not to launch infringement proceedings against any of the relevant Member States, and instead**

¹³⁷ Paragraph 92 of the judgment. It additionally concluded that the fact that the Commission had not started formal procedures against the Austrian authorities did not preclude in any way or form the Court's interpretation.

¹³⁸ European Court of Auditors, Special Report: Free Movement in the EU during the Covid-19 pandemic: Limited scrutiny of internal border controls, and uncoordinated actions by Member States.

¹³⁹ Ibid., paragraph 32.

¹⁴⁰ Commission's joint opinion of 23.10.2015, C(2015) 7100 final.

¹⁴¹ European Court of Auditors, Special Report: Free Movement in the EU during the Covid-19 pandemic: Limited scrutiny of internal border controls, and uncoordinated actions by Member States, p. 18.

‘opted for soft measures...but with no apparent results as the controls are still in place (Paragraph 34 of the Special Report).

In its 2021 Annual Report on the Functioning the Schengen area, the European Parliament underlined similar concerns. **The EP Report highlighted that despite having identified fundamental shortcomings in the implementation of the Schengen *acquis*, the Commission has been ‘slow or outright reluctant to initiate infringement proceedings’.** (Emphasis added). The Parliament called on the Commission to exercise its Treaty powers and ‘to use infringement proceedings where appropriate’. The Report also made **a general call for Member States ‘to respect the law’**¹⁴². Furthermore, Annex 2 of the 2021 Commission Impact Assessment accompanying the latest proposed SBC reform makes reference to a series of ‘Expert Meetings’ organised by DG Home Affairs with relevant actors where it was criticised for not enforcing existing rules¹⁴³.

An assessment of the infringement procedures launched by the Commission, as collected in the Infringement Decisions database¹⁴⁴, **confirms the above concerns** (See also *Annex 3* attached to this Study). There are only five entries of measures taken in relation to ‘Schengen’ by the Commission after 2016. Out of these five, one entry is the closing of a case opened against Germany in 2014, and thus unrelated to the ongoing unlawful prolongation of internal border controls. The other four entries are all related to the same case against Estonia on incompatibility of the Estonian ‘Go Swift’ system with Article 8(3)(g) SBC and are, thus, also unconnected to the core issues under examination in this Study. Hence, **as of March 2023, the Commission has not taken any step towards launching infringement procedures against Austria, Denmark, France, Germany, Norway and Sweden.** Instead, as the Commission has recognised itself, **diplomacy-driven or so-called ‘soft tools’ have been preferred.**

¹⁴² This reflected previous similar calls by the Parliament for the Commission ‘to act decisively’ in matters of violations of EU law – including infringement proceedings – included in the [2018 Annual Report](#) on the Functioning of the Schengen area of 2018 (paragraph 19), or the [2020 Resolution](#) titled ‘on the situation in the Schengen area following the Covid-19 outbreak’, where Parliament called the Commission ‘to enhance its reporting to Parliament on how it exercises its prerogatives under the Treaties’ (Paragraph 13).

¹⁴³ The IA states that ‘Half of those who took the floor **criticised the Commission for not enforcing the current rules on internal border controls properly** and requested stricter enforcement in the future. One participant explicitly asked about the Commission’s handling of Member States that refuse to comply, referring to a monitoring mechanism. The Commission explained that the fact that a **considerable number of Member States that previously complied with the rules for decennia now stopped complying suggests that there might be a general inadequacy of the rules** for current challenges. Therefore, initiating infringement procedures might not be the solution, and the Commission needs to consider adapting the rules’. (Emphasis included in the IA, not by the Authors).

¹⁴⁴ The database is available at: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement-decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&DG=HOME&DG=JLS&DG=JUST&title=&submit=Search It must be noted that the Commission’s Infringement Database shows several limitations. Most entries include a title, in either French or English, detailing the specific EU law instrument that a Member State has violated, transposed incorrectly, or implemented incorrectly. However, there are often no details regarding the type of violation of said instruments. Only a few entries include weblinks or references to explanations or press releases which offer a better understanding of the case. It is also unclear why infringement procedures issued at the same time and related to the same instrument – and often to the same Article – are split between the Home Affairs and Justice, Fundamental Rights and Citizenship categories. This is the case for several infringement procedures dating back to 2003 on Article 26 of the 1985 Convention Implementing the Schengen Agreement. From the available information, however, it is not possible to say if this is due to the different type of violation.

Box 2: Actions of the European Commission since 2015

2015 – Opinion on necessity and proportionality of border checks at internal borders in Austria and in Germany C(2015)7100

2016 – Back to Schengen – a Roadmap COM(2016)120

2017 – Commission Recommendation on proportionate police checks and police cooperation in the Schengen area C(2017)3349

2017 – Proposal on the amendment of the Schengen Borders Code COM(2017)571

2018 – High-Level meeting with the Ambassadors of the Member States having border checks at internal borders in place at that time and the Member States the most affected by such checks

2017-2019 – Requests from DG HOME for additional information following the received notifications

2020 – First Schengen Forum

Source: [2021 Commission Staff Working Document](#)

Schengen governance provides an example where 'politicisation' has translated in the **Commission's choice to give priority to the use of 'diplomacy', informal dispute settlement mechanisms or behind-closed doors dialogue with relevant national ministries over formal EU enforcement measures**. The full compatibility of this choice with the notion of enforcement enshrined in Articles 258 et seq TFEU is a matter of concern¹⁴⁵.

According to Craig and De Búrca, the Commission's preference seems to lie in **the 'elite cooperation' dimension of the Article 258-procedure**, with more emphasis on resolving the 'dispute' at the pre-contentious stage without intervention of the Court, in particular in the context of the so-called EU Pilot scheme¹⁴⁶. It is, however, **highly questionable whether the tools mentioned by the Commission in Table 5 actually qualify as part of Article 258-procedures at all**. The Commission's priority to resolve 'key problems' with relevant Member States 'at an early stage' has attracted wide concerns and scholarly attention underlining **the increase in**

¹⁴⁵ The procedure described in Article 258 TFEU describes three phases of 'enforcement', namely 1) giving Member States the opportunity to submit its observations on the perceived non-compliance, 2) issuing a reasoned opinion by the European Commission, and 3) referral of the issue to the CJEU in cases where Member States do not comply with the reasoned opinion.

¹⁴⁶ European Commission, Communication, EU Law : Better results through better application, COM(2007), 502 final, 5 September 2007. P. Craig and G. De Búrca, *EU Law. Text, Cases and Materials*, sixth edition, Oxford: Oxford University Press 2015, p. 435.

‘politicisation’ instead of ‘legal enforcement’ in the Commission’s role, which in turn has led to clear cases of impunity by the Member States’ governments concerned¹⁴⁷.

This non-enforcement preference is also reflected in the European Commission’s Communication ‘Enforcing EU law for a Europe that delivers’ of 13 October 2022 COM(2022) 518 final¹⁴⁸. While the Communication aims at providing an overview of the Commission’s work on enforcing EU law, when it comes to ‘Schengen’, **the only reference that is made relates to the work and results of the Schengen Evaluation and Monitoring Mechanism (SEMM)**. According to the Communication the new and updated SEMM provides ‘a more streamlined procedure ensures that serious deficiencies in particular are addressed promptly’.

That notwithstanding, **the SEMM is not an EU enforcement tool *per se***. While it may complement and inform the Commission’s formal evaluation and monitoring responsibilities, **it does not exempt it from its obligations to enforce EU law and launch infringement proceedings**. The COM(2022) 518 Communication remains for instance silent regarding the existence of any infringement proceedings covering the EU Schengen Borders Code and its rules on either external or internal borders to relevant Member States. And while the Commission has made it clear that such enforcement action could be resorted to in cases where the SEMM proves ineffective in addressing deficiencies¹⁴⁹, **interviews conducted for the purposes of this Study have not been able to identify one single case where the SEMM results led to the opening of infringement proceedings by the Commission**.

The fundamental distinction between the SEMM and infringement proceedings was recognised by the above-mentioned European Parliament 2021 Report which emphasised the **‘sui generis nature of the evaluation mechanism in EU law’ and recalled that ‘the Commission remains ultimately responsible for ensuring the application of the Treaties’¹⁵⁰**. The exact way in which the Commission understands the linkages between key issues related to serious deficiencies and

¹⁴⁷ R. D. Kelemen and T. Pavone (2022b), ‘Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union’, working paper updated on 11 August 2022, available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918; see also B. Steunenberg, ‘Is Big Brother Watching? Commission Oversight of the National Implementation of EU Directives’, European Union Politics, Vol. 11, No. 3, 2010, pp. 359-380; T.A. Börzel and M. Knoll, ‘Quantifying Non-Compliance in the EU: A Database on EU Infringement Proceedings’, Belin Working Paper on European Integration No. 15, Freie Universität Berlin, Berlin, 2012; S. Andersen, The Enforcement of EU Law. The Role of the European Commission, Oxford, Oxford University Press 2012; and L. Pech and P. Bárd, ‘The Commission’s Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values’, Study for the European Parliament’s LIBE and AFCE Committees PE 727.551, Brussels, European Parliament, February 2022.

¹⁴⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Enforcing EU law for a Europe that delivers. COM(2022) 518 final. 13 October 2022.

¹⁴⁹ See Commission Communication, A strategy towards a fully functioning and resilient Schengen area, COM(2021) 277 final.

¹⁵⁰ Paragraph 10.

systematic/unresolved issues resulting from the SEMM and its infringement powers remains **unclear and legally uncertain**¹⁵¹.

The Commission is **fundamentally confusing specialised tools at its disposal which are aimed at facilitating or assisting EU Member States in the correct transposition/implementation of EU law, with tools which are designed for purposes of enforcing EU law**. This is particular so when dealing with Member States showing an official or **institutionalised unwillingness, and in some cases clear bad faith and insincere cooperation**, to comply with their commitments under EU legislation and/or Luxembourg Court rulings.

This ambivalence regarding the Commission's role as guardian of the Treaties was confirmed in a session dealing with enforcement¹⁵² held by the European Parliament LIBE Committee on 6 February 2023 where Commissioners Ylva Johansson presented the state of play in DG Home Affairs and the criteria used for enforcement actions. Johansson first emphasised the key role played by 'guidelines' and 'dialogue' with EU Member States, and the Commission's preference to use infringements only as regards cases showing 'Member States' *persistent and systemic failure* to implement and correctly apply EU law' (Emphasis added).

It is, however, **unclear why the Commission is limiting itself to cases labelled as 'systematic failure' to launch infringement proceedings in cases of non-application of EU law. It is also questionable how the Commission methodologically and objectively assesses the 'persistent and systemic' scope and 'serious' nature in specific cases, which cases are given priority or not, and what is the specific moment in time when the Commission decides to stop 'elite dialogue' with a particular Member State and starts an actual infringement procedure.**

Commissioner Johansson also mentioned that in the Commission's view infringement proceedings were quite slow and lengthy, not ensuring timely action. Some MEPs expressed their surprise at this statement in light of the actual possibilities in the Commission's hands to expedite the deadlines granted to Member States for responding to letters/opinions, or to ask for accelerated judicial proceedings before the Court of Justice in Luxembourg when there are fundamental rights at stake. Furthermore, **the case of the six EU Member States unlawfully prolonging internal border controls has shown that 'diplomatic tactics' are in fact extremely lengthy, and in some cases not bearing any fruit. Indeed, the effectiveness of the Commission's non-enforcement or diplomacy-driven tools is highly questionable.** This has been recognised by the Commission

¹⁵¹ In fact, back in 2018, the Parliament had requested the Commission to carry out, as part of the SEMM, 'on-site visits to internal borders that are genuinely unannounced and to assess the nature and impact of the measures in place' (paragraph 27 of the Report). This could have informed the Commission's own assessment on the necessity, proportionality and scale of the unlawfully prolonged internal border controls by the relevant Member States.

¹⁵² European Parliament, Committee on Civil Liberties, Justice and Home Affairs. 6 February 2023. Multimedia Centre. https://multimedia.europarl.europa.eu/en/webstreaming/libe-committee-meeting_20230206-1500-COMMITTEE-LIBE

itself in the 2021 Staff Working Document when it stated that: 'Despite the efforts of the Commission over the last few years, hardly any progress has been achieved in the past.'¹⁵³.

That notwithstanding, during the same LIBE Committee session Commissioner Johansson confirmed that after the Luxembourg Court *NW* Case the Commission 'needs to act'. It is striking that it has been necessary to wait until this Court's judgment for the Commission to reach such a conclusion. Johansson mentioned that to this end, the Commission had once more started a 'dialogue' led by the Schengen Coordinator with the six Member States retaining internal border controls and the most concerned neighbouring Member States. Nonetheless, she also noted that there is a stark difference between how the six Member States carry out internal border controls:

...some Member States, like the one I know best [i.e. Sweden], have notified internal border checks at all internal borders and are carrying out internal border checks more or less *all the time everywhere*; others have notified the internal border checks but are carrying [them] out very randomly or on based on specific information (Emphasis added).

This corresponds with the analysis of the EU Member States' Notifications prolonging internal border controls in *Section 2* of this Study, which support the fact that these border controls are 'systematic' in essence and nature. Based on the result of the ongoing 'dialogues', Commissioner Johansson continued, the Commission 'will consider whether to issue an Opinion under the SBC - or different opinions for different Member States – under the SBC', and thus not launching an infringement procedure. **It is surprising that at a such late stage of this story the Commission is still wondering whether to issue an Opinion under the SBC and not to formally launch infringement proceedings.**

During the above-mentioned LIBE Committee meeting another issue of concern was related to **the overall lack of transparency, accountability and protractedness embedded in these 'informal procedures**. Commissioner Johansson agreed on the point on the lack of transparency in the enforcement of EU law, by saying that 'we often don't communicate well on that'. She added that 'It is not up to the Commission to choose or not to choose to enforce the policies and legislation. That is our obligation. This is clear. There is nothing that we can say: that we don't want to or is too politically sensitive, or things like that. We are obliged to do that.' However, a non-public Letter sent by Commissioner Johansson and Commissioner Didier Reynders to the EP LIBE Committee on 25 January 2023¹⁵⁴, which provides some detailed information on enforcement of EU law on Home Affairs and Justice portfolios, states that

It should also be kept in mind that the policy and legislation under the responsibility of DG HOME are being developed and implemented in *a highly complex geopolitical environment*, where

¹⁵³ Page 31 added that 'In particular, despite the efforts of the Commission to convince Member States to go back to a real Schengen area, the only (limited) step in this direction has been made by Germany that has reduced the scope of the long-lasting border checks at its internal borders, by lifting in spring 2018 such checks with regard to the air connections from Greece (that had been in place since November 2017). The Commission retains the right to issue an opinion on the necessity and proportionality of any upcoming prolongations of border checks at internal borders, or even to launch infringement procedures. However, such a step does not guarantee that the *core of the problem* would be permanently addressed – i.e. *the use of border checks rather as a first aid and not a last resort measure*. Thus, without any intervention the situation at the internal borders will continue to be exposed to the changing national political climate, while a European approach which could take into account the overall interest of the Schengen area will continue to lack. (Emphasis added).

¹⁵⁴ Ref. A 000627 25.01.2023, in response to Ares(2022)5038993, 11.7.2022.

issues such as the *changing migration patterns, emergency situations, multiple terrorist attacks, emerging cybersecurity and cybercrime threats and evolving organised crime* need to be taken into consideration (Emphasis added).

This statement is incompatible with the Commission's obligation to act and enforce the law irrespective of the perceived 'political sensitivities' ascribed to any of these matters by any high-level Commission services and cabinets.

The above-mentioned 2021 Commission Staff Working Document adds that while the Commission has the power to issue an Opinion under the SBC or launch infringement proceedings against Member States, 'the problem that border checks are being used as a universal remedy for any security or other type of threat would remain'. It adds that 'launching infringement procedures without any accompanying action needs to be measured against the results expected and the complex implications involved, *including in terms of the necessity to continue building trust between Member States and with the European Commission.*' (Emphasis added). In the Commission's view, launching infringement proceedings 'would not guarantee that the *core of the problem* would be permanently addressed – i.e. *the use of border checks rather as a first aid and not a last resort measure*. Thus, without any [legislative] intervention the situation at the internal borders will continue to be exposed to the *changing national political climate*, while a European approach which could take into account the overall interest of the Schengen area will continue to lack.' (Emphasis added).

Based on these statements, it is clear that the Commission is underestimating and underperforming its **Treaty-based obligation** of launching formal infringement proceedings, and their role and impact that these have to deal with **the actual 'core of the problem', i.e. that all EU Member States unequivocally comply with the letter of the law, including in the scope of Schengen cooperation. 'Mutual trust' is not a given in EU law, but a daily practice. There can be no trust unless EU Member States authorities and actors deserve or merit it by fulfilling their Treaty obligations and upholding Article 2 TEU principles, including the rule of law.**

If this 'core of the problem' is not addressed, there is no guarantee that these same and other Member States will actually comply with any 'new revised rules' as those included in the last proposed 2021 SBC reform. A European Parliament representative interviewed for the purposes of this Study highlighted that **the 2021 SBC legislative reform creates an 'illusion' and follows a 'procedural game' whereby the Commission chooses not to prioritise enforcing EU law, and instead chooses to nurture a false expectation that with a new legislative reform Member States will comply with their duties and that the Commission will then effectively enforce the law if otherwise.**

During our interviews, some EU policymakers even argued that the Commission was not in a position to launch infringement proceedings against Member States who are in violation of the SBC while a new 2021 legislative proposal is currently being negotiated that would change or amend the current rules. **This argument is both astonishing and legally flawed.** Any legality assessment carried out by the Commission as to whether a Member State has failed to fulfil its obligations under EU law must relate to the state of the legislation in force on the date of the assessment and its

application¹⁵⁵. Furthermore, **any potential case brought before the CJEU will be determined by reference to the situation in the Member State concerned which prevails at the end of the period specified in a reasoned opinion by the Commission.**

¹⁵⁵ This has been reconfirmed by the CJEU in the [Case C-821/19, European Commission v. Hungary](#), of November 2021, where the Hungarian government lawyers argued the inadequacy of existing provisions in EU asylum law by making reference to the new Commission Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016) 467 final). In paragraph 32 the Court stated that: 'As a preliminary matter, it should be noted that, contrary to what Hungary appears to contend, the mere fact that an amendment of Directive 2013/32 is under discussion by the EU legislature is not relevant to the examination of this complaint, which must be assessed in the light of the EU legislation in force at the close of the period prescribed in the reasoned opinion sent to that Member State (see, to that effect, judgment of 24 May 2011, *Commission v Portugal*, C-52/08, EU:C:2011:337, paragraph 41)'.

5. SCHENGEN DIPLOMACY AND VENUE MUSHROOMING

As described in this section, the envisaged reform of the Schengen governance framework has seen the emergence of alternative policy venues bringing together Member States, EU institutions (the Commission, the Parliament) and EU agencies, notably Frontex where 'issues' related to Schengen are discussed and negotiated. This process, while officially aiming at a 'Stronger Schengen governance' through **increased political dialogue risks leading to impunity, and the further proliferation and diversification of data-producing actors, venues and instruments, which in turn fosters further 'politicisation' to the detriment of independent knowledge and effective enforcement.** In these venues 'data' does not always correspond to independent and objective knowledge and evidence.

5.1. The Revised Schengen Cycle

Back in November 2020 the Commission established an annual **Schengen Forum, a platform for 'political dialogue'** bringing together Home Affairs Ministers, members of the European Parliament other stakeholders, such as EU agencies and non-governmental organisations, as the first step towards launching a political debate dedicated to building a stronger Schengen area¹⁵⁶.

During the informal meeting of the Home Affairs Ministers on 3 February 2021 in Lille, the then French Presidency of the Council took a leading role in laying down the priorities of a 'reform of the Schengen governance'¹⁵⁷. The French Presidency proposed to set up a new **Schengen Council** to discuss strategic aspects of Schengen and tools for strengthening the political governance of Schengen¹⁵⁸. The Presidency proposed that the Schengen Council's discussions be conducted on the basis of the tools described below. The French proposal has largely informed the Commission's governance model for the Schengen area in the form of a revised '**Schengen cycle**' presented by the Commission at the first Schengen Council of March 2022, which comprises the following components:

- A **scoreboard or 'Schengen Barometer'**, prepared by the Commission before each Schengen Council. The Schengen Barometer is based on the input provided by the JHA Agencies (Frontex,

¹⁵⁶ Three Schengen forums have so far taken place: 30 November 2020, 17 May 2021, and 2 June 2022 (https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2232; https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-keynote-speech-second-schengen-forum_en https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3445). According to the Commission, 'The Forum has proven to be a useful platform to provide political steer to the main elements included in this Strategy, and for building trust.'

¹⁵⁷ Presidency of the Council, 'Confidence in the Schengen area', Brussels, 14 February 2022 (OR. en) 5984/22, <https://www.statewatch.org/media/3129/eu-council-schengen-council-discussion-paper-5984-22.pdf>

¹⁵⁸ The first Schengen Council met on 3 March 2022. According to the French Presidency document, 'in order to ensure its effectiveness, it should therefore be convened at regular intervals, in principle in the margins of each Council and, whenever necessary, in times of crises'. See Council of the EU, Justice and Home Affairs Council, Brussels, Thursday 3 and Friday 4 March 2022, Information Note Brussels, 2 March 2022, https://www.consilium.europa.eu/media/54611/background-brief-jha-220303-04_en.pdf

EUAA, eu-LISA, Europol and Eurojust) and other information available to the Commission. The barometer is an essential part of the Schengen cycle which allows the 'key elements' that have an impact in the Schengen area to be identified with a view to steering the political discussions in the Schengen Council¹⁵⁹.

- **An Annual State of Schengen report**, a yearly reporting exercise through which the Commission identifies the 'main challenges' for the Schengen area and 'priority actions' to be addressed at both national and EU level over the following year¹⁶⁰.
- a **Schengen Coordinator** with the task of steering and coordinating the work of the Schengen Council in coordination with the Member States to ensure the follow-up of the measures and actions taken in that context and play a key central role 'in case of crisis at the external borders'¹⁶¹.

The key pillars of the revised 'Schengen governance' elaborated by Member States under the steering of the French Presidency were further developed by the Commission and presented in the first State of Schengen Report 2022. According to the Commission, the proposed 'governance model' aims at providing **a framework to ensure a proper follow-up, with regular exchanges on common challenges and sharing of 'good practices' so as to pave the way for timely implementation of the required actions**¹⁶².

¹⁵⁹ See European Commission, 'Overall state of the Schengen area – Schengen Barometer +', Brussels, 28 February 2023, <https://migration-control.info/wp-content/uploads/2023/03/Schengen-Barometer.pdf>

¹⁶⁰ European Commission, press release, State of Schengen: Commission sets new priorities and new governance model, 24 May 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3213

¹⁶¹ Dumbrava, 2022, 'Schengen reform Key challenges and proposals', EPRS Briefing, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733599/EPRS_BRI\(2022\)733599_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733599/EPRS_BRI(2022)733599_EN.pdf)

¹⁶² During the last phase of the Cycle at the end of the year, discussions should focus on monitoring how the main challenges for Schengen have been addressed, including guidance for operations carried out by the EBCG agency. This should ensure a stronger political commitment to the common European governance of the Schengen area and set out the necessary steps for the following annual cycle.

Figure 4: Revised 'Schengen governance' – First Schengen Cycle 2022



Source: European Commission, State of Schengen Report 2022.

The effectiveness of this diplomacy-driven framework in ensuring compliance with Schengen rules remains to be seen. The proposed approach rests on the assumption that in order to address 'challenges' faced by the Schengen system what is required is **'better political steering' instead of enforcement** so as to favour 'favour *mutual trust* between Member States and the Associated Countries'.

As underlined in *Section 4* of this Study, however, Schengen is currently facing an 'enforcement gap' with the Commission so far unable to ensure respect of Schengen rules on the absence of internal border controls by a group of Member States. In parallel, the institutionalised character of pushbacks, pullbacks and border fencing policies and the policing of civil society actors engaged in SAR in the Mediterranean points to **a structural process or policy of 'lawlessness and erosion of the rule of law within Europe', where political dialogue and steering are not suited to addressing the impunity and injustice exercised by EU governments which can no longer be trusted**¹⁶³.

¹⁶³ Delphine Rodrik, 'Rightlessness in Melilla: Pushbacks as violations of the right to recognition before the law 21 September 2022, EU Immigration and Asylum Law and Policy Blog, <https://eumigrationlawblog.eu/rightlessness-in-melilla-pushbacks-as-violations-of-the-right-to-recognition-before-the-law/> Human Rights Watch, 'EU admits Croatia to Schengen Without Regard To Abuses at the Border', December 8, 2022, <https://www.hrw.org/news/2022/12/08/eu-admits-croatia-schengen-without-regard-abuses-border>.

5.2. The European Integrated Border Management (EIBM) Cycle

The **2021 Schengen Strategy** identified an **‘integrated approach’ to external border management** and the full implementation of the EBGC Agency mandate as prerequisites for establishing a ‘resilient’ Schengen area. The official goal is for EU and its Member States to advance towards a so-called **European Integrated Border Management (EIBM)**. The key components, principles and the main stakeholders involved in EIBM were first laid down in the 2016 EBCG Regulation and further developed in its 2019 amendment¹⁶⁴.

Previous research has shown that despite the fact that the EIBM concept has ‘integrated’ in its title, the current landscape of national actors with competences over EU border control/surveillance-related activities is anything but ‘integrated’ at present across the Schengen area. There is **a high degree of plurality or rather ‘disintegrated’ arena of national actors and authorities involved in border controls, maritime and border surveillance and coast guard functions** in the EU, which, depending on the Member State, range from predominantly civil, but also paramilitary and military actors¹⁶⁵. When conducting border controls and surveillance, however, all these actors are subject to SBC and EU standards.

‘Disintegration’ in these domains is not always unjustified, nor does it necessarily bring negative effects. It may be informed by the structural division of responsibilities – e.g. between border guards, the police, the military and coast guards – which are linked to specificities characterising national constitutional/administrative systems, and which often fosters **healthy checks and balances, and competition between various actors with different tasks, approaches, interests and priorities in these areas.**

The EBCG regulation still tries to push for an ‘integrated’ approach. Further, it sets out that the EIBM should be ensured by means of a **Multiannual Strategic Policy Cycle (EIBM Policy Cycle)**¹⁶⁶. The latter should guide how the EBCG effectively operates as a ‘structure’ over the ensuing five years,

¹⁶⁴ The 2019 EBCG Regulation indicates the following principles and concepts of EIBM: shared responsibility, duty to cooperate in good faith and obligation to exchange information; Constant readiness to respond to emerging threats; Greater coordination and integrated planning; Comprehensive situational awareness; EIBM technical standards; Common border guards’ culture and high level of professionalism; Functional integrity. See European Commission, Policy document developing a multiannual strategic policy for European integrated border management in accordance with Article 8(4) of Regulation (EU) 2019/189, COM(2022) 303 final Brussels, 24.5.2022. For a historical genesis of the notion refer to P. Hobbing (2006), ‘Integrated border management at the EU level’, in T. Balzacq and S. Carrera (Eds), *Security versus Freedom? A challenge for Europe’s future*. London: Ashgate, pp. 155-181. While Art. 77(2)(d) TFEU stipulates that the Union shall adopt any measure necessary for the gradual establishment of an ‘integrated management system’ for external borders, it is by far unclear the actual scope of this concept, and how far the ‘integrated’ nature of such a system could go without encroaching the EU general principles of subsidiarity, proportionality and fundamental rights.

¹⁶⁵ S. Carrera, S. Blockmans, J.P. Cassarino and E. Guild (2017), *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean*, CEPS Task Force Report, Brussels.

¹⁶⁶ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1, 14.11.2019.

providing an operational framework for the 'daily work of more than 120 000 European Border and Coast Guard officers from national authorities and Frontex'¹⁶⁷.

On May 2022, in accordance with Article 8(4) of the EBCG Regulation, the Commission presented a **Policy Document**, with the aim of starting consultations with the European Parliament and the Council on the development of the EIBM Policy Cycle¹⁶⁸. Interinstitutional discussions resulted in inputs from the EP LIBE Committee¹⁶⁹ and the Council¹⁷⁰ which focused on the policy priorities and strategic guidelines in relation to the 15 EIBM components laid down in Article 3 of the EBCG Regulation. In addition, the consultation sought the views of EU institutions on the shape and functioning of a '**governance mechanism**' to ensure an '**integrated process**' for providing strategic guidelines to ensure a '**coherent EIBM**' implementation and provide guidance to all relevant actors, including the EBCG agency and the above-mentioned wide-range of relevant national authorities and actors.

Following a call in the European Council Conclusions of 9 February 2023¹⁷¹, the Commission presented on 14 March of the same year a **Communication on establishing the multiannual strategic policy for EIBM**. As laid down in Article 8 of the 2019 Frontex Regulation and as further elaborated by the Commission in its Communication, the five-year EIBM multiannual strategic policy cycle is composed of four stages:

- 1) **Political direction by the EU institutions.** The responsibility for establishing a political framework to direct EIBM rests on cooperation between EU institutions, the Commission, the European Parliament and the Council. The outcome of the consultation between EU institutions is included in the Communication on **the multiannual strategic policy for EIBM (2023-2027)**. To draft that Communication, the Commission relied on the **Strategic Risk Analysis for EIBM submitted by Frontex in July 2020, which identified the EIBM challenges for the next 10 years**¹⁷², as well as recommendations elaborated in the thematic Schengen evaluation, carried out in the period 2019-2020, related to Member States' national strategies for integrated border management¹⁷³.

¹⁶⁷ European Commission, Policy document developing a multiannual strategic policy for European integrated border management in accordance with Article 8(4) of Regulation (EU) 2019/1896, Brussels, 24.5.2022 COM(2022) 303 final p.1.

¹⁶⁸ European Commission, Policy document developing a multiannual strategic policy for European integrated border management in accordance with Article 8(4) of Regulation (EU) 2019/189, 2022, COM(2022) 303 final, 24.5.2022.

¹⁶⁹ Letter from the Chairman of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, 17 January 2023, IPOL-COM-LIBE D(2023) 1361.

¹⁷⁰ Council conclusions (14 October 2022), Multiannual strategic policy cycle for European integrated border management (EIBM), Brussels, 17 October 2022, 13585/22.

¹⁷¹ Special meeting of the European Council (9 February 2023) – Conclusions, para. 23(3).

¹⁷² Frontex, Strategic Risk Analysis 2022, <https://frontex.europa.eu/publications/strategic-risk-analysis-2022-Kj2kic>

¹⁷³ European Commission, Annex to the Commission Implementing Decision establishing the report of 2019–2020 thematic evaluation of Member States' national strategies for integrated border management, Brussels, 17.12.2020 C(2020) 8000 final, https://home-affairs.ec.europa.eu/system/files/2021-01/22012021_report_thematic_evaluation_national_ibm_strategies_annex-1_en.pdf

- 2) **Frontex Management Board's technical and operational strategy for EIBM.** In accordance with Article 8(5) of the EBCG Regulation, Frontex is tasked with establishing a multiannual technical and operational strategy for EIBM, by decision of its Management Board (MB) and based on a proposal from the Frontex Executive Director. That strategy is to be prepared in close cooperation with the Member States and the Commission. The Management Board should adopt the strategy within six months of the adoption of this Communication¹⁷⁴.
- 3) **Member States' national EIBM strategies.** Article 8(6) of the EBCG Regulation requires that Member States establish their national strategies for IBM with consideration to the political strategy developed by EU institutions and the EIBM technical and operational strategy adopted by the Frontex Management Board. Member States are requested to align their national strategies for EIBM to the EIBM multiannual strategic policy within 12 months of the adoption of this Communication.
- 4) **Evaluation by the Commission with a view to relaunching the cycle.** Four years after the adoption of the Communication setting out the multiannual strategic policy for European integrated border management, the Commission is requested to carry out a thorough evaluation of the policy's implementation by all stakeholders at EU and national levels, with a view to preparing the next multiannual strategic policy cycle.

In its Communication, the Commission acknowledges **the increasing complexity and sophistication of IBM**, underlying how this situation risks producing increased fragmentation and leading to an uncoordinated approach, with duplication of efforts by the many actors involved¹⁷⁵. The Commission underlines the need to exploit synergies between and avoid duplications between **the EIBM cycle into the Schengen cycle**, a priority shared by the Council in its October 2022 Conclusions¹⁷⁶. According to the Commission, the Schengen cycle should be able to monitor the implementation of the EIBM cycle at different stages. The annual meeting of the Schengen Forum should allow the European Parliament, the Council and the Commission to review the EIBM implementation and provide complementary political direction for the EBCG. The Schengen Council is expected to provide 'political steering' on key 'strategic issues' in relation to the implementation of EIBM. Additional 'strategic steering' will also be provided by a high-level meeting of the Management Board of the EBCG Agency. Annex I of the Commission Communication includes a **list of specific policy priorities and strategic guidelines** for the **15 components of EIBM** laid down

¹⁷⁴ Requirements for the technical and operational strategy on EIBM as well as Member States national IBM strategies are laid down in an annex to the Commission's communication. See Annexes to the Communication from the Commission to the European Parliament and the Council establishing the multiannual strategic policy for European integrated border management, Strasbourg, 14.3.2023 COM(2023) 146 final Annexes 1 to 2, p. 31.

¹⁷⁵ European Commission, Communication on establishing the multiannual strategic policy for European Integrated Border management, p. 3.

¹⁷⁶ European Commission, Policy document developing a multiannual strategic policy for European integrated border management in accordance with Article 8(4) of Regulation (EU) 2019/189; Council conclusions (14 October 2022), Multiannual strategic policy cycle for European integrated border management (EIBM), Brussels, 17 October 2022, 13585/22.

in Art. 3 of the Frontex Regulation. These include 12 thematic components and 3 horizontal components, as laid down in the following Box 3¹⁷⁷.

Box 3: EIBM components

Thematic priorities

- 1) Border control: including measures to facilitate legitimate border crossings, prevention and detection of cross-border crime, migrant smuggling, trafficking in human beings, mechanisms and procedures for the identification of vulnerable persons, unaccompanied minors, and identification of persons in need of international protection.
- 2) Search and rescue operations for persons in distress at sea launched and carried out in accordance with Regulation (EU) No 656/2014 and with international law.
- 3) Analysis of the risks for internal security and analysis of the threats that may affect the functioning or security of the external borders.
- 4) Information exchange and cooperation between Member States in the areas covered by the EBCG Regulation, as well as between Member States and the Agency.
- 5) Inter-agency cooperation among Member State authorities responsible for border control return and national human rights bodies.
- 6) Cooperation and exchange of information among EU institutions, bodies, offices and agencies in the areas covered by the EBCG Regulation.
- 7) Cooperation with third countries, in particular on neighbouring third countries of origin or transit for irregular immigration.
- 8) Technical and operational measures related to border control for addressing irregular migration and countering cross-border crime.
- 9) Return of third-country nationals subject to a return decision.
- 10) Use of state-of-the-art technology including large-scale information systems.
- 11) A quality control mechanism, in particular the Schengen evaluation mechanism, the vulnerability assessment and possible national mechanisms.
- 12) Solidarity mechanisms, in particular Union funding instruments

Horizontal priorities

- 13) Fundamental rights.
- 14) Education and training.
- 15) Research and innovation.

Source: European Commission, Annex I EIBM components policy priorities and strategic guidelines for the components of European integrated border management

¹⁷⁷ Based on inputs from the European Council, the Council and the Parliament however, the Commission identifies eight components of EIBM that are of particular importance: border control, a common EU system for returns, cooperation with third countries, implementation of EU information system and their (SIS, VIS, EES and ETIAS) and their interoperability, respect of fundamental rights, a coherent and comprehensive quality control mechanism and EU funding instruments.

The Commission's Communication on the EIBM multiannual strategic policy provides a synthetic analysis of the **'strategic context'** which has informed the identification of the key components and related priority actions that should guide the EIBM cycle for the period 2023-2027. The analysis relies heavily on the **2022 Frontex Strategic Risk Analysis (SRA)**, an exercise through which the Agency provides foresight on how **'megatrends and possible future events'** are expected to affect EU border and migration management between 2022 and 2032. **The reliance on Frontex Strategic Risk Analysis to inform future EU policies in the field of external border control however is problematic for a number of reasons.**

Frontex 'strategic thinking on megatrends' is informed by a risk-based and crisis-led narrative of migration and asylum dynamics¹⁷⁸. The agency identifies a set of 'crises' which have impacted on EU border management in the previous years, including the so-called instrumentalisation of migration by certain non-EU countries, Covid-19, Russia's war on Ukraine and the related refugee movements, arguing that the long-standing effects of those events will make **'crisis management a permanent feature of EU border management.'** According to Frontex analysis: 'EU border management will experience a higher occurrence of migration/refugee crises (or disproportionate pressures) that will test the effectiveness of border controls'¹⁷⁹.

Academic research has underlined **the role played by Frontex, including through its risk analyses, in sustaining and co-creating a narrative of 'permanent crisis' at the EU external borders**¹⁸⁰. Scholars have pointed out how **an understanding of human mobility in terms of a constantly looming 'threat' to EU internal security that emerges from Frontex Risk Analysis, disregards the asylum dimension of this conversation, the fundamental rights impacts of this insecurity framing and the broader geographical, historical and social conditions** that sustain and inform human mobility, as well as their asylum components¹⁸¹.

Frontex has also played a key role in supporting some Member States' framing of cross-border human mobility in terms of a 'hybrid threat' or 'migration blackmail'¹⁸², endorsing a **dehumanising rhetoric** that has served the purpose of justifying border closures to asylum and ended up legitimising a reliance on pushback practices. In this regard, Frontex strategic Risk Analysis also provides an ambiguous understanding of the **role of EU and international human rights law** in the context of border management by arguing that 'hybrid actors [...] may target the

¹⁷⁸ On the broader limitations of existing methodologies for foresight and scenario building in the field of migration see OECD-EASO, 'Can we anticipate future migration flows?', Migration Policy Debates, N. 18 May 2018, <https://www.oecd.org/els/mig/migration-policy-debate-16.pdf>

¹⁷⁹ Frontex, Frontex Strategic Risk Analysis 2022, p. 3.

¹⁸⁰ J. Jeandesboz and P. Pallister-Wilkins (2016) Crisis, routine, consolidation: The politics of the Mediterranean migration crisis. Mediterranean Politics 21(2), pp. 316–320.

¹⁸¹ Carrera et al., 2021, 'European Union Policies on Onward and Secondary Movements of Asylum-seekers and Refugees', p. 7; Henk van Houtum and Rodrigo Bueno Lacy, 'Ceci n'est pas la migration': countering the cunning cartopolitics of the Frontex migration map, in Handbook on Critical Geographies of Migration, pp. 153–169.

¹⁸² Frontex, Frontex strategic risk analysis 2022, 3.

humanitarian and human right dimension ('lawfare') to try to destabilise the EU, divide political and public opinion and harm the EU's reputation'¹⁸³.

Since it was deployed in the context of tensions at the Greek–Turkish land border in March 2020, the understanding of 'migration' as a 'hybrid threat' has become common currency in EU debates on asylum and migration. It has been applied in an increasing number of highly diverse situations¹⁸⁴ and influenced some latest legislative reforms, such as the revision of the Schengen border Code. This has prompted the call for ad hoc legislative initiatives, e.g. the **Instrumentalisation Regulation**, and provided the ground for Member States pressing requests to use EU funding for **increased militarisation of the external border**¹⁸⁵.

In parallel, the increasing reliance on the notion of 'instrumentalisation' to frame EU challenges in the field of external border controls **serves Frontex's own interests well**, as it has fostered the call for **an ever-expanding role for the Frontex agency, not least in the field of return and cooperation with third countries. Frontex cooperation with third countries** may take different forms, including the conclusion of status agreements and working arrangements with third countries in accordance with Article 73 of the EBCG Regulation¹⁸⁶.

The "externalisation of EU border management in third countries raises, however, profound issues of **accountability and transparency** in the work of the agency and **respect of fundamental rights** of individuals directly and indirectly affected by the **operational activities and information sharing** by the agency in third countries¹⁸⁷. These concerns are made even more pressing by substantiated evidence of previous failures by the Agency to ensure respect of those standards in the context of the operations it supports and coordinates at Member States' external borders as studied in *Section 4* above.

Furthermore, **the risk-based nature of Frontex analysis to inform decision-making, as well as steering and monitoring policy implementation, is equally problematic. The EIBM concept, and its use of Frontex Risk Analysis, pursues an understanding of border management which**

¹⁸³ Frontex, Frontex Strategic Risk Analysis 2022, p. 3. The same Report further states that: 'apparently, certain states in the EU neighbourhood perceive migration blackmail as an effective method/element of a hybrid attack intended to exert pressure on the EU's external borders to further their geopolitical interests and extort concessions.', p. 14.

¹⁸⁴ Reuters, Italy blames surge in migration on Russia's Wagner group, March 13, 2023, <https://www.reuters.com/world/europe/italy-blames-surge-migration-russias-wagner-group-2023-03-13/>

¹⁸⁵ ECRE, Joint Statement: NGOs call on Member States: Agreeing on the Instrumentalisation Regulation will be the Final Blow to a COMMON European Asylum System (CEAS) in Europe, 8 September 2022, <https://ecre.org/joint-statement-ngos-call-on-member-states-agreeing-on-the-instrumentalisation-regulation-will-be-the-final-blow-to-a-common-european-asylum-system-ceas-in-europe/>

¹⁸⁶ Frontex, Frontex Strategic Risk Analysis 2022, p. 4.

¹⁸⁷ M. Gkliati and J. Kilpatrick, Frontex cooperation with third countries: examining the human rights implications, November 2021 FMR 68 <https://www.fmreview.org/externalisation/gkliati-kilpatrick>; F. Coman-Kund, The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond..., Verfassungsblog, 6 February 2020, <https://verfassungsblog.de/the-territorial-expansion-of-frontex-operations-to-third-countries-on-the-recently-concluded-status-agreements-in-the-western-balkans-and-beyond/>

is directly informed by information sharing and analysis about an estimation of ‘possible future events’ and ‘trends’ based on *futureology* and predictive data, including artificial intelligence. The assumption is that ‘risk’ can be quantified, classified and predicted, yet the overall scientific quality and reliability of this tool very much at stake, which clearly **does not** qualify as evidence.

According to Frontex, ‘risk is defined as *the magnitude and likelihood of a threat* occurring at the external borders, given the measures in place at the borders and within the EU, which will impact on EU internal security, on the security of the external borders, on the optimal flow of regular passengers or which will have humanitarian consequences’¹⁸⁸. (Emphasis added) This definition is rather loose and all-encompassing, to say the least. **To base decision-making on likelihoods is extremely problematic from a legal certainty standpoint.**

Jeandesboz has shown how the IBM notion has experienced a significant and visible evolution of ‘what is actually meant by border control in the EU context’ – its rationality and practice – and the prevalence of the concepts of **proactivity, instantaneity and risk**. Since its origins, Frontex has strongly relied on ‘risk assessments’ in framing what it does and the issues that it covers¹⁸⁹, and this method has remained largely unchallenged. The use of ‘risk’ in this context assumes however an uncritical understanding of ‘the possibility to know the future’ or ‘what is likely to happen’¹⁹⁰.

Schengen should not be based on crystal-ball methodologies about uncertain futures, when the decisions and policies adopted based on these methodologies in fact co-create those very same futures that they are seeking to address¹⁹¹. Any risk analysis is not largely different from the fears-based arguments and sources advanced by the few EU Member States’ Ministries of Interior currently disobeying EU Schengen rules to derogate free movement and prolong internal border controls in direct violation of the law as analysed in Section 2 of this Study. In fact, in their latest Notification the French authorities have already dubious use of **Frontex CIRAM 2.0 Model (Common Integrated Risk Analysis Model)** to justify why internal border controls are in their view necessary.

¹⁸⁸ Frontex, Common Integrated Risk Analysis Model (CIRAM), Summary Booklet, Reference number: 17600/ 2013.

¹⁸⁹ S. Carrera (2007), The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Migration in the Canary Islands. CEPS Working Document no. 261, Brussels: CEPS.

¹⁹⁰ J. Jeandesboz (2011), Beyond the Tartar Steppe: EUROSUR and the Ethics of European Border Control practices, in J. P. Burgess and S. Gutwirth (Eds), A Threat Against Europe? Security, Migration and Integration, VUBPress, pp. 111-132.

¹⁹¹ A clear example is this argument is EUROSUR. According to Jeandesboz, ‘One can always claim that EUROSUR, insofar as it allows for an early detection of patterns of irregular crossing, will end up saving lives and, by hardening migratory controls, will enhance possibilities to protect those who can ‘truly’ benefit from rights. The former claim is easy enough to discard: it is the enhancement of interception capacities over the past few years that have made the journey to Europe evermore perilous. Their presumed reinforcement through EUROSUR, while possibly contributing to save some lives, will only result in accentuating this trend.’ Jeandesboz (2011).

5.3. The Schengen Evaluation and Monitoring Mechanism

The **Schengen Evaluation and Monitoring Mechanism (SEMM)** was created to verify that the Schengen *acquis* is properly implemented. As a peer-to-peer instrument, the SEMM objective is to ensure mutual trust among Member States which is key to sustaining the removal of internal borders. A **peer-to-peer** evaluation mechanism of Member States' compliance with the Schengen *acquis* had been in place since 1998¹⁹². Building on these previous experiences, the SEMM was established through a Council Regulation adopted in 2013 and become operational in 2015¹⁹³. The SEMM has two main objectives:

- To verify that Member States have completely applied the Schengen *acquis*.
- To determine whether Member States have met the necessary conditions to allow for the application of all components of the Schengen *acquis*.

The SEMM was tasked with evaluating all aspects of the Schengen *acquis*, including the absence of border control at internal borders and the efficiency of border control at external borders. The SEMM covers a range of **accompanying measures** to the abolition of internal border controls measures, including external border, visa policy, the SIS, data protection, police cooperation, judicial cooperation in criminal matters. The 2013 Regulation stated that during the evaluation and monitoring particular attention should be paid to respect for **fundamental rights** in the application of the Schengen *acquis*¹⁹⁴.

The SEMM was designed with the specific objective of monitoring the effectiveness of the practical implementation of Union policies through peer review, notwithstanding the general power of the Commission to oversee the application of Union law under the control of the Court of Justice of the European Union through infringement procedures.

While in the previous phase the Commission's role was limited to that of 'observer', the 2013 Regulation granted **the Commission an overall coordination role implementing the SEMM and monitoring its applications**¹⁹⁵. **The SEMM process is based on a number of tools**¹⁹⁶ and involves

¹⁹² Decision of the Executive Committee of 16 September 1998 (2) (SCH/Com-ex (98) 26 def) setting up a Standing Committee on the evaluation and implementation of Schengen.

¹⁹³ Council of the EU, Council Regulation (EU) No 1053/2013 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, OJ L295/27, 6.11.2013.

¹⁹⁴ Council of the EU, Council Regulation (EU) No 1053/2013, recital 14.

¹⁹⁵ These coordination responsibilities include creating the multiannual and annual evaluation programmes (with input from Frontex and Europol), preparing evaluation questionnaires, scheduling and undertaking evaluation visits to Member States and preparing resulting reports and recommendations. It also makes sure that follow-up and monitoring activities related to the evaluation reports and recommendations are carried out as mandated. Council Regulation (EU) No 1053/2013, Art. 3.

¹⁹⁶ The two key tools for evaluation are questionnaires and of on-site visits, which may be announced or unannounced. The process also relies on Frontex risk analyses that should include recommendations on specific sections of the

a range of **actors**, foreseeing roles (albeit different in scope and relevance) for the Commission, the Council the European Parliament, as well as EU agencies, notably Frontex. It foresees a planning phase (mostly in the hands of the Commission)¹⁹⁷, an evaluation phase (premised on joint collaboration between the Commission and the Member States), an appraisal phase (in which the findings of evaluation are assessed by both the Commission and the Council) and final monitoring phase, revolving around the assessment of action plans presented by Member States detailing how they will address identified deficiencies¹⁹⁸.

The coordinating role granted to the Commission was understood both as a way to address the inefficiencies associated with **the previous intergovernmental or Member State (Council of the EU) driven system** and to ensure a more objective and impartial evaluation and monitoring process. Over the years, however, **several shortcomings in the functioning of the SEMM were identified**¹⁹⁹. A **2020 Commission Report** concluded that although 'overall, Member States comply with the essential provisions of the Schengen *acquis*', there are some recurrent deficiencies in Member States and equally divergent practices among Member States due to an incoherent implementation of the Schengen *acquis*'.

The Commission Report underlined how **the technical nature of the process had not generated sufficient political pressure to address cases of serious deficiencies**, with ministerial discussions taking place only in 1 (i.e. Greece) of the 10 cases of serious deficiencies identified in the framework of evaluation visits. The Report further underlined how **SEMM did not appear to foster 'enough trust' amongst Member States**, considering that several Member States continued to prolong internal border controls over the previous five years, despite positive SEMM evaluations that Member States were implementing the Schengen *acquis* adequately across EU external borders²⁰⁰.

The European Parliament in its **2021 Report on the Functioning of the Schengen area**, while acknowledging the contribution made by SEMM to the sound functioning of the Schengen area, recalled the ***sui generis* nature of the SEMM** and recalled that **the Commission remains ultimately responsible for ensuring the application of the Treaties**. The EP called for the establishment of **clear deadlines** for all steps of the evaluation procedure, underlined the

external borders to be evaluated in the following year under the multiannual evaluation programme as well recommendations on the priorities for evaluations in the form of unannounced on-site visits.

¹⁹⁷ The planning phase is based on a multiannual evaluation programme, covering a period of five years to be established by the Commission, listing the order in which Member States should be evaluated each year. The Commission is also responsible for establishing annual evaluation programmes, including proposals for evaluation of the Schengen *acquis* for each member state, based on the multiannual programme, as well as proposals for evaluations on specific parts of the *acquis* across several Member States, so-called thematic evaluations.

¹⁹⁸ M. Wagner et al., 'The state of play of Schengen Governance. An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme', Study requested by the LIBE Committee, 2020, p. 21, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)658699](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)658699)

¹⁹⁹ See European Commission, Schengen evaluation and monitoring, https://homeaffairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/schengen-evaluation-and-monitoring_en

²⁰⁰ European Commission, Report on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to Article 22 of Council Regulation (EU) No 1053/2013 First Multiannual Evaluation Programme (2015-2019), COM (2020) 779 final, Brussels, 25.11.2020.

importance of **increasing flexibility** in the multi-annual and annual planning and the allocation of sufficient resources with a view to increasing the number of on-site visits to Member States. The Report also proposed that **fundamental rights** must be evaluated consistently during Schengen evaluations²⁰¹.

Over the years, several other stakeholders have criticised the SEMM for its limited scope and lack of effectiveness. In 2019, the **European Court of Auditors (ECA)** issued a Special Report which pointed to **the lack of binding deadlines for the adoption of evaluation reports and the implementation of corrective actions** by Member States²⁰².

A **2020 Study commissioned by the LIBE Committee** underlined a number of issues, among which the long duration of the SEMM procedure, lack of flexibility due to difficulties in amending annual programmes and limited use of unannounced visits²⁰³. The same Study underlined how the **snapshot approach of the SEMM** (i.e. evaluating a Member State in specific policy areas at a certain point in time) reveals a set of weaknesses, most notably it does not allow **all thematic areas together to be brought together** to analyse a national border management system in its entirety.

Finally, the Study underlined how SEMM is operating at the **intersection between migration, asylum and border management underlying the structural shortcomings of the SEMM in monitoring respect of fundamental rights**, which also make it subject to *political interference* leading to disregard of documented violations of fundamental rights at the external borders²⁰⁴. The risk of **political interference can only be expected to increase under the new SEMM where 'political steering' is prioritised by the Commission over 'technical evaluations'**.

In June 2021, the Commission published a **proposal to revise the SEMM Regulation**²⁰⁵. The aim was to increase the efficiency and flexibility of the mechanism, foster political dialogue on the results of evaluations, and strengthen the evaluation of fundamental rights compliance²⁰⁶.

²⁰¹ The EP Report mentioned in this regard how despite the Commission adopting 198 evaluation reports in the period 2015-2019, only 45 Schengen evaluations have been closed.

²⁰² European Court of Auditors, EU information systems supporting border control - a strong tool, but more focus needed on timely and complete data, 2019, https://www.eca.europa.eu/Lists/ECADocuments/SR19_20/SR_Border_control_EN.pdf

²⁰³ M. Wagner et al., 'The state of play of Schengen Governance. An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme', Study requested by the LIBE Committee, 2020, p. 70, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)658699](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)658699)

²⁰⁴ According to the same Study, analysis of SEMM evaluations over the period 2014-2019 reveals that there has been *political interference* with the functioning of the SEMM during the 2014-19 cycle, in particular when credibly documented violations of fundamental rights at the external borders of Croatia were overlooked.

²⁰⁵ European Commission, Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013, Brussels, 2.6.2021 COM(2021) 278 final.

²⁰⁶ European Commission, Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013, Brussels, 2.6.2021 COM(2021) 278 final.

The Parliament adopted the **legislative resolution** containing the EP's amendments to the proposal on 7 April 2022 and the Council adopted the Regulation on 9 June 2022²⁰⁷. The proposal was adopted under the **consultation procedure**, where the Council has the obligation to consult the Parliament although the Parliament's position is not binding²⁰⁸. Implementation of the new SEMM framework began in February 2023.

The new Regulation²⁰⁹ aims at making the SEMM more **integrated, strategic, and based on a risk assessment, and vulnerability-based approach**²¹⁰. **This changes the SEMM methodology from the until-now evidence-based methods to one characterised or informed by a methodologically dubious 'risks analysis model'**. This seeks to make the evaluation process more 'agile' and thus better able to react to evolving circumstances. The official goal is that evaluations should be more focused on the most relevant aspects, thus allowing the establishment of a **stronger link between SEMM and the Schengen governance**²¹¹. The length of the SEMM evaluation cycle is extended from 5 to 7 years. This extension is expected to lead to an increased and more targeted monitoring of Member States, allowing a better use of the evaluation procedures available²¹².

According to the Regulation, thematic evaluations should be used in a more targeted and balanced way to provide an analysis of Member States' practices in the implementation of the Schengen *acquis*. They should be used to assess the implementation of major legislative changes as they start to apply and to assess issues across policy areas or practices of Member States facing similar challenges²¹³. To make **unannounced visits** more effective, one of the issues identified during the assessment of the previous evaluation period, the new Regulation provides for the removal of the standard 24-hour notice period on a number of grounds, including to verify compliance with the Schengen *acquis* at internal borders or when the Commission has substantiated grounds to consider that there are **serious violations of fundamental rights** in the application of the Schengen *acquis*²¹⁴.

The revised SEMM aims at **accelerating the evaluation process** to identify and address shortcomings. Specifically, it reduces from 3 to 2 months the deadline for Member States to submit

²⁰⁷ European Parliament, Legislative resolution of 7 April 2022 on the proposal for a Council regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing Regulation (EU) No 1053/2013 (COM(2021)0278 – C9-0349/2021 – 2021/0140(CNS))

²⁰⁸ European Parliament, Legislative Train Schedule, Revision of the Schengen Evaluation Mechanism, <https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-revision-of-schengen-evaluation-mechanism>

²⁰⁹ Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, and repealing Regulation (EU) No 1053/2013

²¹⁰ Interview with European Commission official 2, 16 February 2023.

²¹¹ Interview with EU Council official 2, 14 March 2023.

²¹² Council Regulation (EU) 2022/922 of 9 June 2022, recital 16.

²¹³ *Ibid.*, Art. 4(4).

²¹⁴ *Ibid.*, Art. 19(4).

an action plan following recommendations issued by the Council or the Commission²¹⁵. It also establishes an **expedited procedure when evaluations detect serious deficiencies** that could put the functioning of the Schengen area at risk. Under this new procedure, the evaluated Member State will have to immediately start implementing remedial actions before the evaluation report is adopted, informing without delay the Commission and Member States of the measures taken or planned²¹⁶. Within 6 weeks of the adoption of the evaluation report, the Commission shall present to the Council a proposal for recommendations for remedial actions aimed at addressing the serious deficiency identified, following which the Council shall adopt recommendations within 1 month of receipt of the proposal²¹⁷.

While under the previous framework the Council was adopting **recommendations** on all evaluation reports, under the new mechanism the Council will adopt recommendations only in cases of serious deficiencies, first-time evaluations, thematic evaluations and where the evaluated Member State substantially contests the draft evaluation report containing draft recommendations²¹⁸. In all other cases, recommendations for remedial action should be included in the Commission's evaluation report²¹⁹. **This change enabling the simultaneous publication of the report and recommendations is expected to reduce previously identified delays occurring from the finalisation of the report and the adoption of recommendation by the Council**²²⁰.

One of the objectives of the new SEMM regulation is **strengthening the evaluation of respect of fundamental rights under the Schengen *acquis***. Assessments of the previous phase of the SEMM underlined how persistent fundamental rights violations that exist, such as *non-refoulement*, are not covered by the SEMM due to the nature of the evaluation visits and the restrictive approach to considering evidence. According to a 2020 EP Study, **the SEMM cannot be expected to detect fundamental rights issues (e.g. pushbacks) due to the programmed nature of announced visits** and the fact that, for unannounced visits to external borders, the host state must be informed 24 hours in advance²²¹.

The revised SEMM foresees the possibility of **unannounced visits** if there are indications of serious fundamental rights violations. The Regulation also foresees an **increased role for the FRA**: relevant information from FRA should be better utilised and its experts better involved in the design and

²¹⁵ Ibid., Art. 21(1).

²¹⁶ Ibid., Art. 22.

²¹⁷ Ibid., Art. 22(4).

²¹⁸ Ibid., Art. 3(3).

²¹⁹ Ibid., 3(2).

²²⁰ Interview with EU Council official 2, 14 March 2023. At the same time, the Regulation states that, the use of the examination procedure under comitology should ensure Member States' engagement in the decision-making process leading to the adoption of the recommendations (recital 22).

²²¹ Wagner et al., 'An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme', 2020, p. 51.

implementation of evaluations²²². Furthermore, under the new framework it should be possible to **take into account evidence provided or made public by independent monitoring mechanisms or by relevant third parties**, such as ombudspersons, authorities monitoring respect of fundamental rights, and non-governmental organisations, in the programming and design of evaluations²²³.

While recognising the increased focus on fundamental rights of the revised SEMM framework, interviews carried out for this Study pointed to the fact that the **focus and impact of SEMM evaluations should not be overestimated**. While the new Regulation points to an increased role for the FRA, the limited size of the agency implies that its capacity of supporting the process is limited. Furthermore, under the SEMM framework each Member State is expected to be evaluated once over a seven-year period: this long timeframe implies that **SEMM process is not particularly suited to reacting promptly to evidence of fundamental rights violations**²²⁴.

In order to improve the effectiveness of SEMM in remedying fundamental rights issues, the European Parliament in its Resolution on the SEMM proposal included an amendment envisaging that **all SEMM evaluations shall comprise an assessment of compliance with fundamental rights in the context of the aspects covered**²²⁵. However, this proposal was not included in the final version of the Regulation approved by the Council²²⁶.

Rather than by substantially reinforcing evaluation of human rights under the SEMM, the choice made by the Commission was to address key fundamental rights issues at the intersection between border control and asylum through the establishment of **'independent monitoring mechanisms'** as laid down in Art. 7 of the 2020 Screening Regulation²²⁷. However, as underlined elsewhere in this Study, key issues have been identified concerning the scope, independence and effectiveness of the proposed fundamental rights monitoring mechanisms, while the fact that their establishment is linked to the still uncertain fate of the Screening Regulation²²⁸.

²²² FRA has been involved in the Return component of Schengen evaluations since 2015 and, from 2020, in the external border component as well. Interview with EU Agency officials 1, 8 February 2023.

²²³ Council Regulation (EU) 2022/922, Recital 11.

²²⁴ Interview with EU Agency officials 1, 8 February 2023.

²²⁵ European Parliament legislative resolution of 7 April 2022, amendment 22.

²²⁶ Council Regulation (EU) 2022/922, Art. 1(3).

²²⁷ Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

²²⁸ See this Study, Section 3.2.4. The EP Draft Report on the Screening proposal, adopted on 16 November 2021 significantly enhances the scope and of the independent monitoring mechanism. See DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM(2020)0612 - C9-0307/2020 - 2020/0278(COD)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Birgit Sippel.

The SEMM still remains based on peer-pressure, relying on Member States' readiness to implement recommendations. In its 2021 Schengen Strategy, the Commission stated its intention, 'where necessary and appropriate', **to make a more systematic use of the synergies between the SEMM and infringement procedures**. The Commission called for a 'structured approach', applying more **flexible and transparent criteria to decide on the circumstances that may trigger an infringement procedure**.

According to the Commission, situations in which infringements could be launched include cases of non-compliance that may have a 'substantial and immediate impact' on the proper functioning of Schengen, when a Member State does not 'systematically' follow recommendations, or when there are 'persistent deficiencies' because the Mechanism has not succeeded in ensuring Member State compliance by the end of the cycle²²⁹. As *Section 4* of this Study has shown and argued, however, the *sui generis* nature of the SEMM and its use does not exempt the Commission's **from exercising in an effective and timely manner its obligations to enforce EU law and launch infringement proceedings**.

Notwithstanding the previous commitment, over the previous years, to our knowledge, **the Commission has never started formal infringement procedures related to fundamental rights violations in the context of external border procedures related to the SBC provisions**²³⁰. We have not been able to identify one single case where this has been the case following a SEMM evaluation. Several observers have nevertheless attributed lack of action from the Commission to a **'political stance' and specifically the choice to avoid direct confrontation with Member States in a policy field that is considered 'politically sensitive'**²³¹. This hints to **undue intra-Commission interferences of 'politics' on the Commission's enforcement role**.

²²⁹ European Commission, 'A strategy towards a fully functioning and resilient Schengen area', p. 21.

²³⁰ An exception would be the letters sent by the-then-Commissioner for Home Affairs, Cecilia Malmström, to the Spanish Minister of the Interior in 2014. These letters were sent after cases of violence against third-country nationals by the Spanish Civil Guard in the North African enclaves of Ceuta (6 February 2014) and Melilla (15 October 2014). In her letters, Commissioner Malmström insisted that the actions of the Spanish authorities were in violation of *the Schengen Borders Code*, the Return Directive and the EU Charter of Fundamental Rights. See *El Mundo*, 'Malmström exige por carta a Fernández Díaz 'explicaciones' por la actuación de la Guardia Civil'. 18 February 2014. <https://www.elmundo.es/espana/2014/02/18/53038f8de2704e7b118b4578.html>; L. Abellan, 'Bruselas acusa a España de violar las reglas europeas de fronteras'. *El País*. 30 October 2014. https://elpais.com/politica/2014/10/30/actualidad/1414699857_139045.html; Agence Europe, 'Commission still calling Spain to account on migrant question'. 1 November 2014. <https://agenceurope.eu/en/bulletin/article/11189/12>

²³¹ Interview with EU Agency official 2, 2 March 2023; Interview European Commission official 3, 17 February 2023. See also G. Cornelisse, M. Reneman, 'Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?', *Eur Law J.* 2020;26:181–198; Jorrit Rijpma and Apostolis Fotiadis, 'Addressing the Violation of Fundamental Rights at the External Borders of the European Union. Infringement Proceedings and Conditionality in EU Funding Instruments', Study Commissioned by The Greens/EFA in the European Parliament, June 2022, <https://www.greens-efa.eu/en/article/study/addressing-the-violation-of-fundamental-rights-at-the-external-borders-of-the-european-union>

Box 4: Summary of key changes introduced by the 2022 SEMM Regulation

- **Extension of the evaluation cycle** from five to seven years. Under each multiannual evaluation cycle, each Member State shall undergo one periodic evaluation, and may undergo one or more thematic or unannounced evaluations, on the basis of risk analyses, new legislation or information obtained by the Commission (Art. 12).
- **Creation of a pool of Member State experts for evaluations.** The Commission, in cooperation with the Member States, shall establish every year a pool of experts whose professional backgrounds cover policy areas set out in the multiannual evaluation programme. In parallel, Member States shall designate one or more qualified experts per policy area for the following year's pool of experts (Art. 17).
- **Thematic evaluations (TE)** to be used in a more targeted way on the basis of 'risk analyses'. TE should take place to assess the implementation of major legislative changes, as well as to assess 'issues' across policy areas or Member States facing similar 'challenges' in a specific policy area (Art. 4(4)).
- **Unannounced visits** without prior notification of at least 24 hours should take place to verify compliance with obligations under the Schengen acquis, in particular at internal borders and in response to substantiated indications as regards 'serious violations of fundamental rights' in the application of the Schengen acquis.
- **Acceleration of the evaluation process, with clear procedural deadlines.** The Commission shall adopt the evaluation report by means of an implementing act no later than 4 months after the end of the evaluation activity (Art. 20(4)). Evaluated Member States shall submit an action plan within 2 months of the adoption by the Commission of the evaluation report including recommendations (Art. 21(1)).
- **Council should adopt recommendations** on evaluation reports only in cases of political importance and general interest for the functioning of the Schengen area. Specifically, when an evaluated Member State substantially contests the content of the draft evaluation report or the nature of a finding, when an evaluation concludes that there exists a serious deficiency, in cases of thematic evaluations, or in cases of first-time evaluations (Art. 3(3)).
- **Expedited procedure in the event of a serious deficiency.** The evaluated Member State shall take immediate remedial actions including by mobilising all appropriate operational and financial means. Fast track procedure with shortened deadline for the adoption of the evaluation report by the Commission, adoption of recommendations by the Council and adoption of an action plan by the evaluated Member State. The Council is entrusted with adopting and implementing the decision approving the closure of an action based on a proposal from the Commission (Art 22).
- **Increased capacity of the evaluation and monitoring mechanism to identify violations of fundamental rights.** Relevant information from the FRA should be better utilised and its experts better involved in the design and implementation of evaluations. In the programming and design of evaluations, it should be possible to take into account evidence provided by independent monitoring mechanisms and non-governmental and international organisations.

5.3.1. Links between SEMM and EBCG Agency Vulnerability Assessment

In recent years, other quality control and monitoring mechanisms have been established at EU and national levels that complement the SEMM. Among these an important role is assigned to the **Vulnerability Assessment (VA)** process carried out by Frontex. **The 2022 SEMM regulation indicates the VA as a complementary mechanism to the SEMM.** In particular, VA should be taken into account in preparing the evaluation and monitoring activities under the SEMM, thus ensuring up-to-date situational awareness.

The Regulation underlined the importance of **seeking synergies between the two mechanisms avoiding to the extent possible duplication of efforts and conflicting recommendations.** To that aim, regular exchange of information between Frontex and the Commission should take place²³². Interviews conducted for this Study underlined how in the past differences in timing of the respective evaluation process led to cases of discrepancies in the findings or recommendations of the two mechanisms²³³.

The VA and the SEMM share several similarities. Both collect data on aspects such as capacity, equipment, staff, and budget. However, there are differences between the two instruments. To start with, the SEMM is jointly implemented by the Commission and Member States while the VA is under the responsibility of Frontex. The VA is based primarily on **quantitative data** in one specific area of the Schengen *acquis*, namely external borders, whereas the SEMM include both **quantitative and qualitative data** and is much broader in scope, covering the whole Schengen *acquis*. In addition, while the SEMM relies on multiannual evaluation programmes to evaluate the Schengen *acquis*, the VA has a more short-term and 'operational focus' addressing in particular (albeit not exclusively) Member States facing disproportionate challenges at their external borders²³⁴. Interviews for this Study underlined how **the purpose of the VA is not to substitute the SEMM, even in some specific areas, as each of them will maintain their own purposes and specificities**²³⁵.

However, interviews further underlined how, from the perspective of evaluated countries as well as other key stakeholders **there is still the risk of significant overlaps between the SEMM and VA**²³⁶. A 2020 Study for the LIBE Committee focusing on the 2014-2019 cycle, found that integration between the two mechanisms appeared to be still incomplete. For example, SEMM evaluators have

²³² European Commission, Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing Regulation (EU) No 1053/2013, 2021, p. 10.

²³³ Interview with EU Council official 2, 14 March 2023. Following the EBCG Regulation, each Member State shall be subjected to such an assessment once every 3 years.

²³⁴ Wagner et al., 'The state of play of Schengen Governance. An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme', p. 27. Interview with European Parliament representative 1, 8 February 2023.

²³⁵ Interview with EU Council official 2, 14 March 2023.

²³⁶ Interview with European Parliament representative 1, 8 February 2023.

no access to Member States' VAs before on-site visits, despite the EBCG Regulation determining that the Commission shall share the results of VA with all the members of the SEMM teams²³⁷.

The 2019 Frontex Regulation states that the VA should be based on 'objective criteria', and on a common methodology based on a decision of the Frontex management board, on the basis of a proposal from the Executive Director prepared in close cooperation with the Member States and the Commission²³⁸. Furthermore, the Executive Director shall issue recommendations to the Member States concerned on the measures to be recommended based on the results of the vulnerability assessment, consideration of the Agency's risk analysis, the comments of the Member State concerned, and the results of the SEMM²³⁹.

However, provisions on the complementarity between the SEMM and the VA **fails to establish a clear hierarchy between the two mechanisms**, in this way **excluding the fact that Frontex VA evaluation process may itself be subject to scrutiny and peer review in the framework of the SEMM**. In this regard, it should be recalled how the EP in its 2021 Report on the Annual Report on the Functioning of the Schengen area recommended that the future Schengen evaluation mechanism must include an evaluation of the operational activities of the European Border and Coast Guard Agency, given its increasing role in external border management and return operations²⁴⁰.

5.4. Safeguarding and Monitoring Fundamental Rights in the Schengen Area

The 2020 Commission Proposal for a Screening Regulation²⁴¹, which is assessed in detail in *Section 6.3.* below, includes an obligation for each Member State to establish an **'independent monitoring mechanism' aimed at ensuring compliance with EU and international law, including the EU Charter of Fundamental Rights, during what is called 'screening procedures'**²⁴². The initiative aims at addressing existing 'protection gaps' at the EU external borders – including in the context

²³⁷ Wagner et al., *The state of play of Schengen Governance. An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme*, pp. 28, 70 and 72.

²³⁸ Regulation 2019/1896 Art. 32(1).

²³⁹ *Ibid.*, Art. 32(8).

²⁴⁰ European Parliament, *Report on the Annual Report on the Functioning of the Schengen area (2019/2196(INI))* Committee on Civil Liberties, Justice and Home Affairs, 1.6.2021.

²⁴¹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. 2020/0278 (COD)*. 23.9.2020.

²⁴² According to the 2020 Screening Proposal the screening aims at establishing 'the identity' of the person involved, as well as addressing 'health and security risks', and then either referring third-country nationals to either an asylum or an expulsion procedure.

of substantial body of evidence demonstrating systematic expulsions and violence against asylum seekers and undocumented people outlined in *Section 4* of this Study²⁴³.

The proposed independent monitoring mechanism should be seen in the context of other initiatives undertaken at the EU level to ensure monitoring of fundamental rights in the context of border control, asylum, and migration management activities. EU JHA agencies – Frontex and the European Union Asylum Agency (EUAA) – have recently acquired stronger monitoring roles, including in relation to Member States' compliance with fundamental rights and EU law standards in the field of border management, return and asylum²⁴⁴.

Despite those developments, previous analyses have underlined that **Frontex and the EUAA's mandates are not fundamental rights driven, showing how the attribution of monitoring functions to these EU agencies raises a number of challenges from a fundamental rights and good administration perspective**. The identified issues are rooted in **the inherent tension between the envisaged monitoring responsibilities and their (expanding) operational mandates** across a range of fundamental rights-sensitive migration management, asylum, and border control activities²⁴⁵.

Against the backdrop of the inherent knowledge gaps and limitations of existing national monitoring and evaluation mechanisms, the Screening proposal's provisions covering the establishment of an independent monitoring mechanism have been presented by the Commission as instrumental in ensuring that allegations of fundamental rights violations 'in relation to the screening', including those related to access to protection and respect of non-refoulement, are effectively and promptly addressed²⁴⁶.

The Commission's proposal assigns to **the FRA the role of providing guidance to Member States in setting up the mechanism and ensuring its independence, as well as in developing a monitoring methodology and appropriate training schemes**. The FRA issued its guidance in October 2022²⁴⁷.

²⁴³ For a review of existing evidence of pushback cases at EU external and internal borders see: European Union Agency for Fundamental Rights (FRA), *Migration: Fundamental Rights Issues at Land Borders*, November 2020, at p. 18; Refugee Rights Europe and End Pushbacks Partnership, 'Pushbacks and rights violations at Europe's borders. The state of play in 2020', November 2020; Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Displaced Persons, *Pushback policies and practice in Council of Europe member States*, Report, Doc. 14909, 8 June 2019.

²⁴⁴ On Frontex see Section 4.3 of this Study. On the EUAA see Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, Art. 14.

²⁴⁵ L. Tsourdi, *The New Pact and EU Agencies: an ambivalent approach towards administrative integration*, EU Immigration and Asylum Law and Policy Blog, 6 Friday 2020. See also V. Moreno Lax et al., *The EU Approach on Migration in the Mediterranean*, Study requested by the LIBE Committee, 2021.

²⁴⁶ European Commission, proposal on a Screening Regulation, Art. 7(2).

²⁴⁷ FRA, 'Establishing national independent mechanisms to monitor fundamental rights compliance at the EU external borders', 2022, <https://fra.europa.eu/en/publication/2022/border-rights-monitoring>

The FRA Guidance includes a set of **non-binding recommendations** that are wider in scope for border management monitoring than the monitoring mechanism set out under the proposed Screening Regulation²⁴⁸. In fact, the subject matter of the proposed Screening Regulation implies that the scope of the **monitoring mechanism would be limited to possible violations occurring during activities covered by screening in designated border crossing points** (e.g. identity, security, and health checks). Existing evidence of **'pushbacks'** at the EU's external borders, however, underlines how these practices are performed in the context of **border surveillance and interceptions at sea taking place in remote areas** which do not correspond with official 'border crossing points' and **which are often not accessible to independent monitors**²⁴⁹.

In light of the previous, FRA Guidance underlines the importance that 'the mechanism should have unimpeded **access to observe all border operations at any time**' and 'should be able to access **remote border surveillance, monitor apprehensions and inspect all designated detention areas**'²⁵⁰.

A point of concern when assessing the added value of the proposed mechanism has to do with its **degree of independence from Member States' authorities** (relevant national ministries and authorities responsible for border policing and surveillance) **and EU agencies**. The proposed Screening legislation, however, does not specify **how the effectiveness of the monitoring mechanism would be guaranteed in practice**. In its Guidance, the FRA underlines that 'full independence of the national entity monitoring fundamental rights at the borders should be guaranteed in law to ensure that the mechanism can be free of any undue external influence'²⁵¹.

Another aspect to be considered to ensure the mechanism provides an added value is the need to set in place **clear independent monitoring methods and follow-up procedures**, including for instance the possibility to conduct unannounced visits/inspections as well as relevant internal disciplinary provisions and judicial investigations to be activated when cases of non-compliance with fundamental rights are identified by the monitoring mechanism²⁵². On this point, the FRA Guidance states that the monitoring mechanism should have the necessary configuration and level

²⁴⁸ FRA, 'Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders', <https://fra.europa.eu/en/publication/2022/border-rights-monitoring>

²⁴⁹ Interview with EU Agency officials 1, 8 February 2023; E. Brouwer et al., 'The European Commission's legislative proposals in the New Pact on Migration and Asylum', Study Commissioned by the LIBE Committee of the European Parliament, 2021, p. 166; M. Stefan and R. Cortinovis, 'Setting the right priorities: is the new Pact on Migration and Asylum addressing the issue of pushbacks at EU external borders?', ASILE Forum Blog contribution, 25 November 2020 <https://www.asileproject.eu/setting-the-right-priorities-is-the-new-pact-on-migration-and-asylum-addressing-the-issue-of-pushbacks-at-eu-external-borders/>

²⁵⁰ FRA 'Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders', p. 6.

²⁵¹ Ibid., p. 3

²⁵² Interview with EU Agency officials 1, 8 February 2023. See Carrera, S. and Stefan, M. (2018), *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* Brussels: CEPS, p. 22; See also Carrera, S. and M. Stefan (2020), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigrants in the EU*, Routledge Human Rights Series.

of power **to conduct periodic and ad hoc, – announced and unannounced visits – based on Fundamental Rights Risk Assessments**²⁵³. Furthermore, the mechanism should be entitled **to communicate directly with investigative national authorities**, both internal disciplinary bodies and prosecutors, if malpractices are uncovered during monitoring²⁵⁴.

Finally, the possible establishment of new monitoring mechanisms specifically focused on respect of fundamental rights raises the question of **their complementarity with existing national mechanisms** as well as the mechanisms composing the emerging EIBM architecture described in the previous section of this Study²⁵⁵. In this regard, the FRA recommends that the mechanism should **communicate its findings to the SEMM and Frontex**, as well as to the **'national monitoring committees** in charge of ensuring the conditionality requirements for all relevant funds, in particular the EU migration and border management funds'²⁵⁶. With regards to complementarity with the Frontex Agency, the need was identified to ensure coordination between the mechanism and the Frontex Fundamental Rights Officer (FRO). 'including the use of each other's findings as sources of information'²⁵⁷.

As stated in the Guidance, the Commission requested guidance to FRA independently from the 'fate' of the Screening Regulation under the Pact negotiations. **Member States may be incentivised to develop independent monitoring mechanisms by linking or even conditioning them with the provision of EU funding** under the Instrument for Financial Support for Border Management and Visa Policy, the Asylum, Migration and Integration Fund, and its emergency assistance grant scheme²⁵⁸.

Over the previous years the Commission has indeed held discussions on **the establishment of ad hoc monitoring mechanisms** linked with the provision of EU funding in two cases, namely with **Croatia and Greece**²⁵⁹.

Discussions with Croatian authorities in this regard date back in 2018, when the Commission started providing emergency assistance to Croatia through the Internal Security Fund – Borders and Visa and the Instrument for Financial Support for External borders. **In June 2021 an Independent Monitoring Mechanism (IMM) was set up with the use of EU funds as provided by the**

²⁵³ FRA 'Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders', p. 6.

²⁵⁴ Ibid.

²⁵⁵ See Section 6.3. of this Study.

²⁵⁶ FRA 'Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders', p. 10.

²⁵⁷ Ibid.

²⁵⁸ Interview with EU Agency officials 1, 8 February 2023.

²⁵⁹ M. Jaeger et al., Feasibility Study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union, Feasibility Study, 2022, <https://www.proasyl.de/wp-content/uploads/Feasibility-Study-FINAL.pdf>

emergency assistance grants signed the same year²⁶⁰. The mechanism was established for an initial period of 12 months through a Cooperation Agreement signed by the Ministry of the Interior of the Republic of Croatia with a group of Croatian NGOs and an independent academic expert²⁶¹.

The mechanism is based on a two-level governance structure. It consists of a Coordination Board (5 members representing four Croatian NGOs and an independent academic expert), which decides on the implementation of monitoring activities by so-called direct activity providers (8 members, two each of the four participating organisations)²⁶². The latter are tasked with implementing observations in the field (police stations, border crossing points, green border, reception centres, etc.). **Border observations are the key source used by the Coordination Board to draft its semi-annual and annual reports, which includes recommendations to improve the actions of the police and enhance Croatia's border control and asylum system.** The Ministry of the Interior reacted to the first semi-annual Report published in December 2021 by means of an 'Action Plan', providing an update on actions taken or planned with a view to fulfilling the recommendations²⁶³.

The mechanism also relies on an Advisory Board (AB) – including representatives of the European Commission, Frontex FRO, FRA, EUAA, UNHCR, IOM, the Ombudsman, the Ombudsman for Children, and the State Attorney's Office of the Republic of Croatia. The AB, currently chaired by FRA, is tasked with analysing the reports produced by the Coordination Board and to issue recommendations on how to improve the performance of the mechanism²⁶⁴.

In **November 2020, the European Ombudsman opened an inquiry into how the Commission had monitored respect of fundamental rights in Croatia in the context of border control activities supported by EU funds.** The inquiry was opened in the context of persistent serious human rights violations by the Croatian authorities in the context of border management operations for which Croatia received EU funds. In its Decision of February 2022, the Ombudsman identified **significant shortcomings** in the context of the emergency funding for border

²⁶⁰ European Commission, 'Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls', p. 6.

²⁶¹ Interview with Academic, 27 March 2023. See Annual Report of the Independent Mechanism of Monitoring the Actions of Police Officers of the Ministry of the Interior in the Area of Illegal Migration and International Protection, June 2021 – June 2022, p. 1, https://www.pravo.unizg.hr/download/repository/Annual_report_of_the_Independent_monitoring_mechanism_-_1_July_2022.pdf

²⁶² The Coordinating Board includes representatives from the Croatian Academy of Medical Sciences, Croatian Academy of Legal Sciences, Centre for Cultural Dialogue Croatian Red Cross, and Prof. Iris Goldner Lang joining as independent expert. Members of the Coordinating Board were not selected through an open call for applications but directly 'invited' by the Minister of Interior.

²⁶³ Annual Report of the Independent Mechanism of Monitoring the Actions of Police Officers of the Ministry of the Interior in the Area of Illegal Migration and International Protection, p. 4.

²⁶⁴ Ibid., p. 17.

management activities in Croatia, and notably as regards **how fundamental rights compliance was monitored by the Commission**²⁶⁵.

While acknowledging the establishment in 2021 of an independent fundamental rights monitoring mechanism as an 'important step', **the Ombudsman requested the Commission to take further actions to ensure its effectiveness**. In particular, it requested the Commission to take an active role in overseeing the monitoring mechanism, and demanded concrete and verifiable information from the Croatian authorities on the actions adopted to investigate reports of collective expulsions and mistreatment of asylum seekers and migrants. It also suggested the Commission should monitor **whether the mechanism is truly independent and effective** in ensuring compliance with fundamental rights and EU law²⁶⁶.

In November 2022 a renewed Cooperation Agreement related to the IMM was signed²⁶⁷. The renewed agreement seeks to address a number of aspects that had been previously identified as limiting the effectiveness of the mechanism²⁶⁸. The mechanism will, therefore, be in place for automatic renewable periods of 18 months, to avoid repeating a gap in its functioning that occurred from the conclusion of the previous coordination agreement and the signing of the new one²⁶⁹. Furthermore, **the mechanism will now be able to conduct unannounced visits at the green borders** as well, which was not the case under the previous phase²⁷⁰. Finally, **it has gained access to files on petitions received on the alleged illegal treatment of irregular migrants and applicants for international protection of the General Police Directorate**, including accessing information from the Information System of the Ministry of Interior based on a written or oral request made to the same Ministry²⁷¹.

²⁶⁵ European Ombudsman, Decision concerning how the European Commission monitors and ensures respect for fundamental rights by the Croatian authorities in the context of border management operations supported by EU funds (case 1598/2020/VS), 22 February 2022, <https://www.ombudsman.europa.eu/en/decision/en/152811>

²⁶⁶ Ibid.

²⁶⁷ Cooperation Agreement to Implement an Independent Monitoring Mechanism on the Protection of Fundamental Rights in Actions of Police Officers of the Ministry of the Interior in the Area of Border Surveillance, Irregular Migration and International Protection, 4 November 2022, https://www.hck.hr/UserDocsImages/Nezavisni%20mehanizam/22_146%20Sporazum%20NMN-final_EN.pdf?vel=217379

²⁶⁸ AIDA 2021 Update: Croatia, <https://ecre.org/aida-2021-update-croatia/>; Amnesty International et al., 'Croatia/EU: Strengthen Border Monitoring System Effective Mechanism Needed: Independent, Broad Mandate, Adequate Resources', August 3, 2021, <https://www.amnesty.org/es/wp-content/uploads/2021/08/EUR6445462021ENGLISH.pdf>; Centre for Peace Studies, 'Call to the EU to protect human rights and rule of law by establishing an independent monitoring mechanism of the police operations', https://www.cms.hr/system/article_document/doc/809/Recommendations_Independent_Border_Monitoring_Mechanism.pdf

²⁶⁹ Art. 11.

²⁷⁰ Art. 8.

²⁷¹ Art. 9. See also European Commission 'Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls', p. 7.

At the time of writing, **it is not feasible to assess the implications of the changes included in the new Cooperation agreement**, in particular when it comes **to remedying previously identified operational limitations**²⁷². However, it should be mentioned that the revised Cooperation Agreement does not refer to the role of the mechanism in communicating directly with national investigative authorities and to require the launching of official investigations from the relevant state bodies in relation to possible fundamental rights violations, as recommended for example in the above-mentioned FRA guidance. Another aspect to be considered concerns the need **to ensure that the new mechanism does not downplay – or serve as a justification – to limit the competences and role of other national monitoring institutions, notably the Ombudsman**, which is also entrusted with the authority to conduct investigations on alleged fundamental rights violations at the border²⁷³.

While visible progress has been made in the development of a Croatian IMM, both in terms of designing its structure and detailing its key functions, less progress has **been made towards developing an IMM in Greece**. Discussions between the European Commission and the Greek authorities about the possible establishment of a monitoring mechanism date back to early 2020. In August 2021, media sources revealed that the Commission was asking the Greek authorities to set up a mechanism as a precondition for gaining access to additional EU funding for border management, which had been requested by the Greek government to face the situations in the Aegean²⁷⁴. Discussions on **the establishment of a Greek IMM however have been characterised by limited public information and lack of transparency**.

In January 2022, in a reply to a parliamentary question asking how the Commission was going to deal with Greece's refusal to establish a monitoring mechanism, Commissioner Johansson revealed that Greece had 'officially requested the National Transparency Authority (EAD) to perform the functions of such a mechanism and to investigate the media reports mentioned in the Honourable Member's question', i.e., episodes of illegal pushbacks occurring at Greek borders²⁷⁵. A preliminary analysis of the Greek case, however, has questioned **the choice of the EAD as the body for investigating allegations of fundamental right violations at the border, pointing to limited safeguards of independence compared to the Greek Ombudsman's Office, lack of publicity and transparency** of its previous audit activities, and **limited expertise in terms of fundamental rights monitoring**²⁷⁶.

²⁷² M. Jaeger et al., Feasibility Study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union, Feasibility Study, 2022, p. 42.

²⁷³ Interview with Academic, 27 March 2023.

²⁷⁴ G. Christides, S. Lüdke, M. Popp, EU-Kommission blockiert Zahlungen an griechische Küstenwache, 29.08.2021, <https://www.spiegel.de/ausland/pushbacks-von-fluechtlingen-eu-kommission-kuerzt-griechischer-kuestenwache-das-geld-a-028e8f42-cb75-41b9-97dd-bc28add93967>

²⁷⁵ Beatings and illegal pushbacks of asylum seekers at the EU's external borders, Question for written answer E-004642/2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-004642_EN.html; Answer given by Ms. Johansson on behalf of the European Commission (25.1.2022), https://www.europarl.europa.eu/doceo/document/E-9-2021-004642-ASW_EN.pdf

²⁷⁶ M. Jaeger et al., Feasibility Study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union, Feasibility Study, 2022, p. 45.

The experience with setting up and implementing *ad hoc* national monitoring mechanisms linked with the provision of EU funding in the cases of Croatia and Greece underlines how **an approach based solely on political pressure and financial conditionality may produce divergent and not completely satisfactory outcomes, depending on the willingness/interest of concerned Member States' authorities to cooperate**. This circumstance may lead to further **differentiation and an inconsistent level playing field in the way fundamental rights monitoring is performed in different national, regional and local contexts**.

The diversity in outcome of these two cases, coupled with the lack of clarity and transparency that has surrounded the establishment and implementation of the two mechanisms underscores **the need to provide a clear legal basis under EU law for the establishment of similar mechanisms** in other contexts, for example within the framework of the Screening Regulation, and to further specify the scope, activities, and the required level of legal and operational independence of the mechanisms²⁷⁷.

²⁷⁷ Draft Report on the proposal for a regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM(2020)0612 – C9-0307/2020 – 2020/0278(COD)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Birgit Sippel, 16.11.2021, amendments 75-87.

5.5. Case Study: Schengen Enlargement – Bulgaria, Romania and Croatia

5.5.1. The Schengen Evaluation Process and Positions of EU Institutions

The Schengen area without internal border controls currently includes 27 countries. Among these, 23 EU Member States participate in the Schengen area. Of the remaining four Member States, three (Bulgaria, Cyprus, and Romania) are already bound in part by the Schengen *acquis* but internal border controls with those Member States have not yet been lifted. Ireland participates in some important parts of the Schengen system except for the *acquis* related to external borders and the abolition of internal border controls²⁷⁸.

As part of the EU accession process, all candidate Member States must commit to accept in full the Schengen *acquis*, as the latter is considered an integral part of the EU' legal framework. To that aim, candidate Member States need to fulfil several conditions in different interrelated policy areas: management of external borders, visas, information systems such as the Schengen Information System (SIS), fundamental rights and data protection. Beyond meeting the above requirements, full application of the Schengen *acquis* relies on unanimous approval from other Member States that are already part of the Schengen area²⁷⁹.

Since 2011, the Commission has consistently stated that Bulgaria and Romania are ready to become part of the Schengen area, while the same conclusion was reached for Croatia in 2019. Accordingly, the Commission invited the Council to adopt decisions allowing the three countries to join the Schengen area without restrictions²⁸⁰. The European Parliament has also reiterated the same request in several circumstances²⁸¹.

²⁷⁸ The Schengen area also includes four non-EU Member States, namely Iceland, Liechtenstein, Norway, and Switzerland. These countries have signed agreements with the EU concerning the implementation, application and development of the Schengen *acquis*. See European Commission, 'Schengen area', https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area_en

²⁷⁹ European Commission, Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls, COM(2022) 636 final, Brussels, 16.11.2022, p. 1. Article 4 of the Accession Treaties of Bulgaria, Romania and Croatia states that the full Schengen *acquis* can only apply following a Council decision to that effect, after verification, through the applicable evaluation procedures, that the necessary conditions for the application of all parts of the Schengen *acquis* have been met. See Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, OJ L 157/203, 21.6.2005; Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ L 112/21, 24.4.2012.

²⁸⁰ European Commission, Communication on the verification of the full application of the Schengen *acquis* by Croatia, COM(2019) 497 final, Brussels, 22.10.2019; European Commission, State of Schengen Report 2022, p. 11.

²⁸¹ European Commission, Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls, COM(2022) 636 final; 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)); European Parliament, Resolution of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area (2022/2852(RSP)); European Parliament legislative resolution of 10

Pursuant to Article 4(2) of the 2005 Act of Accession, Bulgaria and Romania successfully accomplished their respective Schengen evaluation processes in 2011. The process started in 2009 and all relevant parts of the Schengen acquis were thoroughly assessed in line with the applicable procedures. The Council recognised the completion of the evaluation process in two separate Council Conclusions of 9 June 2011²⁸². The Draft Council Decision on the full application of the provisions of the Schengen acquis in Bulgaria and Romania received a positive opinion from the EP on 8 June 2011²⁸³. **Despite the positive outcome and completion of the Schengen evaluation process, for more than 11 years no Council Decision has been taken on the full application of the Schengen acquis in Bulgaria and Romania and the lifting of controls at their internal borders.**

Given the amount of time since the completion of the evaluation process for the two countries in 2011, and given that the SEMM does not allow for a formal evaluation of Bulgaria and Romania to be conducted²⁸⁴, the two countries issued a Joint Declaration on 2 March 2022, in the context of negotiations on the revision of SEMM, in which they invited, on a voluntary basis, a team of Member State experts coordinated by the Commission to assess the application of the latest developments of the Schengen area since the 2011 evaluation, focusing on external border management and police cooperation²⁸⁵. The outcome of the voluntary fact-finding mission that took place in October 2022 **confirmed the positive conclusions of the completed evaluation processes from 2011, revealing that both Bulgaria and Romania had substantially reinforced the overall application of the Schengen acquis in all its key dimensions**²⁸⁶.

A positive evaluation process was also completed in the case of Croatia. Following Croatia's Declaration of Readiness to start the Schengen evaluation process with a view to a Council Decision on the full application of the Schengen acquis, the evaluation took place in the period 2016-2020. On 22 October 2019, the Commission adopted a communication concluding that Croatia had taken the measures needed to ensure that the conditions for the application of all relevant parts of the Schengen acquis were met²⁸⁷. The Justice and Home Affairs Council of December 2021 confirmed the Commission's Conclusions²⁸⁸. Later, the Council consulted the EP on the draft decision on the

November 2022 on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Croatia (10624/2022 – C9-0222/2022 – 2022/0806(NLE)).

²⁸² Council of the EU, 3096th Council meeting Justice and Home Affairs Luxembourg, 9 and 10 June 2011, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/122516.pdf

²⁸³ European Parliament resolution of 13 October 2011 on the accession of Bulgaria and Romania to Schengen, Thursday, 13 October 2011 – Brussels.

²⁸⁴ Council Regulation (EU) 2022/922 of 9 June 2022, Article 1(2)(b).

²⁸⁵ Council of the EU, Summary Record Permanent Representatives Committee, 28 February, 2 and 4 March 2022, <https://data.consilium.europa.eu/doc/document/ST-7304-2022-INIT/en/pdf>

²⁸⁶ European Commission, 'Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls', p. 4.

²⁸⁷ European Commission, 'Communication on the on the verification of the full application of the Schengen acquis by Croatia'.

²⁸⁸ Council of the EU, Council conclusions on the fulfilment of the necessary conditions for the full application of the Schengen acquis in Croatia, Brussels, 9 December 2021.

full application of the Schengen acquis, which received a positive opinion from the EP on 10 November 2022²⁸⁹.

In its Communication of 16 November 2022 'Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls' the Commission stated that 'having successfully completed all Schengen evaluations, there is a legitimate expectation of Bulgaria, Romania and Croatia to fully join the Schengen area without internal border controls'. According to the Commission, 'there is no doubt the Union is ready for such a historical decision' and called on all Member States to fully support the Czech Presidency in the last steps to make this happen, in line with the 2005 and the 2011 Acts of Accession of respectively Bulgaria and Romania, and Croatia²⁹⁰.

In its Resolution of 18 October 2022, **the European Parliament urged the Council to take all the necessary steps to adopt its decision on the full application of the provisions of the Schengen acquis to Bulgaria, and Romania by the end of 2022**, with a view to ensuring the abolition of checks on persons at all internal borders for both those Member States by early 2023²⁹¹. On the same occasion, the EP expressed its dismay that in the 11 years since the completion of the evaluation in 2011, the Council had failed to take a decision on the full application of Schengen acquis to the two countries, despite the repeated calls to this end by both the Commission and the EP itself. The EP recalled, among other things, that Article 21(1) TFEU provides that every EU citizen has the right to move and reside freely within the territory of the Member States and stressed that the maintenance of internal border controls for the citizens of Bulgaria and Romania has a negative impact on the principle of equality and non-discrimination within the EU.

5.5.2. Opposition of some Member States to Bulgaria and Romania's accession

On 8 December 2022, against the background of the assessment process described in the previous section, the Home Affairs Ministers of EU Member States were called to decide on Schengen's accession for Bulgaria, Romania and Croatia. On that occasion, however, **only Croatia was given a 'green light' while entry of Bulgaria and Romania was refused**. During the meeting, two votes were held: one for Croatia and one for Bulgaria and Romania, which were bound to a single decision²⁹². **Romania's accession was vetoed by a single Member State, Austria, while Bulgaria's accession found the opposition of both Austria and the Netherlands.**

²⁸⁹ European Parliament, Legislative Resolution of 10 November 2022 on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Croatia (10624/2022 – C9-0222/2022 – [2022/0806\(NLE\)](#)).

²⁹⁰ European Commission, 'Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls', Brussels, 16.11.2022 COM(2022) 636 final.

²⁹¹ European Parliament, Resolution on the accession of Romania and Bulgaria to the Schengen area. European Parliament resolution of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area (2022/2852(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0364_EN.pdf

²⁹² According to media sources reporting views of sources involved in the decision-making process, from a legal point of view it would be possible to separate the decisions for Bulgaria and Romania, but this would not make sense from a practical point of view as the decision for the two countries has been linked since the beginning of the evaluation of

In advance of the Meeting, the Austrian Minister of Interior motivated its vote against Bulgaria and Romania by stating that 'it is wrong that a system that does not work in many places should be enlarged'²⁹³. Here too, **fears of 'unauthorised migration and secondary movements'** that would result from that move have been repeatedly **misused by Austrian authorities to justify their negative opinion**. In particular, Austrian authorities have expressed **non-evidence-based concerns that removing checks on people transiting from Bulgaria and Romania will increase the numbers of asylum seekers and migrants towards its territory**²⁹⁴.

Concerning its refusal to vote in favour of the entry of Bulgaria into Schengen, the Netherlands requested that an additional Report under the Cooperation and Verification Mechanism (CVM) provide a positive assessment, mentioning risks related to corruption and organised crime²⁹⁵. This has been a long-standing request from the Dutch authorities since the completion of the evaluation process of Bulgaria and Romania in 2011²⁹⁶. According to the position expressed on several occasions by the Netherlands, **persisting challenges related to corruption and organised crime in Bulgaria and Romania** imply that the two countries could not be trusted with guarding the external borders of the Schengen area²⁹⁷.

From a legal perspective, however, **the criteria based on which reservations to accession of Bulgaria (and until recently Romania) were made – e.g. related to rule of law, corruption, and independent judiciary – were not included among the criteria to be assessed in the context of the two countries' evaluation processes**. Already in 2011, with reference to the above-mentioned position expressed by some Member States, the EP expressed its belief that **'additional criteria cannot be imposed** on Member States which are already in the process of joining the Schengen area²⁹⁸.

process and it would not be feasible to separate the two countries by a new Schengen border. Allegedly, Bulgaria was also against the decoupling of the decisions allowing for the entry of Romania only.

²⁹³ S. Lynch, 'Migration feud derails expansion plan for Europe's Schengen visa-free travel area', Politico Europe, December 7, 2022, <https://www.politico.eu/article/migration-feud-derails-expansion-of-europes-visa-free-travel-area/>

²⁹⁴ Ibid.

²⁹⁵ The Cooperation and Verification Mechanism (CVM) was set up after Bulgaria and Romania formally became EU Member States on 1 January 2007 based on the assessment that the two countries still had progress to make in the fields of judicial reform, corruption and (for Bulgaria) organised crime. See European Commission, 'Cooperation and Verification Mechanism for Bulgaria and Romania', https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en

²⁹⁶ See Agence Europe, 'Dutch stand firm on Schengen', 2 March 2012, <https://agenceurope.eu/en/bulletin/article/10565/9>; Dow Jones International News, 'Dutch PM: No Decision On Schengen Until September', 1 March 2012; Valentina Pop, 'EU leaders meet on economy, Schengen and Serbia', EU Observer, 1. March 2012, <https://euobserver.com/green-economy/115438>;

²⁹⁷ V. Pop, Bulgaria and Romania's Schengen bid vetoed, euobserver, 22 September 2011, <https://euobserver.com/rule-of-law/113707>

²⁹⁸ European Parliament, Resolution of 13 October 2011 on the accession of Bulgaria and Romania to Schengen, P7_TA(2011)0443, https://www.europarl.europa.eu/doceo/document/TA-7-2011-0443_EN.pdf

In its last report on 'Progress in Bulgaria under the Cooperation and Verification Mechanism' in 2019 the Commission concluded that progress made by Bulgaria under the CVM is sufficient to meet Bulgaria's commitments made at the time of its accession to the EU²⁹⁹. In the aftermath of the negative decision in December 2022, the Commission reiterated that it no longer intends to produce new CVM reports as the process has been completed since 2019, adding that the Commission would publish from now on its annual reports on the rule of law for all Member States³⁰⁰.

On the same occasion, Commissioner for Home Affairs and Migration Ylva Johansson, declared regret at the decision of the Council, expressing to Romanian and Bulgarian citizens that 'you deserve to be full members of Schengen', promising she would work to ensure both countries could join Schengen before the end of 2024³⁰¹. Vice-President of the Commission Schinas **called the long-standing opposition from Austria and the Netherlands 'political'** adding that expanding Schengen would actually 'mean more and better control, not less'³⁰².

In its Communication of 16 November 2022, the Commission expounded several reasons for supporting full accession of Bulgaria and Romania, in addition to Croatia, in the Schengen system. Besides reiterating how the three countries had a legitimate expectation to join after having been thoroughly evaluated and found to meet all the criteria for joining, the Commission pointed to the benefits for the EU as a whole that would derive from that choice. Accession of those countries would contribute to eliminating barriers within the single market, thus fostering the EU competitiveness and growth potential. According to the Commission the planned enlargement of Schengen would also allow for a stronger, more 'orderly management of migration', through a 'reinforced protection of the external border and effective police cooperation'³⁰³.

Against the previous background, **the decisions by Austria and the Netherlands to veto the entry of Bulgaria and Romania is not based on reliable and objective evidence** pointing to those countries insufficient compliance with the benchmarks assessed in the framework of the Schengen evaluation procedure³⁰⁴. Recently, it has been reported that Austrian President, Alexander Van der Bellen, publicly declared that Romania and Bulgaria are in fact ready to join the Schengen

²⁹⁹ European Commission, Report from the Commission to the European Parliament and the council on Progress in Bulgaria under the Cooperation and Verification Mechanism (SWD(2019) 392 final), Brussels, 22.10.2019 COM(2019) 498 final.

³⁰⁰ See Agence Europe, 'Member States agree on Croatia's entry into Schengen area, Romania and Bulgaria will have to wait', 08/12/2022, <https://agenceurope.eu/en/bulletin/article/13080/1>; European Commission, 'Rule of law mechanism', https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en#:~:text=rule%20of%20law-What%20is%20the%20rule%20of%20law%20mechanism%3F,on%20the%20rule%20of%20law.

³⁰¹ Agence Europe, 'Member States agree on Croatia's entry into Schengen area, Romania and Bulgaria will have to wait' Brussels, 08/12/2022, <https://agenceurope.eu/en/bulletin/article/13080/1>

³⁰² S. Lynch, 'Migration feud derails expansion plan for Europe's Schengen visa-free travel area', Politico, December 7, 2022, <https://www.politico.eu/article/migration-feud-derails-expansion-of-europes-visa-free-travel-area/>

³⁰³ European Commission, 'Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls', Brussels, p.11.

³⁰⁴ Jonas Bornemann, 'Joining Schengen – Cutting a Gordian knot for Romania and Bulgaria?', EU Immigration and Asylum Law and Policy Blog, 13 April 2018, <https://eumigrationlawblog.eu/joining-schengen-cutting-a-gordian-knot-for-romania-and-bulgaria/>

area, distancing himself from the country's Chancellor, Karl Nehammer, who was Minister of Interior from 2020 to 2021³⁰⁵. Van der Bellen shared that his concern was about **'Austria's reputation with our European partners'**.

In this context, it is relevant to mention how Member States' reservations concerning Bulgaria's failure to meet rule of law standards contrasts with **the lack of equal attention on candidate states' respect of fundamental rights standards in the field of border control**. On 8 December 2022, the date of Croatia's accession to Schengen, eight human rights and humanitarian organisations expressed concerns on the positive decision on the full application of the provisions of the Schengen acquis despite **substantiated reports of frequent breaches of EU and international human rights law by Croatian authorities at its borders**³⁰⁶. The statement underlines how in its current form, the Croatian border monitoring mechanism falls short of established standards of independence and it is not in line with the guidance issued on this matter by the FRA³⁰⁷.

The same organisations claimed that **the Council decision 'sets a bad precedent for future Schengen enlargements** and for the EU's intention to enforce compliance with human rights standards inside the Schengen zone' adding that 'What is unfolding at Croatia's and other EU external borders is **a rule of law crisis in which fundamental rights violations**, including of the right to asylum, are met with widespread impunity'.

A few months earlier, in October 2022, the European Parliament, while voting in favour of the draft Council decision, recalled that following the publication of the Commission's Communication on the verification of the full application of the Schengen acquis by Croatia in October 2019, several NGOs and media outlets repeatedly reported **abuse, violence and illegal pushbacks of migrants by Croatia's border officials**. The EP pointed to the need for a constant assessment of compliance with fundamental rights at the external borders in all Member States, which was implemented through the introduction of the Independent Monitoring Mechanism in Croatia³⁰⁸.

Instead of prioritising enforcement, the Commission has proposed a reform of the 'Schengen governance cycle' leading to **a mushrooming of new venues for 'political dialogue' and 'policy exchanges'** with national ministries and relevant EU agencies, such as the Schengen Council and the Schengen Forum. These **blur the effective application of EU checks and balances, politicise**

³⁰⁵ SchengenVisaInfo.com, Austrian President: Romanian and Bulgaria are ready to join Schengen, 27 March 2023, [Austrian President: Romania & Bulgaria Are Ready to Join Schengen - SchengenVisaInfo.com](https://www.schengenvisa.info/en/austrian-president-romania-bulgaria-are-ready-to-join-schengen)

³⁰⁶ Human Rights Watch, 'EU admits Croatia to Schengen Without Regard To Abuses at the Border', December 8, 2022, <https://www.hrw.org/news/2022/12/08/eu-admits-croatia-schengen-without-regard-abuses-border>

³⁰⁷ See Amnesty International, 'Croatia/EU: Strengthen Border Monitoring System – Effective Mechanism Needed: Independent, Broad Mandate, Adequate Resources', 3 August 2021, <https://www.amnesty.org/en/documents/eur64/4546/2021/en/>

³⁰⁸ The Parliament amended the Draft Council conclusion requiring that in view of the full application of the Schengen Acquis to Croatia, the European Parliament calls on the Commission to include in its upcoming annual evaluation programme, either a periodic evaluation of Croatia, with a focus on external border management, or a thematic evaluation on the respect for fundamental rights at Union external borders, an evaluation that should involve a visit to Croatia. See European Parliament, Report on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Croatia, (10624/2022 – C9-0222/2022 – 2022/0806(NLE)), 28.10.2022, https://www.europarl.europa.eu/doceo/document/A-9-2022-0264_EN.pdf

the effective enforcement of EU rules and principles and distant themselves from an independent evaluation and evidence-based policy shaping and making.

6. POLICY LAUNDERING

The von der Leyen Commission has produced an enormous body of new legislative initiatives of direct or indirect relevance to the Schengen system. This way of doing policymaking is characterised by **policy laundering consisting of ‘worst regulation’ and hyper-complexity, and the ad hoc legalisation of EU Member States’ malpractices and exceptionalism to existing EU Schengen rules.**

Legislative proposals covering Schengen-related aspects have been prepared and adopted by the Commission in a highly speedy and accelerated fashion, with some of them having been put forward **without an accompanying Impact Assessment (IA)**. Noticeable examples include for instance the legislative package presented under the 2020 EU Pact on Migration and Asylum³⁰⁹, including the substantial revision of the Eurodac database; or the 2021 Instrumentalisation Proposal³¹⁰. Other legal initiatives have had an Impact Assessment (IA), but have **not provided robust evidence or solid basis justifying their necessity, proportionality and fundamental rights impacts**, nor have they recommended a way forward fully consistent with existing evidence – e.g. expanding intra-Schengen police checks as studied in *Section 7* of this Study below, e.g. Impact Assessment accompanying the 2021 Commission Proposal reforming the SBC³¹¹. In a significant number of cases these legislative acts have not had **a meaningful assessment of their effectiveness, consistency and fundamental rights compliance as required by EU Better Regulation Guidelines**³¹².

The Commission has put forward an enormous body of secondary legislation proposals, of a level of complexity that is **simply overwhelming for anybody**. They also have **key linkages and substantial cross-references and consecutive amendments** with other pre-existing secondary legislation proposals and existing laws dealing with EU policy areas which fall sometimes outside the Schengen *acquis* and Art. 77 TFEU. Each of these legislative files are held by MEPs acting as Rapporteurs and Co-Rapporteurs from different political groups in the LIBE Committee. **The resulting picture is a legislative nightmare featuring hyper-complexity** which runs **contrary to**

³⁰⁹ G. Campesi and G. Cornelisse (2021), The European Commission’s New Pact on Migration and Asylum. Horizontal Substitute Impact Assessment, Study Commissioned by the EPRS, [https://www.europarl.europa.eu/thinktank/it/document/EPRS_STU\(2021\)694210](https://www.europarl.europa.eu/thinktank/it/document/EPRS_STU(2021)694210)

³¹⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890 final, Strasbourg, 14.12.2021.

³¹¹ European Commission, Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. SWD/2021/462, 14.12.2021.

³¹² European Commission, Commission Staff Working Document: Better Regulation Guidelines. SWD(2021) 305 final. 11 November 2021. https://commission.europa.eu/system/files/2021-11/swd2021_305_en.pdf

legal certainty and makes **democratic accountability and the consistent implementation of the European Parliament's role increasingly challenging if not completely unfeasible in practice.**

The Commission's behaviour is **contrary to the 2016 Inter-institutional Agreement on Better Law Making between the European Commission and the European Parliament**³¹³, which requires **sincere and transparent cooperation**, and calls for the obligation to ensure that legislative initiatives are explained and grounded on Impact Assessments and comply with legal certainty and fundamental rights standards. Moreover, the Commission's practice runs contrary to Point 32 of the Agreement which requires that the ordinary legislative procedure must be *'in line with the principles of sincere cooperation, transparency, accountability and efficiency'*.

6.1. Reforming the Schengen Borders Code

A first example of policy laundering is the European Commission Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (SBC proposal) of 14 December 2021. **The Proposal calls for the expansion of the number of grounds or exceptions allowing Member States to reintroduce internal border controls to areas as wide as 'migration' or 'public health'**³¹⁴ – which is currently not expressly foreseen by the SBC, **or extending the SBC-envisaged time periods/deadlines.**

The amendment to Article 25 SBC **adds new grounds for the reintroduction of internal border control.** In its current form, Article 25 only refers to 'a serious threat to public policy or internal security', the Commission's proposal specifies that such threats may be considered to arise from, in particular: activities relating to terrorism or organised crime; large-scale public health emergencies; 'a situation characterised by large-scale unauthorised movements of third-country nationals' between the Member States, putting at risk the overall functioning of the area without internal border control; and large-scale or high profile international events such as sporting, trade or political events.

Table 2 below provides a synthetical overview of the key changes proposed in the 2017 and 2021 Commission attempts to reform the SBC. **It is significant – and rather problematic – that these different grounds are explicitly listed in the newly proposed Article 25.** As shown in *Section 2* of this Study, Member States have already used these renewed grounds as justifications in the past for the temporary reintroduction of internal borders. However, the inclusion of so-called 'unauthorised movements of third-country nationals' and large-scale health emergencies would give **legitimacy and legalise ad hoc current Member States' unlawful practices** that have been criticised by the Commission, the Parliament, and civil society.

³¹³ European Parliament, Council of the EU and European Commission, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making. OJ L 123/1. 12.5.2016.

³¹⁴ S. Carrera and N.C. Luk (2020), In the Name of Covid-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU. <https://www.ceps.eu/ceps-publications/in-the-name-of-covid-19/>

6.1.1. Migration and Intra-EU Mobility by Asylum Seekers

In the Proposal, the Commission reiterates that the temporary reintroduction of internal border control is ‘a measure of last resort’. However, **the inclusion of ‘unauthorised secondary movement of third-country nationals’ between Member States would *de facto* transform the ‘temporary’ internal border controls into permanent ones.** The inclusion of the ground related to intra-EU mobility by asylum seekers and refugees **runs contrary to the current provisions of the SBC and the EU Treaties objectives laid down in Article 77 TFEU**, which requires an internal area free from internal border controls and where ‘migration’ **does not constitute a legitimate ground for derogating free movement**³¹⁵.

Indeed, intra-EU mobility by third-country nationals is protected by Articles 3 TEU, 67(2) TFEU, 77(2)(e) TFEU. The last one in particular establishes ‘the absence of any controls on persons, **whatever their nationality**, when crossing internal borders’. Recital 26 SBC further states that ‘**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**’.

As Section 2.3. of this Study shows, this has been the conclusion reached as well by the **Luxembourg Court**. For instance, in the **Case C-72/22 PPU, M.A. v Lithuania of 30 June 2022**, the Court concluded that the sole reason of unauthorised entry or presence of an international protection seeker does not *per se* constitute a legitimate ground for Member States to demonstrate the existence of a ‘**sufficiently serious threat**’ to public policy and/or public order³¹⁶. This, in the Court’s view, should not be based on **generalised assumptions or considerations, but rather on ‘account of specific circumstances which demonstrate that he or she is dangerous, in addition to being illegally present.’**

Accordingly, the inclusion of ‘migration’ and secondary movements of third-country nationals as an explicit ground for the reintroduction of internal border controls would clearly be **incompatible with current EU primary and secondary law, and CJEU case-law**. Crucially, the potential inclusion of this new exception in the SBC disregards the fact that intra-EU mobility by refugees and asylum seekers **may be in fact legitimate and should be permitted and facilitated by EU Member States without penalisation or criminalisation**³¹⁷. Refugees and asylum seekers might be forced to travel within the EU due to **dysfunctional asylum systems, as well as individualised risks of suffering degrading reception and living conditions, social exclusion, poverty, lack of secure residence, institutionalised discrimination and lack of lasting life opportunities.**

³¹⁵ Guild et al. (2015), ‘What is happening to the Schengen borders?’

³¹⁶ Paragraphs 90 and 91. Paragraph 90 of the ruling emphasises that ‘Accordingly, it cannot be accepted that such an applicant can, for the sole reason that he or she is staying illegally in a Member State, constitute a threat to national security or public order in that Member State, within the meaning of Article 8(3)(e) of Directive 2013/33’.

³¹⁷ Carrera et al. (2019), ‘When mobility is not a choice’.

The proposed reform stands also in contradiction with the approach that was adopted under the Council Decision to activate the **Temporary Protection Directive for people fleeing the war in Ukraine**. In this context, EU Member States formally agreed **to allow for intra-EU mobility of Temporary Protection beneficiaries** and not to **negatively label their mobility as 'migration' or 'secondary movements' to be policed and prevented at all costs**³¹⁸. The Commission and relevant Member States should be asked **to provide evidence and justification** behind this discriminatory framing and provisions depending on the national and ethnic origin of the people seeking asylum in Europe.

6.1.2. Public health

The new proposal would add new instruments for the Member States, the Commission, and the Council to respond to **'public health challenges'** in a more coordinated fashion. These measures complement the proposal for a regulation of the European Parliament and of the Council on serious cross-border threats to health³¹⁹. According to the Commission, the inclusion of these provisions in the SBC aims to enhance the capacity of the Schengen area to respond to 'major public health threats', ensure that the rules are applied in a uniform way to protect public health, and avoid Member States acting unilaterally, as happened at the outset of **the Covid-19 pandemic**.

With regards to the external borders, Article 21a would introduce a set of restrictions on travel from third countries to the Schengen area. They would apply when **the European Centre for Disease Prevention and Control (ECDC) or the Commission identifies 'the existence in one or more third countries of an infectious disease with infective potential'**. In this situation, based on a proposal by the Commission, the Council would be able to adopt an Implementing Decision establishing temporary restrictions on the entry of people travelling to Member States from outside the Schengen area or other measures 'considered necessary for the protection of public health', like testing, quarantine, and self-isolation. Exemptions would apply, regardless of the purpose of the travel, to EU citizens and third-country nationals with long-term residence permits or visas and their families.

To implement these travel restrictions, the Commission is introducing **the categories of 'essential' and 'non-essential' travel**. The former is defined as 'travel in connection with an essential function or need, taking into account any applicable international obligations of the Union and of the Member States and listed in Annex XI' and the latter as 'travel for purposes other than essential travel'³²⁰. According to Annex XI, essential functions or needs include:

- i. Healthcare professionals, health researchers, and elderly care professionals; *
- ii. Frontier workers;
- iii. Transport personnel;

³¹⁸ See Paragraph 15 of the Council Decision Preamble. S. Carrera, M. Ineli Ciger, L. Vosyliute and L. Brumat (2022), The EU Grants Temporary Protection for People fleeing the War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy, CEPS Policy Insight, No. 2022-09, Brussels.

³¹⁹ COM(2020)727.

³²⁰ Article 2? Definitions 28 and 29.

- iv. Diplomats, staff of international organisations and people invited by international organisations whose physical presence is required for the well-functioning of these organisations, military personnel and humanitarian aid workers and civil protection personnel in the exercise of their functions;
- v. Passengers in transit;
- vi. Passengers travelling for imperative family reasons;
- vii. Seafarers;
- viii. Persons in need of international protection or for other humanitarian reasons.

This list closely resembles the one contained in Annex II of the Council Recommendation 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restrictions³²¹. **It does, however, exclude a number of categories of people, such as seasonal workers in agriculture, third-country nationals travelling for the purpose of study, and highly qualified third-country workers** if their employment is necessary from an economic perspective and the work cannot be postponed or performed abroad³²².

The **explicit inclusion of persons in need of international protection or for other humanitarian reasons** in the list of people engaging in 'essential travel' and protected from all travel restrictions is a positive aspect. There is extensive evidence that asylum seekers were disproportionately affected by the travel restrictions introduced by the Member States during the Covid-19 pandemic³²³.

Contrary to Council Recommendation 2020/912 and despite the right to asylum being anchored in Article 14 CFREU, only four EU Member States (Luxembourg, Poland, Romania and Sweden), as well as Norway and Iceland, adopted explicit exemptions for asylum seekers. The FRA reports multiple instances where Mediterranean ports were closed to persons seeking protection and asylum seekers were pushed back because they could not self-quarantine or provide a negative Covid-19 test³²⁴.

³²¹ Council of the EU, Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, *OJ L 208 I/1*, 1 July 2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H0912&from=EN>

³²² According to Article 21a(4), in its Implementing Decision, the Council would (a) outline categories of individuals travelling for non-essential purposes that should be exempt from any restrictions; (b) identify areas or countries from which non-essential travel should be restricted or exempt based on the epidemiological situation; (c) establish the conditions under which non-essential travel may be restricted or exempt from restrictions; and (d) establish the circumstances under which travel restrictions may be imposed exceptionally on individuals travelling for essential purposes if there is a rapid worsening of the epidemiological situation or new variants of the virus are detected. When the Council would plan to introduce restrictions on essential travel, the only categories listed in Annex XI that could potentially be affected by these restrictions are frontier workers and transport personnel. All other categories would be protected under Article 21a(5) from all travel restrictions.

³²³ S. Carrera and N.C. Luk (2020), In the Name of Covid-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU, p. 76. <https://www.ceps.eu/ceps-publications/in-the-name-of-covid-19/>

³²⁴ FRA, Migration: Covid-19 continues to cause hardship for migrants and deprives children of access to education, 27 July 2020, <https://fra.europa.eu/en/news/2020/migration-covid-19-continues-cause-hardship-migrants-and-deprives-children-access> ; Regarding ports, see, for example, Italy, Decreto del Ministro delle infrastrutture e dei trasporti, in concerto con Il Ministro degli affari esteri e della cooperazione internazionale, il Ministro dell'interno e il Ministro della salute, 7 April 2020, https://altreconomia.it/app/uploads/2020/04/M_INFR.GABINETTO.REG_DECRETIR.0000150.07-04-2020-3.pdf.pdf

Similarly, in Hungary, the government approved a law that abolished the possibility of applying for asylum from within the country and directed the applicants to the nearest Hungarian embassy³²⁵.

When it comes to the internal borders, **public health would be introduced as a ground for police checks at the internal borders** under Article 23 and for the temporary reintroduction of internal border control under Article 25. Building on the experience of the Covid-19 pandemic, Article 23 on the exercise of public powers would be expanded to protect not only the exercise of police powers by the competent authorities at the internal border areas but also the exercise of 'other public powers'. This would include health authorities carrying out testing and other sanitary operations.

Furthermore, the Commission's proposal includes **the containment of the spread of an infectious disease with epidemic potential as detected by the ECDC as one of the specific threats to public security or public policy for which the exercise of powers by the competent authorities may not be considered equivalent to the exercise of border checks at the internal borders**. In other words, in the case of epidemics, the competent national authorities could carry out checks on persons crossing borders within the Schengen area without these checks being equivalent to border control.

Secondly, the explicit inclusion of **'large-scale public health emergencies' as a serious threat to public policy or internal security under Article 25 SBC** means that Member States could still reintroduce temporary internal border control to contain the spread of infectious diseases. As the experience with Covid-19 has shown, Member States relied on Article 28 and Article 25 to reintroduce and prolong internal border controls. However, as seen in *Section 2.2.1.* of this Study, **public health was deliberately not previously included by EU legislators as one the grounds for the reintroduction of internal border controls in the SBC**. In the Impact Assessment for the SBC proposal, **the Commission acknowledges that internal border controls and travel bans are in fact not adequate solutions against the spread of epidemiological diseases**. They do so by reporting statements from the WHO. Nonetheless, and contrary to EU Better Regulation Guidelines, **public health has remained** as a new possible ground for the reintroduction of internal border controls **under the proposed text**.

6.1.3. Time limits

The Commission's proposal amends **the time limits in the hands of Member States for the reintroduction of internal border controls within the Schengen area**. In its current version, Article 25 establishes that Member States may exceptionally reintroduce border control 'for a limited time of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days'³²⁶. If the serious threat persists, this initial period can then be prolonged for up to 30 days³²⁷,

³²⁵ ECRE, <https://ecre.org/hungary-new-law-on-the-lodging-of-asylum-applications-at-embassies/>

³²⁶ Article 25(1) SBC.

³²⁷ Article 25(3) SBC.

for a maximum period of six months or, in the case of the exceptional circumstances covered by Article 29 SBC, two years³²⁸.

The Commission's proposal would change these time limits. First, there is a **new differentiation between unforeseeable and foreseeable threats to public policy and internal security**. In practice, this means that the new Articles 25 and 25a would also cover events that, as of now, fall within the scope of Article 28 (**specific procedure for cases requiring immediate action**), which is also modified accordingly³²⁹. When it comes to 'unforeseeable threats', Member States would be allowed to immediately reintroduce internal border control for a limited period of one month with possible prolongations up to a maximum of three months³³⁰. In the case of foreseeable threats, instead, upon notifying the Commission and the other Member States, Member States can reintroduce internal border control for **up to six months, with possible prolongations for six months and for a maximum duration of two years**³³¹.

While the new time limits for unforeseeable threats seem reasonably contained, **the time limits for foreseeable threats would be extended compared to the current system**. In her draft report, the European Parliament Rapporteur for the SBC proposal at the Parliament, MEP Sylvie Guillaume (S&D, France), has proposed **to sensibly reduce the time limits for foreseeable threats as follows: Member States would be able to reintroduce internal border control for an initial period of three months, which could then be renewed for a further 3 months, for an overall maximum duration of one year**. In other words, she proposes to halve the time limits established by the Commission. According to her, '[g]iven that internal border control should remain the exception and not the rule, a period of six months [of] internal border control without further assessment is *deemed too long*' (Emphasis added)³³².

To increase the oversight over Member States' decisions, the Rapporteur also includes **the obligation for Member States to notify the Parliament**, as well as the Commission and the other Member States. As she further notes, it is crucial **to avoid internal border control becoming the *de facto* normality**, and a period of one year should be satisfactory for the Member States to identify alternative solutions for the identified threat. This should be even more feasible **in the case of foreseeable threats, which – by definition – allow Member States to plan 'alternative measures' in advance**.

³²⁸ Article 25(4) SBC.

³²⁹ As will be shown below, in the Commission's proposal, Article 28 is amended to provide for mechanisms applicable when a 'serious threat to public policy or internal security puts at risk the overall functioning of the area without internal border controls'. The scope of Article 28 would be reduced, as 'regular' unforeseeable events would pass to Article 25.

³³⁰ Amendment 25a(3).

³³¹ Amendment 25a(5).

³³² Draft Report European Parliament, Amendment 61, p. 50.

The Commission's proposal also profoundly modifies Article 28 SBC. In its current form, Article 28 deals with **cases requiring immediate action**. With the distinction between foreseeable and unforeseeable threats to public policy and internal security introduced in Articles 25 and 25a, the amended Article 28 now focuses on serious threats to public policy and internal security putting at risk the overall functioning of the area without internal border controls. Currently, Article 28 allows Member States to immediately reintroduce internal border control for a period of 10 days, which can be prolonged, after an assessment of the necessity and proportionality of these measures, for 20 days and a maximum overall period of two months³³³.

Under the new amended version of Article 28, instead, it would be up to the Commission – and not to the Member States – to decide to reintroduce internal border control. If the measures included in the amended Articles 23 (exercise of public powers) and 23a (procedure for transferring people apprehended at the internal borders) are deemed not sufficient to deal with the identified threat, the Commission would make a proposal to the Council for an implementing decision to reintroduce internal border control for a period of up to six months. Upon proposal of the Commission, **the decision may then be renewed for further periods of six months, as long as the threat persists**³³⁴. The Commission would be tasked with reviewing the evolution of the threat and the impact of the measures adopted and would be able to recommend alternative measures under Articles 23 and 23a to complement or replace internal border control³³⁵.

Notably, **the Commission's proposal does not set an overall time limit for the reintroduction of internal border control under the amended Article 28.** It is possible to assume that Commission does not expect Article 28 to be used instrumentally since it would be up to the Commission itself to recommend the reintroduction and prolongation of internal border controls. This is however problematic. **The SBC should not contain any instrument that could potentially allow for the reintroduction of internal border control for an indeterminate and unspecified amount of time.** To remedy this, the Parliament's Rapporteur has included **strict time limits** in her draft report on the Commission's proposal. Specifically, she suggests limiting the possibility for the Council to renew its decision to three times and for a maximum duration not exceeding two years³³⁶.

Under the Rapporteur's proposal, the Commission would not only review the measures adopted to assess whether they remain justified, but also with a view to proposing the lifting of internal border control as soon as possible³³⁷. Based on the letter and the spirit of the SBC, the return to and preservation of the area of free movement should be the main goal of both the Commission and the Member States in all situations. Hence, the option to prolong internal border control indefinitely would be incompatible with EU values and the protection of the Schengen area.

³³³ Article 28(3) SBC.

³³⁴ Amended 28(1), 28(2).

³³⁵ Amended 28(5), 28(7).

³³⁶ Draft Report European Parliament, Amendment 75, p. 57.

³³⁷ Draft Report European Parliament, Amendment 77, p. 58.

6.1.4. How does the new Commission proposal deal with impunity and arbitrariness?

In the Explanatory Memorandum preceding the 2021 SBC Proposal, the Commission stresses that it **establishes stronger reporting obligations for Member States reintroducing border controls, as well as a solid coordination and oversight role for the Commission**. As regards the reintroduction of internal border control under Article 25, the elements that Member States are required to include in the notification under Article 27 remain unchanged, with the addition of **‘considerations as to the necessity and proportionality’ for the introduction or prolongation of internal border control**³³⁸. Based on Article 26, Member States would specifically have to pay attention to whether the measures are appropriate to solve the identified serious threat to public policy or internal security and the impact of border control measures on the movement of persons and the functioning of cross-border regions³³⁹. Similarly, in the case of prolongation, they would have **to assess whether alternative measures like proportionate checks (Article 23), the internal transfer procedure (Article 23a), or forms of police cooperation between Member States could attain the same objectives**³⁴⁰.

Furthermore, under Article 27, if border controls have been in place for six months, Member States are required to also submit a **‘risk assessment’** delineating the scale and anticipated evolution of the serious threat, i.e., how long it will persist and what sections of the border will be impacted, as well as the steps taken to coordinate with the impacted Member States³⁴¹. In the case of so-called large-scale unauthorised movements, the risk assessment should include **data on the scale and trend of the phenomenon**, including information and data analysis from the relevant EU agencies and information systems³⁴². As stated above, **any risk-based methodology is inherently flawed and cannot be equated to evidence to derogate EU fundamental freedoms such as free movement in the Schengen area**.

Upon request from the Commission, Member States would also be required to provide additional information regarding coordination with other Member States and the possible use of alternative measures (Articles 23 and 23a SBC)³⁴³. While Member States can classify the information for security reasons, this should not preclude access to the Member States affected by the reintroduction of internal border control³⁴⁴.

In addition to this, the newly introduced Article 27a regulates the consultation with the Member States and the opinion of the Commission. Upon receiving the notification, **the Commission could open a consultation process between the Member State reintroducing internal border control**

³³⁸ Amended Article 27(1).

³³⁹ Amended Article 26(1).

³⁴⁰ Amended Article 26(2).

³⁴¹ Amended Article 27(2).

³⁴² Amended Article 27(3).

³⁴³ Amended Article 27(4).

³⁴⁴ Amended Article 27(5).

and the Member States that would be affected. The Commission and the other Member States could issue Opinions if there are concerns regarding the necessity and proportionality of the adopted measures. **Where border controls are prolonged for 18 months, the Commission would be required to issue an Opinion on necessity and proportionality and, if it identified concerns, launch a consultation process.**

If a Member State considers that there are exceptional circumstances justifying the prolongation of internal border control *beyond* the maximum limit of two years set in Article 25a(5)³⁴⁵, **for the same renewed ground, it shall notify the Commission, and the Commission is required to issue a follow-up opinion**³⁴⁶. **This last situation is, however, clearly at odds with the CJEU's judgment in the NW case. The prolongation of internal border control for the same threat to public policy and internal security beyond the maximum limit provided for in the SBC is clearly unlawful.**

Further measures related to reporting are included in Article 31, which establishes that the Commission and the Member State(s) concerned shall inform the Parliament and the Council of any decision taken under Article 21 or Articles 25-30³⁴⁷. In such situations, the Member States would have to inform the co-legislators about the details of the internal borders where internal border control is reintroduced, the reasons for the reintroduction, the authorised crossing points, the date and duration of the reintroduction, and the possible measures taken by the other Member States³⁴⁸. **This information can be classified for 'public security reasons' under rather unclear and untransparent methods. However, the classification should not preclude the Parliament and Council from receiving said information**³⁴⁹.

Article 33 further establishes that, within four weeks of the lifting of border control at the internal borders, Member States shall present a report to the Parliament, Council, and Commission on the reintroduction and/or prolongation of border control³⁵⁰. At the end of the first 12 months and every 12 months thereafter, Member States would have to submit a report based on a uniform format created by the Commission outlining the initial and follow-up assessment of the necessity of border controls and the respect for the criteria set in Article 26, the operation of the checks, the cooperation between Member States, the impact on the movement of people and cross-border regions, the

³⁴⁵ Article 27a(5) of the Proposal refers to Article 25(5) setting the maximum period of internal border control. This seems to be a mistake. The maximum duration of internal border control is included in the newly added Article 25a(5).

³⁴⁶ Amended Article 27a(5).

³⁴⁷ Article 31 SBC; Amended Article 31(1).

³⁴⁸ Amended Article 31(2).

³⁴⁹ Amended Article 31(3).

³⁵⁰ Amended Article 33(1).

effectiveness of the reintroduction of border control, including an ex post evaluation of its proportionality³⁵¹. The Commission can then issue an opinion on this ex post assessment³⁵².

Article 33 also sets the information that the Commission shall cover in the yearly ‘State of Schengen report’ to be presented to the Parliament and Council³⁵³. Namely, the report should include all the introductions of internal border controls by Member States and information on unauthorised movements of third-country nationals within the Schengen area based on the data collected by the relevant agencies and information systems and an assessment of the necessity and proportionality of the reintroduction of internal border controls within a given year³⁵⁴.

The idea behind these new requirements for Member States is that each prolongation of internal border control should be linked with **an increased burden of proof** for the Member States. Each time, they would have to consider the impact of the proposed border control on the movement of persons within the Schengen area and on the cross-border regions and should coordinate with the affected Member States and the Commission. The Commission is also pushing for increased evaluation of necessity and proportionality and of the so-called alternative measures included in Articles 23 and 23a and studied in *Section 7* below.

³⁵¹ Amended Article 33(3-4).

³⁵² Amended Article 33(5).

³⁵³ Amended Article 33(6). The first State of Schengen Report was released in 2022. Available here: https://home-affairs.ec.europa.eu/system/files/2022-05/State%20of%20Schengen%20Report%202022_en.pdf

³⁵⁴ Amended Article 33.

Table 2: Comparison between 2017 Proposal, 2021 Proposal and EP Draft Report

2017 COMM Proposal	2021 COMM Proposal	EP Draft Report
<p>Grounds:</p> <ul style="list-style-type: none"> A serious threat to public policy or internal security in a MS <p>Time limits:</p> <ul style="list-style-type: none"> Period of up to 30 days, or for the foreseeable duration of the serious threat if its duration exceeds 30 days, but not exceeding six months. Prolongation for the foreseeable duration of the serious threat and not exceeding six months. The total period shall not exceed one year. In exceptional cases (Article 27a), the period may be further extended to a maximum length of two years. <p>Other:</p> <ul style="list-style-type: none"> MS would be required to submit a risk assessment demonstrating that the prolongation of border control is a last resort measure and how it would help address the identified threat. If prolonged beyond six months, the risk assessment should also demonstrate retrospectively the efficiency of the reintroduced border control in addressing the identified threat and explain how each neighbouring MS affected was consulted and involved in determining the least burdensome operational arrangements. The Commission could issue an opinion when it has doubts about the necessity and proportionality of the reintroduced border controls and would be required to issue one after border controls have been reintroduced for six months. 	<p>Grounds:</p> <ul style="list-style-type: none"> A serious threat to public policy or internal security may be considered to arise from, in particular: <ul style="list-style-type: none"> activities relating to terrorism or organised crime; large scale public health emergencies; a situation characterised by large scale unauthorised movements of third-country nationals between the MSs, putting at risk the overall functioning of the area without border control; large scale or high-profile international events such as sporting, trade or political events. <p>Time limits:</p> <ul style="list-style-type: none"> Unforeseeable threats: Border control at internal borders may be immediately reintroduced for a limited period of up to one month. It can be renewed for further periods, for a maximum duration not exceeding three months. Foreseeable threats: Border control at internal borders may be reintroduced for a period of up to six months. Where the threat persists, the MS may prolong the border control for renewable periods of up to six months. The maximum duration shall not exceed two years. <p>Other:</p> <ul style="list-style-type: none"> If prolonged for six months, MS are required to submit a risk assessment delineating the scale and anticipated evolution of the threat and steps taken to coordinate with other MS. The Commission would be required to issue an opinion on necessity and proportionality if border control is prolonged for 18 months. Exercise of public powers: irregular migration and public health as grounds for police checks at the internal borders. Situations of instrumentalisation: closure of border crossing points. Procedure for intra-EU transfers of people apprehended near the border (Article 23a) 	<p>Grounds:</p> <ul style="list-style-type: none"> A serious threat to public policy or internal security may be considered to arise from, in particular: <ul style="list-style-type: none"> A direct and immediate threat of acts of terrorism or of serious organised crime. Same as COMM 2021 Deleted Same as COMM 2021 <p>Time limits:</p> <ul style="list-style-type: none"> Unforeseeable threats: Border control can be reintroduced for one month. It can be renewed for up to three months. Foreseeable threats: Border control at internal borders may be reintroduced for a period of up to three months. Where the threat persists, the MS may prolong the border control for renewable periods of up to three months. The maximum duration shall not exceed one year. <p>Other:</p> <ul style="list-style-type: none"> After three months of border control, MSs would be required to provide a risk assessment. After six months of internal border control, the Commission would be obliged to issue an opinion on necessity and proportionality. Removes provisions on instrumentalisation. Procedure for intra-EU transfers of people apprehended near the border (Article 23a).

Source: Authors' elaboration

6.2. The ‘Instrumentalisation of migrants’

The proposed 2021 amendments of the SBC would also introduce provisions applicable in situations of the so-called instrumentalisation of migrants. Article 1(b)(27) of the Commission’s SBC proposal defines a situation of ‘instrumentalisation of migrants’ as:

...a situation where a third country instigates *irregular migratory flows* into the Union by *actively encouraging or facilitating* the movement of third-country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of *an intention of a third country to destabilise the Union or a Member State*, where the nature of such actions is liable to put at risk essential State functions, including its *territorial integrity, the maintenance of law and order or the safeguard of its national security* (Emphasis added).

The measures introduced in the SBC are linked to the Commission’s 2021 Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum³⁵⁵. The proposed Instrumentalisation Regulation is based on the Council Decision on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland of 1 December 2021, which authorised the three countries to adopt extraordinary measures at their border with Belarus under Article 78(3) TFEU³⁵⁶. These measures were designed to address **unauthorised arrivals by asylum seekers allegedly pushed by the Belarusian regime authorities towards the Schengen external borders in the second half of 2021**³⁵⁷.

With regards to the SBC proposal, the measures for instrumentalisation are limited to the definition provided above and to the possibility for Member States facing such situations to limit the number of border crossing points under Article 5 SBC. **The adoption of the above proposal for a Regulation and the potential inclusion of the ‘instrumentalisation’ concept inside the SBC would be problematic.** The SBC and the Instrumentalisation Regulation rely on different legal bases under the EU Treaties: while the Instrumentalisation Regulation falls within the asylum *acquis*, the SBC is the basis for the Schengen *acquis*. This is another proof of **the hyper-complexity and lack of coherence of the recent Commission proposals**, as well as **the increasing hybridisation**

³⁵⁵ European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final, 14 December 2021. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A890%3AFIN> The Instrumentalisation Regulation would allow Member States who are experiencing a situation of ‘instrumentalisation of migrants’ to derogate from selected provisions contained in the proposed Asylum Procedures Regulation (APR) of 2016 and the amended APR proposal of 2020, the proposed recast of the Reception Conditions Directive (rRCD) of 2016, and the proposed recast Return Directive (rRD) of 2018. Member States would be able to apply the measure laid out in the Regulation, either selectively or cumulatively, for ‘what is strictly necessary to enable the Member States concerned to address the situation of instrumentalisation and in any case for an initial period of no more than six months’, which can be then renewed following the authorisation of the Council and Commission.

³⁵⁶ European Commission, Council Decision on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland. COM(2021) 752 final, 1 December 2021. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A752%3AFIN>

³⁵⁷ BBC, ‘Belarus border crisis: How are migrants getting there?’ 26 November 2021. <https://www.bbc.com/news/59233244>

– or blurring of boundaries – of constitutionally and legally distinct EU policy domains, which gives priority to policing and criminalisation over asylum in the EU.

Based on this, the European Parliament's Rapporteur on the SBC proposal has suggested in the LIBE Committee Draft Report that **all provisions related to instrumentalisation should be removed altogether from the SBC proposal**³⁵⁸. In her view, the instrumentalisation measures 'serve a geopolitical goal with limited relevance for the rules governing the good functioning of the Schengen area'. The Rapporteur has argued that 'instrumentalisation' should be examined independently and not divided in separate legal texts with different purposes and objectives.

The Instrumentalisation Regulation was criticised by civil society organisations for being openly **'disproportionate', 'counterproductive', 'unnecessary', 'misguided', and 'unfair'**³⁵⁹. The very **definition of 'instrumentalisation of migrants' is too broad and vague and could be easily applied in the future as a way to derogate from crucial provisions in the asylum *acquis* and non-derogable or absolute human rights**³⁶⁰. As ECRE pointed out³⁶¹, the Instrumentalisation Regulation risks **legitimising national-level changes that are fundamentally incompatible with existing primary and secondary EU law.**

The Instrumentalisation Regulation targets the *victims* of instrumentalisation more than the actual *perpetrators*, i.e. the third-country authorities engaging in such actions. **It would penalise the actual victims of this phenomenon.** PICUM and other civil society organisations pointed out that '[t]hese measures unjustifiably penalise asylum seekers by **limiting access to the territory and *de facto* undermining Article 31 of the Refugee Convention** which prohibits States **from imposing penalties on refugees on account of their entry or presence in their territory without authorisation**, and are therefore in violation of international law'³⁶².

³⁵⁸ European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (COM(2021)0891 – C9-0473/2021 – 2021/0428(COD)). 8.11.2022.

³⁵⁹ See ECRE, Joint Statement: NGOs call on Member States: Agreeing on the Instrumentalisation Regulation will be the Final Blow to a COMMON European Asylum System (CEAS) in Europe, 8 September 2022.; ECRE, Ecre Comments On The Commission Proposal For A Regulation Of The European Parliament And Of The Council Addressing Situations Of Instrumentalisation In The Field Of Migration And Asylum Com(2021) 890 Final. January 2022. <https://ecre.org/wp-content/uploads/2022/01/ECRE-Comments-Instrumentalisation-January-2022.pdf>; ECRE, Policy Note: A Step Too Far: Introducing 'Instrumentalisation' In EU Law. 25 March 2022. <https://ecre.org/policy-note-a-step-too-far-introducing-instrumentalisation-in-eu-law>

³⁶⁰ It would severely affect a whole range of fundamental rights, including the right to human dignity (Article 1 CFREU), the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), the right to liberty and security (Article 6 CFREU, Article 5 ECHR), the protection in the event of removal, expulsion or extradition (Article 19 CFREU), the rights of the child (Article 24 CFREU) and the right to an effective remedy (Article 47 CFREU, Article 13 ECHR).

³⁶¹ ECRE, ECRE Comments On The Commission Proposal For A Regulation Of The European Parliament And Of The Council Addressing Situations Of Instrumentalisation In The Field Of Migration And Asylum Com(2021) 890 Final. January 2022.

³⁶² PICUM, Joint Civil Society Statement on the Schengen Borders Code. 5 April 2022. https://picum.org/wp-content/uploads/2022/09/Schengen-borders-code-EN_Sept22.pdf

It is hard to understand why third-country nationals who arrive to the EU in such instances should be treated worse than anybody else, and how this would have any impact on the third country's intentions and actions. As discussed during the **Workshop** organised in the context of this Study, it is unclear **why new derogations from the asylum *acquis* are actually needed to respond to situations of 'instrumentalisation of migrants'** when the original Directives and proposals already offer **a degree of flexibility when Member States' capacities are overstretched**³⁶³. Moreover, while the Commission mentions specific safeguards for 'vulnerable groups' (e.g. minors), the provisions contained in the legal text do not back up these claims³⁶⁴.

The Instrumentalisation Regulation was under discussion during the JHA Council of 8-9 December 2022 under the Czech Presidency³⁶⁵. On this occasion, the Council did not reach a majority to endorse the proposal. Interviews conducted for the purposes of this Study mentioned that³⁶⁶ **some EU Member States raised serious concerns about the fundamental rights violations inherent to both its design and rationale**. While it seemed that the proposal had been halted³⁶⁷, in the Conclusions of its meeting of 9 February 2023, the European Council condemned 'attempts to *instrumentalise* migrants for political purposes, particularly when used as leverage or as part of hybrid destabilising actions' and called for progress on the relevant tools³⁶⁸. Hence, it is possible that the work on the Instrumentalisation Regulation, or some of its components, may be pursued or followed up in the near future³⁶⁹.

6.3. The Screening Proposal

Another key piece of the Commission's legislative nightmare on Schengen-related files is the **Proposal introducing a screening of third-country nationals at the external borders** (referred to as the Screening Proposal from here on)³⁷⁰. This piece of legislation is a component of the Pact on Asylum and Migration. The Screening Proposal was presented during our interviews as a 'key step' to strengthen the Schengen area and instil 'mutual trusts' across the national governments.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Council of the EU, Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum - Presidency compromise text. 13963/22. 4 November 2022.

³⁶⁶ Interview with EU Council representative 1, 21 February 2023.

³⁶⁷ ECRE, ECRE Reaction: No Majority for Instrumentalisation Regulation. 8 December 2022. <https://ecre.org/ecre-reaction-no-majority-for-instrumentalisation-regulation/>

³⁶⁸ European Council, Special meeting of the European Council (9 February 2023) – Conclusions, EUCO 1/23. 9 February 2023.

³⁶⁹ During the Workshop, a civil society representative mentioned that if the Instrumentalisation Regulation were not to be approved, part of its provisions could be re-introduced 'through the back door', that is, through amendments to the Crisis and Force Majeure Proposal which is also being discussed by the co-legislators. Refer to European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum. COM/2020/613 final. 23.9.2020.

³⁷⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. 2020/0278 (COD). 23.9.2020.

According to one interviewee, having the screening procedure at the external border, modern technologies both at the external and internal borders, and police cooperation between Member States would be a sufficient incentive for Member States to suspend their internal border controls³⁷¹.

The Screening Proposal introduces 'uniform rules concerning the procedures to be followed **at the pre-entry stage of assessing the individual needs of third-country nationals** and uniform rules on the length of the process of collecting relevant information for identification of the procedures to be followed with regard to such persons'³⁷². The Screening procedure would have a duration of five days – with a possible extension of five more days in 'exceptional situations' – and would comprise the following six elements:

1. Preliminary health and vulnerability checks;
2. Identification based on information in European databases;
3. Registration of biometric data in the appropriate databases (i.e., fingerprint data and facial image data);
4. Security checks through a query of relevant national and Union databases (via the European social portal);
5. The filling out of a de-briefing form;
6. Referral to the new appropriate procedure³⁷³.

After this procedure, **third-country nationals would be 'referred to the applicable procedure', i.e., either asylum or return**. The Screening procedure would apply to:

- All TCNs 'apprehended in connection with an unauthorised crossing of the external border of a Member State by land, sea or air' or 'disembarked in the territory of a Member States following a search and rescue operation'³⁷⁴;
- All TCNs 'who apply for international protection at external border crossing points or in transit zones and who do not fulfil the entry conditions set out in Article 6 [SBC]'³⁷⁵;
- All TCNs 'found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner'³⁷⁶.

For persons apprehended at the EU external borders, **the procedure would take place 'at locations situated at or in proximity to the external borders'**³⁷⁷. While undergoing the screening,

³⁷¹ Interview with European Commission official, 1, 7 February 2023.

³⁷² Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

³⁷³ Article 6(6), Screening Proposal.

³⁷⁴ Article 3(1)(a), Screening Proposal.

³⁷⁵ Article 3(1)(b), Screening Proposal.

³⁷⁶ Article 5, Screening Proposal.

³⁷⁷ Article 6(1), Screening Proposal.

they ‘shall not be authorised to enter the territory of a Member State’³⁷⁸. **This presumption or legal fiction of non-entry would mean that the procedure would instead take place in an ‘appropriate location within the territory of a Member State’ for TCNs found within the territory of the Member State**³⁷⁹.

As previously discussed in *Section 5.4* of this Study above, **Article 7 of the Screening Proposal provides for the establishment by each Member State of an ‘independent monitoring mechanism’** covering ‘in particular the respect of fundamental rights in relation to the screening, as well as the respect of the applicable national rules in the case of detention and compliance with the principle of *non-refoulement*’.

In her Draft Report³⁸⁰, the European Parliament’s Rapporteur on the Screening Proposal, Birgit Sippel (S&D), identified **several negative important shortcomings of the file**. First of all, she expressed regret for **the lack of an impact assessment** accompanying the Commission’s proposal, especially ‘given the potential serious effects on the fundamental rights of third-country nationals and **the complexity** of the migration and asylum system proposed in the new Pact on Migration and Asylum’. The Parliament requested a substitute *ex ante* impact assessment, which was produced by the European Parliament Research Service (EPRS)³⁸¹.

On the substance of the Proposal, she observed that **the prohibition for TCNs to enter the territory of the Member States, regardless of their intention to file an asylum application, is not in line with the existing Asylum Procedure Directive** and the proposal for the Asylum Procedure Regulation. As she noted, ‘applicants for international protection have **the right to remain in the Member State pending the examination of the application**’. Based on this, she removed said prohibition and also introduced amendments **to ensure the right for these persons to enter the territory**, in line with the derogations set by Articles 3 and 4 SBC for asylum seekers. With regards to the screening within the territory of a Member State, the Rapporteur suggested removing completely Article 5 from the Screening Proposal as these measures would go beyond the legal basis for the screening (Article 77(2)(b) TFEU).

Moreover, she suggested changes to the requirements concerning the screening, especially with regards to **the location and timeframe**. In terms of location, she suggested lifting the obligation to conduct the screening ‘at or in proximity to the external borders’, leaving more freedom to Member States in choosing appropriate locations. In terms of timing, she recommended expanding the five-day limit. Furthermore, in addition to potential health issues, she proposed that other vulnerabilities or special reception or procedural needs be identified as early as possible in the procedure, and for guarantees for unaccompanied minors during the screening to be included.

³⁷⁸ Article 4(1), Screening Proposal.

³⁷⁹ Article 6(2), Screening Proposal.

³⁸⁰ European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM(2020)0612 – C9-0307/2020 – 2020/0278(COD)). 16.11.2021.

³⁸¹ Campesi and Cornelisse (2021), The European Commission’s New Pact on Migration and Asylum. Horizontal Substitute Impact Assessment, Study Commissioned by the EPRS.

The Rapporteur welcomed the introduction of independent monitoring mechanisms for the respect of fundamental rights. Nonetheless, she introduced **an obligation to involve non-governmental institutions and organisations 'to strengthen this mechanism and ensure its independence' and recommended that the European Data Protection Supervisor (EDPS) should be involved to monitor the collection of personal data during the screenings.** Furthermore, she suggested that, as well as Member States having to investigate allegations of non-respect, these mechanisms **'should be able to trigger such investigations** and Member States should provide for penalties for the failure to respect fundamental rights'.

Concerning the outcome of the screening, the Rapporteur also included amendments to ensure that, in line with the General Data Protection Regulation (GDPR), **the applicant receives a copy of the final debriefing form at the same time as the relevant authorities.** She further recommended that Member States be given **the option to apply the derogations** under Article 6(5) SBC, which also include humanitarian grounds, to allow for the entry of TCNs.

Finally, in relation to databases and access to information and citing the above-mentioned substitute impact assessment, the Rapporteur expressed concerns that **'this expansion may go beyond the limits foreseen in relation to law enforcement access to EU migration databases'**³⁸². She opposed **the granting of blanket access rights to all relevant databases** (i.e. VIS, EES, and ETIAS) to the competent authorities and only retained their access to the Common Identity Repository (CIR), which would still allow for the verification of the identity of a third-country national. As analysed in *Section 8* of this Study below, the proliferation and use of EU databases and their interoperability are a key component of the (in)securitisation pursued and promoted by the European Commission.

The amendments proposed by the Rapporteur reflect some of the findings of a previous study commissioned by the European Parliament on the new Pact on Asylum and Migration³⁸³. As regards the Screening Proposal, **the study raised concerns regarding the observed 'blurring between the border enforcement and asylum protection rationale the proposal entails'**³⁸⁴. The Commission seems to be 'extending to air and land borders a practice already experimented with under the **hotspot approach** in relation to unauthorised entry by sea'³⁸⁵.

The legal fiction of 'non-entry' created through the Screening Proposal would be problematic as it would significantly and disproportionately impinge on the fundamental rights of third-country nationals. In particular, the pre-entry screening may lead to delays in the access by asylum seekers to the entitlements and protections offered to them under EU law. It could legitimise the **widespread use of arbitrary detention and to deprivation of liberty as well as possible violations of the prohibition of torture, and inhuman and degrading treatment.**

³⁸² See EPRS, The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment, p. 101. [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS_STU\(2021\)694210_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS_STU(2021)694210_EN.pdf)

³⁸³ Brouwer et al., 'The European Commission's legislative proposals in the New Pact on Migration and Asylum', Study Commissioned by the LIBE Committee of the European Parliament, 2021.

³⁸⁴ Ibid. p. 56.

³⁸⁵ Ibid.

That notwithstanding, this fiction of ‘non-entry’, however, **does not relieve Member States from their obligations under international human rights law and the EU Charter of Fundamental Rights**³⁸⁶. The Proposal is also problematic in terms of proportionality. Based on the idea that third-country nationals ‘might abscond’ after entering the territory irregularly, the Commission has opted for **the systematic containment of asylum seekers in border areas** instead of an individualised assessment by the competent authorities.

As regards the independent monitoring mechanism, it is crucial that this system would include clear consequences and follow-up procedures to respond to non-compliance. Moreover, as it stands now and as indicated in *Section 5* of this Study above, the mechanism would be limited to the violations of fundamental rights that take place during the screening procedure at specific border crossing points. **It would not apply to border surveillance activities despite the fact that ‘the vast majority of reported breaches of migrants’ fundamental rights typically occur outside of official border crossing points**, transit zones, hotspot areas, and reception facilities³⁸⁷.

On 28 March 2023, the LIBE Committee approved the mandate for the Parliament to negotiate with the EU Council on the Screening Proposal, as well as on the Asylum and Migration Management Regulation, the Asylum Procedures Regulation and the Crisis and Force Majeure Regulation. Surprisingly, the Compromise Amendments to the Screening Proposals brought back the ‘legal fiction of non-entry’. The text however leaves discretion to the Member States saying that they ‘*may consider*’ the persons subject to the screening ‘*as not having entered* the territory’³⁸⁸. As stated above, the ‘legal fiction of non-entry’ is problematic as it leads to extensive detention and other potential violations of fundamental rights. Accordingly, it should be completely removed and not retained as an option for Member States.

³⁸⁶ As argued in the previous European Parliament Study on the Pact on Migration and Asylum, ‘The CJEU ruling of 17 December 2020 *European Commission v Hungary* confirmed that the deprivation of liberty of asylum seekers in transit zones framed as a non-territory in the context of border procedures constitutes ‘detention’ in European law. Detention is now an autonomous concept of EU law that undoubtedly unlocks EU Member States responsibilities and liabilities in cases of violations with EU asylum legislation and the EU Charter of Fundamental Rights.⁶⁴⁹ This therefore renders the presumption or legal fiction of non-entry meaningless and without any relevant purpose’, p. 164. Brouwer, E. et al., 2021. ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’, Study Commissioned by the LIBE Committee of the European Parliament.

³⁸⁷ Ibid., p. 63

³⁸⁸ European Parliament, Compromise Amendments Introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. Proposal for a regulation (COM(2020)0612 - C9-0307/2020 – 2020/0278(COD)). 27 3. 2023. Amendment 39, p. 37. Emphasis in the original.

7. (IN)SECURITISATION

In the name of 'saving Schengen' and convincing the group of misbehaving EU Member States to lift the reintroduction of internal border controls, **the European Commission has advanced a number of proposals which have overall favoured an (in)securitisation**³⁸⁹ by deepening the so-called compensatory or flanking measures. That notwithstanding, are these initiatives and tools really 'less invasive measures than border checks' and not essentially equivalent to formal internal border controls? Moreover, these initiatives are officially presented as 'compensating' the security-related claims by EU Ministries of Interior. Yet, aren't they in turn nurturing their 'fears-based' positions and unsubstantiated claims?

These have translated into **three key priorities**: First, an expansive use of policing in internal border areas³⁹⁰ and police identity checks based on surveillance systems and risk profiles of some travellers across EU internal border areas³⁹¹ which are presented as 'alternatives' to internal border checks (*Section 7.1.*); second, the formalisation and proliferation of intra-EU Schengen area readmission or accelerated expulsion arrangements among EU Member States (*Section 7.2.*); and third, the exponential expansion of EU IT surveillance databases and their 'Interoperability'³⁹² (*Section 7.3.*).

7.1. Intra-EU policing and surveillance

A first example of the insecuritisation inherent to proposals which are presented 'to save Schengen' relates **the persistent and increasing call of the Commission for Member States to enhancing or enlarging the use of police controls and identity checks as well as cross-border police tools like joint patrols, joint investigation teams, and cross-border hot pursuits**. This call comes along incentives for Member States to implement **intra-Schengen Area borders and mobility surveillance**.

The Commission adopted a Recommendation in 2017 calling on Member States to intensify or step up police checks within their territories 'not having border control as an objective', and 'to make use of modern technologies in order to monitor vehicles and traffic flows'³⁹³. The Recommendation also

³⁸⁹ This notion is informed by critical scholarly contributions to security, which understand (in)security not as an existential notion, but rather as a process by which constructed 'threats' and 'risks', and 'what is to be protected', and by which politics and policies, are constructed in a relational fashion where different networks of security professionals and actors play a key role. According to C.A.S.E. Collective (2006), 'Policing insecurity is then a mode of governmentality, drawing the lines of fear and unease at both the individual and the collective level', page 457. C.A.S.E. Collective (2006), *Critical Approaches to Security in Europe: A Networked Manifesto*, Security Dialogue, Vol. 37(4), pp. 443–487.

³⁹⁰ E.P. Guittet, N. Vavoula, A. Tsoukala and M. Baylis (2022), *Democratic Oversight of the Police*. Study requested by the LIBE Committee.

³⁹¹ S. Carrera and N.C. Luk (2020), *In the Name of Covid-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU*. <https://www.ceps.eu/ceps-publications/in-the-name-of-covid-19/>

³⁹² S. Carrera (2020), *Towards interoperable justice: interoperability and its asymmetry in access rights by EU digital citizens*. EUI, Migration Policy Centre. <https://migrationpolicycentre.eu/towards-interoperable-justice/>

³⁹³ European Commission, *Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area*. OJ L 122/79. 13.5.2017.

underlined the need for EU Member States to use bilateral readmission agreements or arrangements to effectively 'counter unauthorised secondary movements where those movements pose a specific threat to public policy or internal security'.

These same priorities found a prominent place in the 2021 Commission proposals for a **Police Cooperation Code**³⁹⁴, which has been presented as developing the Schengen *acquis*, and which reiterates³⁹⁵ and develops the idea of '**joint police patrols and operations**' in **intra-EU border areas** potentially covering so-called **secondary movements and human smuggling** among their key priority areas³⁹⁶. Section 3 of the Commission's COM(2021) 780 final Proposal on operational police cooperation states that EU Member States *should* use police joint operations to counter human smuggling and 'prevent and detect illegally staying migrants and cross-border crime linked to irregular migration'³⁹⁷. It also recommends Member States to ensure better coordination between national competent authorities with responsibility for joint operations and those in charge of migration enforcement, as well as the setting up of a 'single coordination platform' for Member States to share information on 'their needs and priority' under the auspices of the Europol agency.

None of these proposals has had corresponding effective police oversight mechanisms and complaint mechanisms in the context of intra-EU border checks, joint operations and use of surveillance technologies and tools. This is despite the fact that, as a 2021 European Parliament Study has concluded 'policing, understood as being the enforcement of laws and rules, is more than ever expected to be performed with high degrees of legitimacy, transparency, and accountability'³⁹⁸. The same Study recommends **the use of civilian oversight of police complaint mechanisms and bodies, such as those engaged in the Independent Police Complaints Authorities' Network (IPCAN)**³⁹⁹, which have been recognised as presenting significant potentials for upholding cross-border police accountability.

The Commission's 2021 legislative proposal for reforming the SBC analysed in *Section 6.1.* above of this Study would significantly strengthen the power of national law enforcement and police authorities in the geographical proximities of intra-EU borders and the use of new technologies for monitoring and surveillance of intra-EU travellers. Based on the Commission's proposal, Article 23

³⁹⁴ European Commission, Police Cooperation Code: Boosting police cooperation across borders for enhanced security. 8 December 2021. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6645

³⁹⁵ The Recommendation reconfirms the objective to 'contribute to a fully functioning and resilient Schengen area as set out in the Schengen strategy, which reiterates 'the need for common standards to allow police officers to cooperate effectively with their colleagues in neighbouring countries.' It will help to ensure a high level of security within the territory of Member States and therefore support a Schengen area without controls at internal borders. It will also complement the proposal to amend the Schengen Borders Code.', pp. 7–8.

³⁹⁶ According to the Recommendation one of its key aims relates to 'Use targeted joint patrols and other joint operations in specific intra-EU border areas, based on prior analysis, to counter migrant smuggling as well as to prevent and detect illegally staying migrants and cross-border crime linked to irregular migration', p. 6.

³⁹⁷ European Commission, Proposal for a Council Recommendation on operational police cooperation. COM(2021) 780 final. 8 December 2021.

³⁹⁸ Guittet et al, (2022), Democratic Oversight of the Police.

³⁹⁹ See <https://ipcan.org>

of the SBC is set to change titles from 'checks within the territory' to 'exercise of public power'. **Article 23 would be expanded to protect not only the exercise of police powers by the competent authorities at the internal border areas, but also the exercise of 'other public powers'**. This would include for instance national health authorities potentially carrying out testing and other sanitary operations.

The new text adds to Article 23(a)(ii) several objectives for border checks within the Schengen area when these are carried out on the basis of general information and experience of the competent authorities. Namely, **the scope of border checks at the internal borders would be expanded beyond its original focus on 'cross-border crime'**. The Commission's proposal adds **'combating irregular residence' or stay linked to 'irregular migration' and containing the spread of an infectious disease with epidemic potential** as explicit reasons for legitimate intra-Schengen border checks⁴⁰⁰. The Commission also expanded Article 23(a)(iii), which would state that, when devised and executed in a manner clearly distinct from systematic checks, the exercise of public powers is not equivalent to border checks *not only* at the external borders but also in transport hubs, onboard of passenger services, and when these checks are based on risk analysis.

Equally, Article 23(a)(iv), which currently allows for spot checks at the internal borders, would be changed **to permit checks that 'are carried out, when appropriate, on the basis of monitoring and surveillance technologies** generally used in the territories, for the purposes of addressing threats to public security or public policy' as listed in Articles 23(a)(ii)⁴⁰¹. Finally, and problematically, Article 23(e) of the amended SBC would allow for public authorities to conduct checks for security purposes on persons travelling within the Schengen area and run their personal data in the relevant EU databases.

As these proposed amendments show, **the Commission's proposal has a strong emphasis on police surveillance**. The Commission sees the use of these means as a way 'to ensure a high level of security within the Schengen area in a proportionate manner', yet the very proportionality of such a proposal is not carefully examined⁴⁰². The 2021 European Commission Impact Assessment accompanying the proposed SBC reform states that:

However, the increased use of the compensatory measures also requires strong safeguards to protect against abuses, including where the promoted measures could become *border checks in disguise*. According to a study commissioned by the European Parliament, the discretionary power conceded to police officers when conducting checks on persons within the territory of a Member State in accordance with the current Article 23 of the Schengen Borders Code, has led to **racial profiling and discriminatory selection of the persons being checked within the border**

⁴⁰⁰ Amended Article 23.

⁴⁰¹ That is, when they aim to combat cross-border crime; combat irregular residence or stay, linked to irregular migration; or contain the spread of an infectious disease with epidemic potential as detected by the European Centre for Disease Control.

⁴⁰² Proposal, p. 8.

areas. It can therefore not be excluded that Options 2 and 3 which are based on **an increased use of compensatory measures might increase this risk** (Emphasis added)⁴⁰³.

However, despite this statement, **the Commission still recommends Member States to deepen and proliferate their policing actions as ‘compensatory measures’** which actually undermines Schengen and EU fundamental rights principles. **This is another example of ‘worst regulation’ or policy laundering at EU level.** The Commission’s priority to increase policing of the Schengen area disregards the **on-the-ground reality of over-policing and discriminatory practices such as racial profiling against certain EU citizens with immigrant background or who look physically different** which runs contrary to the absolute prohibition of racial/ethnic discrimination in international and EU law.

The risk of police profiling for non-discrimination – including in the scope of stop and search powers – was identified and studied by the EU Fundamental Rights Agency (FRA) back in 2010⁴⁰⁴. It has also been expressly recognised as incompatible with EU law in **the EU Anti-Racism Action Plan 2020-2025** published in September 2020 by the European Commission itself⁴⁰⁵. The Action Plan expressly calls for ‘fair policing’ to fight racism in law enforcement and confirms that police profiling ‘on the basis of special categories of personal data, such as data revealing racial or ethnic origin’ is directly incompatible with EU law⁴⁰⁶. The actual scope and practical negative impacts, along with fundamental rights violations, of these cases have been recently confirmed by national courts in the Netherlands⁴⁰⁷. In a ruling issued on **13 February 2023, the Dutch Court of Appeal in The Hague**⁴⁰⁸

⁴⁰³ Page 50. The Commission’s Impact Assessment makes here reference to the following sources: Sergio Carrera, Ngo Chun Luk ‘In the Name of Covid-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU’, September 2020, study commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the LIBE Committee, PE 659.506, p.72f., citing e.g. K. Brouwer, M. van der Woude, J. van der Leun, ‘Op de grens van het vreemdelingentoezicht: discretionaire beslissingen binnen het Mobiel Toezicht Veiligheid’, Tijdschrift voor Veiligheid, Vol. 16, No. 2/3, 2017, p. 73; T.J.M. Dekkers, ‘Selecting in Border Areas: Profiling Immigrants or Cimmigrants?’, The Howard Journal of Crime and Justice, Vol. 58, No. 1, March 2019, pp. 25-44.

⁴⁰⁴ FRA (2010), ‘Towards More Effective Policing Understanding and Preventing Discriminatory Ethnic Profiling: A Guide’. https://fra.europa.eu/sites/default/files/fra_uploads/1133-Guide-ethnic-profiling_EN.pdf

⁴⁰⁵ European Commission (2020), A Union of equality : EU anti-racism action plan 2020-2025, COM(2020) 565 final, 18.9.2020, Brussels.

⁴⁰⁶ See page 7 of the Action Plan. Article 11(3) of Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

⁴⁰⁷ N. Camut, Dutch police are guilty of racial profiling, court rules. Politico Europe. 14 February 2023. <https://www.politico.eu/article/dutch-police-found-guilty-racial-profiling-royal-netherlands-marechaussee-hague-ngo-amnesty-international/>

⁴⁰⁸ The Court of Appeal held in Paragraph 8.24 that ‘The conclusion is that there is no objective and reasonable justification for the distinction made by the KMar on the basis of race or ethnicity in selection decisions under the MTV. Discriminating on the basis of race or ethnicity without objective and reasonable justification is a particularly serious form of discrimination.’ The Court of Appeal quoted paragraph 56 of the European Court of Human Rights ruling ECHR 13 December 2005, Nos 55762/00 and 55974/00, *Timishev to Russia* as follows: ‘A differential treatment of persons in relevantly similar situations, *without an objective and reasonable justification*, constitutes discrimination. Discrimination on account of one’s actual or perceived ethnicity is a form of racial discrimination (see the definitions adopted by the United Nations and the European Commission against Racism and Intolerance – paragraphs 33 and 34 above). *Racial discrimination is a particularly invidious kind of discrimination* and, in view of its perilous consequences, requires from the authorities *special vigilance and a vigorous reaction*. It is for this reason that the authorities must use all available

held that the **Royal Netherlands Marechaussee (KMar)**, which is responsible for Mobile Surveillance Security (MTV) in the country and border regions for purposes of 'combating illegal residence after crossing borders', **discriminates on the basis of race⁴⁰⁹ or ethnicity when making selection decisions for choosing persons for identity checks on the basis of indicators related to race or ethnicity – such as skin colour**. The Court of Appeal prohibited the Dutch State from making selection decisions for police identity checks that are (partly) based on race-related considerations.

In the Commission's 2021 proposal for reforming the Schengen rules and in current debates, there is indeed **a pronounced emphasis on expanding intra-Schengen territory border surveillance**. The **continuous or systematic deployment and uses of these intrusive technologies by different law enforcement actors** have, however, profound implications on EU fundamental rights and freedoms. These fundamental rights and freedoms remain largely unexplored, not least when it comes to questions related to the absolute prohibition of racial and ethnic discrimination or issues related to the major risks for arbitrary interferences on the right to privacy, which may in turn act as effective deterrents for people to exercise free movement inside the Schengen area.

The Commission has however already secured EU funding for Member States to implement this agenda. The Commission Implementing Decision C(2022) 8993 final of 12 December 2023 on the financing of the components of the Thematic Facility under the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (BMVI)⁴¹⁰, foresees Grants titled 'Projects on innovative solutions ensuring the well-functioning of the Schengen area'. EU funding under this Call for Proposals is aimed at covering EU Member States' national authorities **'use of measures alternative to standard controls at the internal borders' such as 'mobile and stationary equipment, trainings, procurement, IT solutions and modern technologies.'**

Another noticeable example is included in Annex 11 of the above-mentioned 2021 European Commission Impact Assessment reforming Schengen which presents – rather uncritically – as a 'good practice' that **the so-called @MIGO-BORAS surveillance system in the Netherlands** be promoted or 'transferred' across other EU Member States for intra-Schengen law enforcement surveillance. This system has been implemented since 2012 by the Dutch Royal KMAR, the exact same authority that has recently been found by the Dutch Court of Appeal to engage in prohibited racial discrimination when selecting people for identity checks. The @MIGO-BORAS surveillance system's main goal is to support mobile supervision or camera surveillance of traffic or vehicles circulating in border areas with Belgium and Germany. The tool consists of '15 fixed camera (or sensor) installations and six vehicle-mounted mobile sensors plus a central control application to which all data is sent and processed.'

means to combat racism, thereby *reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment*' (Emphasis added). See <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Koninklijke-Marechaussee-mag-bij-controles-op-verblijfstatus-geen-gebruik-maken-van-ras-als-selectiekenmerk.aspx>

⁴⁰⁹ See <https://uitspraken.rechtspraak.nl/#/details?id=ECLI:NL:GHDHA:2023:173>

⁴¹⁰ See https://home-affairs.ec.europa.eu/system/files/2022-12/BMVI-Work%20Programme%202023-2025_en.pdf

@MIGO-BORAS official objectives are to 'combat illegal residence' including human smuggling and trafficking, and to 'to help combat cross-border crime and migration-related crime.' The system collects anonymous data for developing 'traffic profiles', to select those to be stopped and searched. It also allows for the collection and surveillance of non-anonymised data linked to specific individuals when this is deemed necessary by the KMAR to 'respond to quick alerts in situations where there has been a serious or large-scale breach of the legal order or public order or in the interests of emergency assistance.'

This is coupled with 'mobile supervision operations' which, according to the Factsheet provided in Annex 11 of the IA, are based on 'intelligence held and/or empirical information on illegal residence' and with the aim of gathering more 'intelligence on illegal residence' (Page 135 of the IA). Problematically, according to the IA, 'the @MIGO-BORAS system will provide direct support by comparing characteristics of passing vehicles with existing risk profiles.' According to the Factsheet, 'The risk profiles will be used to support the system of aliens' supervision. The legal basis for this process lies in the general power to supervise aliens in the Netherlands' (page 135).

The European Commission does not consider the overall practical effectiveness of the system to deliver its stated public goals, which has been questioned by research⁴¹¹, nor does it consider **the major risks that these mobile surveillance technologies pose when put into the hands of discriminatory policies or police practices**. It is true that the Court of Justice of the EU (CJEU) found in the 2012 Case C-278/12 PPU *Atiqullah Adil* that MTV identity checks conducted in border areas with Belgium and Germany did not generally qualify as 'equivalent' to internal border controls for EU law purposes as they pursue different objectives⁴¹². However, **the Court did not enter into examining the actual compatibility of the selective – profiling-driven – nature of these checks with EU anti-discrimination law**⁴¹³. Furthermore, the judgment underlined that in order to determine their legality attention should be paid to **the actual implementation or practical exercise**⁴¹⁴ of these identity controls.

⁴¹¹ [Border Technologies in Dutch Immigration Control | Oxford Law Blogs](#)

⁴¹² The CJEU previously laid down key standards for testing the legality of intra-Schengen police checks within the national territory, so that they are not equivalent to internal border checks, in Joined Cases C-188/10 and C-189/10, *Aziz Melki* (C-188/10), and *Sélim Abdeli* (C-189/10), 22 June 2010. According to Paragraph 70 of this ruling 'The exercise of police powers may not, under the second sentence of that provision, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective; are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime; are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; and, lastly, are carried out on the basis of spot-checks.' In paragraphs 72-74 of the judgment, the Court put particular emphasis on the quality and legal certainty characterising the national legislation as regards, for instance, issues such as their territorial scope, the intensity and frequency of the controls, and the exact manner in which domestic law restricts the discretion by national law enforcement authorities in the practical exercise of their powers. See also Joined Cases C-412/17 and C-474/17, *Bundesrepublik Deutschland v Touring Tours und Travel GmbH* (C-412/17), *Sociedad de Transportes SA* (C-474/17), 13 December 2018, where the Court confirmed that systematically requiring private law transport actors to check the travel documents of travellers were equivalent in effects to prohibited internal border control under the Schengen Borders Code (See Paragraphs 50 and 71 of the ruling).

⁴¹³ Paragraph 81 of the judgment.

⁴¹⁴ Paragraph 68 of the same ruling.

Based on the above-mentioned 2023 ruling by the Dutch Court of Appeal, **there is now solid evidence of the inherently systematic discriminatory rationale behind the selection of MTV identity controls by KMar** and the misuses that this authority has been carrying out of @MIGO-BORAS surveillance system over the years. This in turn highlights how critical it is to ensure that EU Member States' national legislation covering intra-Schengen police checks and operations are configured and framed **under very strict detailed rules and limitations 'laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations**, in order not to imperil the attainment of the objective of the abolition of internal border controls'⁴¹⁵, which is directly informed by **the prohibition of non-discrimination as inherent to the effective exercise of intra-EU free movement**.

7.2. Intra-EU expulsions

The European Commission recommendations for EU Member States to over police the Schengen area has been in line with calls for **enacting and formalising bilateral readmission agreements and expedited arrangements covering intra-EU expulsions of asylum seekers and undocumented third-country nationals without fulfilling the current EU standards under the 2008/115 EU Returns Directive**⁴¹⁶. This is reflected in the Commission's 2021 Proposal for reforming the SBC text which includes a new Article 23a on the procedure for transferring persons apprehended at the internal border. The newly proposed version of Article 23a would grant Member State **the power to immediately expel a third-country national who has no right to stay on its territory to the Member State from which the person entered or sought to enter**.

This new procedure would apply if a third-country national, who does not meet the entry requirements set in Article 6(1) SBC⁴¹⁷ and is not covered by the derogations laid out in Article 6(5)(a) SBC⁴¹⁸, is apprehended as part of cross-border police operational cooperation, and there is a clear indication that they have arrived from the other Member State based on information immediately available to the authorities (i.e. statements from the person concerned; identity, travel or other documents found on the person; results on searches in national and EU databases). All these four conditions must be met for a Member State to trigger the transfer or expulsion procedure to another

⁴¹⁵ Paragraph 75 of the *Atiqullah Adil* case.

⁴¹⁶ European Parliament/Council of the EU (2008), Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348/98. 24.12.2008.

⁴¹⁷ i.e., (a) does not have a valid travel document; (b) does not have a visa despite requiring one; (c) fails to comply with the purpose and conditions of the intended stay and does not have or cannot lawfully acquire sufficient means of subsistence for their stay and return; (d) is a person for whom an alert has been issued in the SIS; (e) is considered a threat to public policy, internal security, public health or the international relations of any of the Member States.

⁴¹⁸ i.e., holds a residence permit or a long-stay visa shall be authorised to enter the territory of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the long-stay visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit.

Schengen member country. If so, the apprehended third-country national will be transferred to the neighbouring Member State within 24 hours.

The specifics of this new intra-Schengen expulsion procedure are further elaborated in Annex XII of the Proposal, along with a so-called Standard Form to be filled in by national authorities. In this context, it is also specified that the affected third-country nationals can appeal according to the national law of the Member State in which they were stopped. However, **the lodging of the appeal would not have any suspensive effect, which entails that the expelled third-country national can only appeal *ex post***⁴¹⁹.

Based on the revised Article 23a SBC, the receiving Member State would be required to take all measures necessary to receive the third-country national in accordance with the procedures set out in Annex XII, **and not those at present foreseen in the above-mentioned EU Returns Directive**. Exceptions by EU Member States to enforcing expulsions would not be allowed, such as the possibility for Member States to grant permits for compassionate, humanitarian or other reasons as allowed by Article 6.4 of the 2008/115 EU Returns Directive⁴²⁰, would be prohibited. The receiving State would be required to issue a 'return decision' to the third-country national in question⁴²¹.

The newly envisaged internal transfer procedure introduced through Article 23a is complemented by a proposed amendment of Article 6(3) of the EU Return Directive. When approved, **the Return Directive would put a stop to new bilateral agreements between Member States for the return of third-country nationals.** Only the readmission agreements contracted before 2009 were allowed to remain in place for third-country nationals in an irregular situation⁴²². The Commission recommends the use of these agreements and arrangements when possible. However, **sufficient attention is not given to actually ensuring the full accountability and overall transparency of all the EU Member States' bilateral agreements and arrangements that currently exist or are under operation, as well as the key issues raised by their implementation, by EU Member States.**

On different occasions, the EU Fundamental Rights Agency (FRA) has highlighted issues with these practices. In its 2022 Fundamental Rights Report, the agency warned that the introduction of an

⁴¹⁹ All appeal procedures in the Commission's reform do not have suspensive effect. This seems to be a precise and consistent policy choice by the Commission and might continue in the future. The lack of suspensive effect, however, can lead to important violations of the fundamental rights, primarily the right to an effective remedy (Article 3 ECHR; Article 47 CFREU).

⁴²⁰ Article 6.4 of the Returns Directive states that '4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay'.

⁴²¹ *Annex XII* also includes provisions for private carriers. If the third-country national is brought to another Member State by a carrier, the authorities can order the carrier to transport the third-country national back to the Member State from where they have left, or, pending onward transportation, take appropriate measures to prevent the irregular entry of third-country nationals who have been refused.

⁴²² Asylum seekers are instead subject to the measures included in the Dublin Regulation.

intra-EU transfer procedure in the SBC risks authorising violations of the principle of *non-refoulement*⁴²³. Domestic courts across the EU have examined cases on intra-EU expedited expulsions and reaffirmed the duty to respect procedural safeguards on access to asylum, the right to be heard, to be formally notified of decisions taken against oneself, and the principle of *non-refoulement* in intra-EU expedited expulsions⁴²⁴.

For example, in September 2021, the Supreme Court of Slovenia found that the return of a Cameroonian citizen to Croatia based on a bilateral readmission agreement, which then led to his expulsion to Bosnia Herzegovina, violated the plaintiff's right to asylum, the prohibition of collective expulsion and the principle of *non-refoulement* under Article 19 EU Charter of Fundamental Rights⁴²⁵. This case clearly shows that **intra-EU expulsions poses very concrete risks of creating situations of chain refoulement within the Schengen area** whereby third-country nationals might be indiscriminately expelled to EU Member States or neighbouring countries where they could face serious harm, inhuman and degrading treatment.

Furthermore, the Luxembourg Court held in the Case C-444/17 *Abdelaziz Arib* of 19 March 2019 that **intra-EU expulsions by Member States fall within the scope and must respect the procedures laid down in the 2008/115 EU Returns Directive, even in cases where any EU Member States may have reintroduced internal border controls**⁴²⁶. It is therefore unclear *why the European Commission is proposing to apply exceptions to the full application of the EU Returns Directive standards and procedural guarantees*, and who would actually 'win' with the proposed reform allowing critical exceptions for Member States' law enforcement authorities to carry out accelerated, 'simplified' and in fact sub-standard intra-Schengen expulsions.

7.3. Databases and their interoperability

Another example of (in)securitisation relates to **the progressive proliferation and exponential expansion of EU Home Affairs databases, and their interconnections**. EU IT systems play a key

⁴²³ FRA (2022), p. 148.

⁴²⁴ FRA (2021), p. 161. France, Conseil d'État, 7ème chambre, 8 July 2020, No. 440756, paras. 2 and 12 (concerning a mother from the Central African Republic and her child passed back to Italy in May 2020); Italy, Court of Rome (Tribunale Ordinario di Roma), Judgment No. 56420/2020, 18 January 2021 (concerning a Pakistani national informally pushed back to Slovenia). See also Italy, Chamber of Deputies (Camera dei Deputati) (2020), Stenographic record of session No. 379 (Resoconto stenografico dell'Assemblea, Seduta n. 379), 24 July 2020; Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) (2020), 'Riammissioni informali' dei cittadini stranieri alla frontiera terrestre italo-slovena, lettera aperta dell'ASGI al Governo e ad UNHCR', 3 August 2020. Slovenia, Administrative Court, judgment I U 1490/2019-92, 16 July 2020. Judgment not final.

⁴²⁵ Supreme Court of Slovenia, UPRS Sodba I U 1686/2020, 4 September 2021. http://www.sodnapraksa.si/?q=listin*%20temelj*&database%5bSOVS%5d=SOVS&submit=i%C5%A1%C4%8Di&order=date&direction=desc&rowsPerPage=20&page=1&id=2015081111448095

⁴²⁶ According to paragraph 61 of this ruling, the Court held that 'it follows from the Schengen Borders Code that an internal border at which border control has been reintroduced by a Member State under Article 25 of the code is not tantamount to an external border for the purpose of that code.'; for intra-Schengen expulsions purposes, the Court added that 'The very wording of the Schengen Borders Code therefore precludes, for the purposes of that directive, an internal border at which border control has been reintroduced under Article 25 of the code from being equated with an external border.'

role in **the multiplication of electronic frontiers across internal and external borders in the Schengen area**. They also act as **catalysts for the criminalisation of asylum seekers, refugees and undocumented migrants** in the EU.

The Eurodac database constitutes a case in point. Eurodac has experienced successive and highly dynamic legislative changes profoundly transforming its originally envisaged purpose, i.e.: a biometric database dealing with asylum seekers to facilitate the application of the EU Dublin Regulation⁴²⁷. With time, however, **Eurodac has mutated into an IT information system pursuing mainly law enforcement and policing interests and objectives**.

Despite reiterated calls and concerns to the contrary⁴²⁸, a legislative reform in 2013⁴²⁹ permitted **expansive access to Eurodac by EU Member States' national law enforcement authorities (LEAs) as well as EU Home Affairs agencies – such as Europol – to asylum seekers' and refugees' data** for purposes related to the prevention, detection and investigation of serious crimes and terrorism. Refugee data is now processed in parallel with that of convicted and suspected criminals.

This nurtures **the criminalisation of asylum and contradicts the above-mentioned prohibition of penalisation and criminalisation of refugees** under international and EU law, which applies irrespective of their regular or irregular means of entry, transit or residence. Furthermore, the 2013 reform **blurred the institution of asylum with the 'irregular immigration'** by including data in Eurodac on irregularly entering third-country nationals for migration enforcement purposes. This in turn reinforces the artificial link between unauthorised migration status and criminality⁴³⁰.

The 2020 EU Pact on Migration and Asylum was yet another proposal for modifying the Eurodac Regulation⁴³¹ which would expand even further the scope of the database beyond its original

⁴²⁷ N. Vavoula (2020), Transforming Eurodac from 2016 to the New Pact from the Dublin System's Sidekick to a Database in Support of EU Policies on Asylum, Resettlement and Irregular Migration. ECRE Working Paper 13. <https://www.ecre.org/wp-content/uploads/2021/01/ECRE-Working-Paper-Transforming-Eurodac-from-2016-to-the-New-Pact-January-2021.pdf>

⁴²⁸ Meijers Committee, Standing Committee of experts on international immigration, refugee and criminal law. Note Meijers Committee on the EURODAC proposal (COM(2012) 254. 10 October 2012. <https://www.statewatch.org/media/documents/news/2012/oct/eu-meijers-committee-eurodac-proposal.pdf>

⁴²⁹ European Parliament/Council of the EU, Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast). OJ L 180/1. 29.6.2013.

⁴³⁰ A.C. Smith and M. LeVoy (2020), 'Mo'databases, mo'problems? The EU's new interoperability systems and enhanced policing of third-country nationals'. <https://migrationpolicycentre.eu/databases-eu-new-interoperability-systems/>

⁴³¹ European Commission, Amended Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the

purpose and current objectives so as to cover fields such as 'preventing secondary movements'. It would simplify law enforcement access to the database and add new categories of persons to be included, including irregularly staying third-country nationals and those disembarked following a search and rescue (SAR) operation at sea, in order to facilitate a statistical picture of 'secondary movements' inside the Schengen area.

Controversially, the 2020 Proposal would **lower the age for storing individuals' fingerprints from the current 14 years to 6 years old**. The 2020 proposed reform, which has been seriously criticised by several stakeholders⁴³², would also expand the data categories stored in the system and the data retention periods. It would also allow for less strict criteria for third-country data-sharing of asylum seekers' personal data, and further **expand Member States' discretion to determine who is a 'competent national authority' to have access to Eurodac**.

A 2021 European Parliament Study examining the EU Pact on Migration and Asylum underlined how **the 2020 Eurodac proposal has not been accompanied by robust and independent evidence demonstrating its necessity, proportionality and legitimacy**, nor by **a data protection impact assessment** studying in detail its privacy impacts⁴³³. This should be **a precondition for its adoption**. This is particularly so when considering that the new shapes of the database will allow for the indiscriminate and unfettered access and use by a wide-range of actors to data which is in fact owned by third-country nationals, asylum seekers/refugees.

On the 9 June 2022, the **Eurodac Supervision Coordination Group (Eurodac SCG)** expressed deep concerns to the European Parliament and its 'deep regret that there has still been no detailed impact assessment of the proposed changes, including a thorough study of the fundamental rights implications and proportionality assessment', which questions the lawfulness of the proposal⁴³⁴. An **EDPS Letter of 14 July 2022 provided to the Shadow Rapporteurs at the EP** replies to the additional questions on data protection in the Proposal for a recast of the Eurodac Regulation; it stated how the EDPS 'has consistently stressed that the fundamental rights enshrined in the EU Charter of Fundamental Rights are *universal and do not depend on citizenship or migration status*' (Emphasis added). The letter expressed particular concerns regarding the inclusion **of a so-called security flag – where it appears that a third-country national could be considered as a 'threat to internal security', in Eurodac** in addition to the already stored information, and its linkage to the proposed Article 11 of the above-mentioned Screening Regulation Proposal. The EDPS underlined that this provision would facilitate an **'uneven and arbitrary labelling of someone as a security risk'**, and **questioned the necessity and proportionality of such a provision, and its overall lawfulness**. Furthermore, the same letter raised concerns about **'the lack of information**

comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818. COM(2020) 614 final. 23.9.2020.

⁴³² Joint letter from civil society, Fundamental rights concerns about the EURODAC reform. 8 September 2021. <https://www.statewatch.org/media/2714/eu-eurodac-open-letter-rights-8-9-21.pdf>

⁴³³ Brouwer et al. 2021, The European Commission's legislative proposals in the New Pact on Migration and Asylum.

⁴³⁴ Eurodac Supervision Coordination Group, Letter to Juan Fernando LÓPEZ AGUILAR Chair of the LIBE Committee European Parliament, 9 June 2022. [eurodac scg letter on eurodac fin.pdf\(europa.eu\)](https://eurodac-scg.letter-on-eurodac-fin.pdf(europa.eu))

of the data subject – including on possible legal remedies – against the issuing of the proposed ‘security flag’.

Furthermore, little consideration has been given to the overall effectiveness of this reform, i.e. **how effective reforming Eurodac would actually be, and on how EU Member States are and will make use of the data which will be made available in the new Eurodac version regarding so-called secondary movements to unlawfully prolong internal border controls**. As shown in Section 2.1. of this Study, the Austrian authorities’ notifications to justify the legality of prolonging their internal border controls are making selective use of the Eurodac database.

The same study highlighted how one of the most worrying features characterising the Pact on Migration and Asylum, and its accompanying legislative initiatives such as the newly proposed Eurodac reform, is **the ‘hybridisation’ or blurring of boundaries between constitutionally distinct EU and national policies of asylum, migration, borders, police and judicial cooperation in criminal matters**. This point was also underlined by the European Data Protection Supervisor (EDPS) Opinion on the Pact⁴³⁵, which emphasised the critical need to uphold the EU data protection principle of purpose limitation and data minimisation, and stated that:

Bringing asylum and migration management under the same legal and policy framework entails important legal and practical consequences. *Different purposes call for different assessments of the necessity and proportionality* of the envisaged measures. The proposals under the New Pact on Migration and Asylum further *blur the distinction* between the different policy areas of asylum, migration, police cooperation, internal security and criminal justice (Emphasis added).

The EDPS called for ‘an in-depth fundamental rights and data protection impact assessment’, and highlighted how this policy areas blurring advanced by the Pact mimics or **replicates a previous policymaking practice by the Commission under the so-called 2019 Interoperability Regulations**⁴³⁶ which aim at interconnecting all existing and upcoming EU information systems having different purposes which are related respectively to borders, migration, security and criminal justice. These regulations will make it highly complicated to ensure and monitor that Member States staff and Union authorities – including those of relevant EU agencies such as Frontex and Europol – **only see the data that is relevant for the performance of their tasks**.

⁴³⁵ EDPS, Opinion 9/2020: EDPS Opinion on the New Pact on Migration and Asylum. 30 November 2020. https://edps.europa.eu/sites/edp/files/publication/20-11-30_opinion_new-pact-migration-asylum_en.pdf

⁴³⁶ European Parliament/Council of the EU, Regulation 2019/817 establishing a framework for interoperability between EU information systems in the field of borders and visas. OJ L 135/27. 22.5.2019; European Parliament/Council of the EU, Regulation (EU) 2019/818 establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration. OJ L 135/85. 22.5.2019.

These include the updated version of the Schengen Information System (SIS) II⁴³⁷, the Visa Information System (VIS)⁴³⁸, the Europol information system⁴³⁹, ECRIS-TCNs⁴⁴⁰ as well as the Entry/Exist System (EES)⁴⁴¹ and the European Travel Information and Authorisation System (ETIAS)⁴⁴². According to Agence Europe on 7 March 2023⁴⁴³, the Entry/Exist System (EES) will not enter into operation by the expected date of May 2023 'due to the persisting failure of eu-LISA's contractor, and which has 'a knock-on effect' on ETIAS roll out, which has been re-scheduled for November 2023.

The Schengen Information System (SIS) II represents another instance of EU IT systems which with time have over-expanded their scope, objectives and users. It affects the fundamental rights of millions of people whose data are stored in the system⁴⁴⁴. The new SIS II which became operational in March 2023, resulted from its latest reform in November 2018⁴⁴⁵. **The SIS II database is now including an even larger set of individuals' biometric and dactyloscopic data, including fingerprints, palm prints and facial images.** It also serves a new purpose of monitoring and enforcing EU return policy more generally, by now including alerts on third-country nationals subject to a return decision or a removal order⁴⁴⁶.

⁴³⁷ European Commission, 'Schengen Information System'. https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-information-system_en

⁴³⁸ European Commission, 'Visa Information System (VIS)'. https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/visa-information-system_en

⁴³⁹ Europol, 'Europol Information System (EIS)'. <https://www.europol.europa.eu/operations-services-and-innovation/services-support/information-exchange/europol-information-system>

⁴⁴⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS-TCN system) and amending Regulation (EU) No 1077/2011. COM(2017) 344 final. 29.6.2017.

⁴⁴¹ European Parliament/Council of the EU, Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011. OJ L 327/20. 9.12.2017.

⁴⁴² European Parliament/Council of the EU, Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226. OJ L 236. 19.9.2018.

⁴⁴³ Agence Europe, 'Interoperability of European information systems, Member States urged to address accumulation of delays and technical problems'. Brussels, 07/03/2023. <https://agenceurope.eu/en/bulletin/article/13136/6>

⁴⁴⁴ The latest updated version of the SIS II widened the authorities having access to SIS data (Europol, Eurojust, national prosecutors, vehicle licensing authorities), allowed for the addition of new categories of data (fingerprints and photographs) and interlinkages between alerts.

⁴⁴⁵ European Parliament/Council of the EU, Regulation (EU) 2018/1861 of the European Parliament and of the Council 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 312/14. 7.12.2018.

⁴⁴⁶ European Parliament/Council of the EU, Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals. OJ L 312/1. 7.12.2018.

The new SISII includes **a key role for the eu-LISA agency** (European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice) **for its operational management, supervision and coordination**. It foresees **access by the Europol agency to all categories of data** – for purposes related to ‘the prevention and combating of human smuggling and facilitation of irregular immigration’. It also allows access by **teams working under the Frontex Agency** when necessary for ‘fulfilling operational aims specified in the operational plan on border checks, border surveillance and return.’

Some of the above **databases**, e.g. ETIAS, **have been adopted by the EU legislators despite previous European Parliament Studies unequivocally showing the outstanding lack of evidence showing their overall necessity and effectiveness**⁴⁴⁷. These same studies had also expressed very serious concerns about these EU IT systems being proposed by the Commission without impact assessments showing their proportionality and fundamental rights impacts such as the risk of extensive profiling of some travellers with potential discriminatory practices.

The Interoperability Regulations aim at interconnecting these new and old EU IT systems through the setting up of new databases at EU level, which according to Vavoula entails a **‘masked setting up of new databases’** constituting **‘a new information-processing paradigm of mass and indiscriminate surveillance’**⁴⁴⁸. These include in particular:

- First, a **European Search Portal (ESP)**, which aims at facilitating multiple searches in all the above databases at the same time through the use of biometric and biographical data. Searches through the ESP run the risk of overcoming prior verifications and checks and balances for LEAs to have access to data.
- Second, a **Shared Biometric Matching Service (BMS)** granting the possibility to carry out cross-EU databases search and comparison of individuals biometric information (fingerprints and facial image).
- Third, a **Common Identity Repository (CIR)** comprising biometric and biographical third-country nationals’ data across EU IT systems.
- Fourth, a **Multiple Identity Detector (MID)**, which seeks to ascertain if biometric or biographical data exists across systems so as to detect cases of ‘multiple identities’.

⁴⁴⁷ S. Alegre, J. Jeandesboz, and N. Vavoula, (2017), ‘European Travel Information and Authorisation System (ETIAS): Border management, fundamental rights and data protection’. Study commissioned by the LIBE Committee of the European Parliament. https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583148/IPOL_STU%282017%29583148_EN.pdf

⁴⁴⁸ N. Vavoula, 2019, ‘Interoperability of European Centralised Databases: Another Nail in the Coffin of Third-Country Nationals’ Privacy?. EU Immigration and Asylum Law and Policy. <https://eumigrationlawblog.eu/interoperability-of-european-centralised-databases-another-nail-in-the-coffin-of-third-country-nationals-privacy/>

The Interoperability Regulations were presented in combination with the previous expansion – back in 2018 – of the eu-LISA agency mandate to cover interoperability⁴⁴⁹. It is noticeable that **this revised eu-LISA mandate was formally adopted even before the overall idea behind the Interoperability Regulations actually received the green light from the European Parliament.**

EU IT systems, and their interconnections, have been officially presented by the European Commission as **'facilitating', 'easing' or 'fastening' cross-border human mobility**. However, as Bigo and others have investigated and demonstrated, **'speed' does not necessarily mean effectively safeguarding individuals' liberties and fundamental rights**⁴⁵⁰. This is particularly so when one considers the enormous negative impacts these large-scale surveillance technologies have on crucial issues such as human dignity, citizenship, privacy, non-discrimination and effective remedies.

Groenendijk has additionally argued that – despite official discourses to the contrary by the Commission – the Interoperability Regulations cannot only be expected to bring **major transformations to the current EU databases eco-system**⁴⁵¹. They also raise **very serious risks for both third-country nationals and EU citizens fundamental rights**⁴⁵². Here **EU nationals of immigrant origin** perceived to be third-country nationals, as well as dual nationals, can be expected to be among the primary targets of expanded intra-Schengen area police checks.

The Interoperability Regulations technology-driven tools **negatively affect individuals' privacy, by disowning them from their own data**⁴⁵³. It also nurtures an **asymmetry in access rights by EU data citizens**⁴⁵⁴, which include both EU citizens and third-country nationals without distinction, in comparison to the wider and ever-expansive uses by LEAs and EU Home Affairs agencies. This asymmetry is reflected for instance in **the lack of a Single Contact Point (SCP) covering all relevant authorities in each Member States for EU data citizens to submit complaints and seek remedies** and that could be centrally channelled to the relevant EU or national actor in the interoperability eco-system.

⁴⁴⁹ European Parliament/Council of the EU, Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011. OJ L 295/99. 21.11.2018.

⁴⁵⁰ D. Bigo, S. Carrera, B. Hayes, N. Hernanz, and J. Jeandesboz (2012), 'Evaluating current and forthcoming proposals on JHA databases and a smart borders system at EU external borders.' Study commissioned by the LIBE Committee of the European Parliament. <https://www.statewatch.org/media/documents/interoperability/interoperability/Unsorted/european%20parliament/ep-study-smart-borders.pdf>

⁴⁵¹ K. Groenendijk (2020), 'Nothing new under the sun? Interoperability of EU justice and home databases'. EUI, Migration Policy Centre. <https://migrationpolicycentre.eu/interoperability-eu-justice-databases/>

⁴⁵² C. Jones (2019), Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status. PICUM and Statewatch. <https://picum.org/wp-content/uploads/2019/11/Data-Protection-Immigration-Enforcement-and-Fundamental-Rights-Full-Report-EN.pdf>

⁴⁵³ D. Bigo and L. Bonelli (eds) (2019), *Digital data and the transnational intelligence space*. London: Routledge.

⁴⁵⁴ S. Carrera (2020), 'Towards interoperable justice: interoperability and its asymmetry in access rights by EU digital citizens'. EUI, Migration Policy Centre. <https://migrationpolicycentre.eu/towards-interoperable-justice/>

While each of the EU IT systems founding Regulations, as well as those related to their interoperability, includes some express references to fundamental rights, the **effective exercise of these rights – such as for instance the right to information – and access to remedies by data subjects can be expected to be extremely complex, fragmented and nightmarish in practice.** This is due to the foreseen linkages between each of the systems which will make the identification of who is the ‘data controller’ a daunting task. According to our interviews, the European Commission is preparing an overview of a set of existing legal remedies available to data subjects across EU Member States in the scope of the ETIAS system.

The EU official website titled <http://travel-Europe.europa.eu/etias> provides a section – currently under development – titled ‘Your right to appeal’ against a decision related to your ETIAS travel authorisation or data protection rights. The website’s section dealing with remedies, which remains to be put in place, is first unclear on what is meant precisely by a ‘right to appeal’ in this context, in what appears to rather refer to available complaints. Further, the European Commission is underestimating **the extreme procedural complexity that travellers will experience for filing a complaint in practice considering the plurality of ‘data controllers’ and data protection regimes (e.g. Frontex Central Unit or competent authorities at national level) which will apply in these circumstances.**

Furthermore, the implementation of **the Interoperability Regulations can be expected to act as a magnifying glass of the widespread challenges experienced by national Data Protection Authorities (DPAs) in supervising and monitoring already existing and upcoming EU databases.** As Guerra has identified, national DPAs are affected by a lack of financial and human resources to effectively and independently carry out their envisaged supervisory tasks under these EU databases⁴⁵⁵. This is the case despite the clear obligations of Member States to support and facilitate their responsibilities and expertise for instance under Article 51 of the Interoperability Regulation. **The implementation of the Interoperability Regulations would only exponentially increase this problem.** According to our interviews⁴⁵⁶, it will not be feasible to properly monitor and scrutinise, in the context of the Common Identity Repository (CIR), **whether it was in fact legitimate for a specific national authority to have access to the relevant data in light of its mandate and tasks.**

The supervisory role that **the European Data Protection Supervisor (EDPS)** is supposed to be playing in this context is equally and profoundly affected by **its current structural constraints and lack of enforcement capacity.** This is for instance the case when considering the revised mandate of the **Europol** agency after its entry into force in **June 2022**⁴⁵⁷, and which **makes any meaningful**

⁴⁵⁵ C. Guerra (2020), ‘Interoperability and refugees from a data protection perspective’. EUI, Migration Policy Centre. <https://migrationpolicycentre.eu/interoperability-refugees-data-protection/>

⁴⁵⁶ Interview with EU agency officials 3, 28 March 2023.

⁴⁵⁷ REGULATION (EU) 2022/991 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol’s cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol’s role in research and innovation, OJ L 169/1, 27.6.2022.

independent supervision of Europol's data activities by the EDPS unfeasible, if not fundamentally impossible, in practice.

In a Press Release issued on 27 June 2022, **the EDPS regretted that the adoption of the new Europol mandate was not accompanied by 'strong data protection safeguards'** allowing for effective supervision of the agency when it comes to the processing of large data sets of individuals 'with no established link to criminality'⁴⁵⁸. This led the EDPS to present on 16 September 2022 an action for annulment before the Court of Justice of the EU (CJEU)⁴⁵⁹ regarding two provisions of the newly amended Europol Regulation, Articles 74a and 74b, which retroactively legalise processing operations that were previously considered in violation of the 2016 Europol Regulation by the EDPS. Another key challenge relates to the major obstacles for the EDPS to effectively supervise and monitor **the blurring of responsibilities and data accuracy inherent in the new Europol Regulation when it comes to issues related to data processing using national platforms, cooperation with private parties and data transfers and exchange with third-country actors, as well as its new so-called research and innovation tasks**⁴⁶⁰.

Home affairs database policy provides another example of 'worse regulation' and hyper complexity. According to Groenendijk, the Interoperability Regulations are an illustrative example of a **'legislative nightmare'**. It is highly concerning that the Interoperability Regulations were swiftly adopted **despite the widespread concerns expressed by both the FRA and the EDPS** in relation to their lack of proportionality and their expected fundamental rights risks⁴⁶¹, **which were utterly unmet in the final text of these Regulations.**

The European Data Protection Board (EDPB) as well as the representatives of the DPAs supervising the SIS II, the VIS and the Eurodac within the Supervision Coordination Groups (SCGs) raised concerns about **the non-transparent and speedy decision-making processes characterising the adoption of the Interoperability Regulations**, along with the consecutive amendments in other pending EU IT system-specific legislative proposals such as the ongoing Eurodac reform. In a letter issued to EU Commissioners Schinas, Johansson and Reynders on 13 January 2020, the SIS II, VIS and Eurodac SCGs representatives emphasised that:

The regulatory approach – amending provisions for some databases that are not yet in place – does neither align with the *principle of transparency* nor with the principle that data processing

⁴⁵⁸ EDPS, Amended Europol Regulation weakens data protection supervision. 27 June 2022. https://edps.europa.eu/press-publications/press-news/press-releases/2022/amended-europol-regulation-weakens-data_en

⁴⁵⁹ EDPS, EDPS takes legal action as new Europol Regulation puts rule of law and EDPS independence under threat. 22 September 2022. https://edps.europa.eu/press-publications/press-news/press-releases/2022/edps-takes-legal-action-new-europol-regulation-puts-rule-law-and-edps-independence-under-threat_en

⁴⁶⁰ Refer for instance to the revised version of Article 18.a of 2022 Europol mandate.

⁴⁶¹ FRA, Interoperability and fundamental rights implications: Opinion of the European Union Agency for Fundamental Rights. 11 April 2018. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-01-2018-interoperability_en.pdf; EDPS, Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems. 16 April 2018. https://edps.europa.eu/sites/edp/files/publication/2018-04-16_interoperability_opinion_en.pdf

has to be based on *clear, precise and accessible rules*. Furthermore, it constituted a real challenge for data protection authorities to provide the requested prior assessments. The new architecture and functionalities of EU information systems being established by these *successive proposals, negotiated with tremendous speed and with a continuous flow of complex and intertwined legislative proposals*, poses enormous risks to the rights for privacy and data protection. (Emphasis added).

Interviews conducted in the scope of this Study revealed that this ultra-complexity is further incentivised by the use by **the European Commission of so-called Implementing Acts and Delegated Decisions**⁴⁶². **These may broaden, fine-tune or further delineate key provisions and specify the envisaged content and functions** under the Interoperability Regulations or the founding instruments of instrument-specific databases. As a way of illustration, the EDPS issued in August 2022 Formal comments on the draft Commission Delegated Decision on specifying the content and format of the questions and laying down the additional set of predetermined questions under the ETIAS system⁴⁶³, where it raised that a newly envisaged obligation for applicants to provide personal data of family members or friends – including children and grandchildren – as part of the ETIAS application form is **‘excessive and not justified’**.

Brouwer has argued that the interoperability of EU databases relies heavily on **an inter-state trust model**⁴⁶⁴. Such a model assumes too easily the reliability, data quality/accuracy and trustworthiness of the data stored in each of the sectorial EU IT systems and corresponding interconnected databases. However, **the risk of decision-making being reliant upon or based on incorrect, not updated (e.g. non-deletion of alerts) or unlawful data remains a central issue of concern**. This in turn calls for ensuring a careful examination of each individual case and **avoiding a ‘blind trust’ model** in the use of expansive EU Home Affairs databases.

Importantly, intra-EU surveillance or sharing of information of travellers for policing purposes may in fact function as equivalent to internal border controls and hence **directly encroach the right of free movement and Schengen internal borders free area**. This has been recently recognised by the **Court of Justice of the EU in its judgment Case C-817/19 *Ligue des droits humains v Conseil des ministres*, of June 2022** assessing the legality of the 2016 EU Passenger Name Record (PNR)

⁴⁶² Interview with EU Agency officials 3, 28 March 2023.

⁴⁶³ EDPS Formal comments on the draft Commission Delegated Decision on specifying the content and format of the questions and laying down the additional set of predetermined questions, 3 August 2022, Brussels. See also EDPS Formal comments on the Commission Implementing Decision on laying down the technical specifications for data retention, 9 September 2022; and EDPS Formal comments on the draft Commission Implementing Decision adopting measures for the application of Regulation (EU) 2018/1240 of the European Parliament and of the Council as regards accessing, amending, erasing and advance erasing of data in the ETIAS Central System and repealing Commission Implementing Decision C(2021) 3300, 23 February 2022; and EDPS Formal comments of the EDPS on the draft Commission Delegated Decision on further defining the risks related to security or illegal immigration or high epidemic risk, 7 June 2021.

⁴⁶⁴ E. Brouwer (2019), ‘Interoperability of Databases and Interstate Trust: A Perilous Combination for Fundamental Rights’, <https://verfassungsblog.de/interoperability-of-databases-and-interstate-trust-a-perilous-combination-for-fundamental-rights/>

Directive⁴⁶⁵. In this ruling the Court examined whether EU law precludes EU Member States in the light of Article 3(2) TEU, Article 67(2) TFEU and Article 45 EU Charter from transferring and processing PNR data of flights and transport operations by other means.

The CJEU first started by highlighting that Article 45 of the EU Charter, which enshrines the free movement of person, is 'one of the fundamental freedoms of the internal market'. In the Court's view, any Member State's legislation placing certain EU citizens 'at a disadvantage' because of the mere fact that they have exercised their freedom to move constitutes a 'restriction of their freedoms'⁴⁶⁶. Furthermore, the CJEU concluded that **the PNR Directive entails 'serious interferences' with the rights of privacy and data protection enshrined in Articles 7 and 8 of the Charter**, and that the *seriousness* of this interference exponentially grows **when surveillance extends to other means of transport beyond air traffic such as trains, buses and ferries**. In this way, **PNR applying to intra-EU mobility would deter EU mobile nationals and their families from exercising EU freedom of movement**.

Crucially, and based on the above, the Court's judgment confirmed for the first time that **systematic data transfers and processing of intra-EU travellers' data and their means of transport can in fact qualify as having an equivalent effect to traditional – hence territorial – internal border checks**⁴⁶⁷. The ruling limits the discretion or margin of manoeuvre for Member States to apply the PNR information system to intra-EU flights, as otherwise it would lead to **a 'systematic and continuous transfer and processing of the PNR data' penalising every passenger travelling or exercising free movement** within the Union (Paragraph 278). In the Court's view, any obstacle by EU Member State authorities to 'free movement' must be based on objective considerations⁴⁶⁸, meet the proportionality test – so that the national measure does not go beyond what is strictly necessary

⁴⁶⁵ CJEU, 21 June 2022, C-817/19, *Ligue des droits humains v Conseil des ministres*; European Parliament/Council of the EU, Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. OJ L 119/132. 4.5.2016.

⁴⁶⁶ Paragraphs 277 and 279 of the judgment. According to Paragraph 279 of the ruling 'Such interferences are, for the same reasons as those set out in those paragraphs, also such as to *place at a disadvantage* and, therefore, *deter from exercising* their freedom of movement, within the meaning of Article 45 of the Charter, the nationals of the Member States which adopted such a legislation as well as, generally, Union citizens travelling by those means of transport within the European Union from or to those Member States, with the result that that legislation entails a restriction of that fundamental freedom.' (Emphasis added).

⁴⁶⁷ Paragraph 290.

⁴⁶⁸ Paragraph 171 of the same ruling declares that the PNR regime under the Directive may only be extended to intra-EU flights when based on 'sufficiently solid grounds' where there is 'a [terrorist] threat which is shown to be genuine and present or foreseeable', and for a limited period of time. Moreover, in paragraph 174 the Court clarified that in these specific situations the PNR data system should be limited to 'certain routes or travel patterns or to certain airports in respect of which there are indications that are such as to justify that application'. For the ways in which EU Member States should carry out that assessment refer to paragraphs 163 to 169 of the ruling.

to attain its public objective⁴⁶⁹ – and be consistent with fundamental rights so that it is legitimate in a democratic society⁴⁷⁰.

Importantly, the Court reminded the Belgian government that **the objectives of the PNR Directive relate exclusively to judicial cooperation in criminal matters** – finding its legal basis in Article 82.1 TFEU – and police cooperation – enshrined in Article 87.2 TFEU, which are essentially **distinct in purpose and scope from border controls and irregular immigration policies**, which constitutionally find different legal basis and objectives under the EU Treaties. Therefore, processing PNR data for purposes different from those exhaustively prescribed in the PNR Directive for border or migration-related purposes would be contrary to Article 6 PNR Directive and the EU Charter (Paragraph 288 of the judgment).

The judgment also underlined **the risks inherent to creating one single database** containing data dealing with different EU Treaties' domains pursuing specific thematic objectives and purposes, which corresponds to what the Interoperability Regulations are all about⁴⁷¹. This constitutes a clear instance where the Court holds **the constitutional significance of not blurring EU AFSJ policy areas, legal instruments, thematic objectives, prescribed purposes and legal basis**, in order to ensure consistency with the EU Treaties and the EU Charter.

⁴⁶⁹ The CJEU accepted, perhaps too easily – without having recourse to actual evidence substantiating it – that PNR data and the Directive are in fact effective or '*appropriate* for the purpose of attaining the intended objective of combating terrorist offences and serious crime' (Emphasis added). Refer to Paragraph 284 of the ruling.

⁴⁷⁰ Paragraphs 280 and 281.

⁴⁷¹ The Court underlined in paragraph 289 that 'Member States cannot create a single database containing both the PNR data collected under the PNR Directive and relating to extra-EU and intra-EU flights and the data of passengers of other means of transport as well as the data covered by Article 3(2) of the API Directive, in particular where that database can be consulted not only for the purposes referred to in Article 1(2) of the PNR Directive but for other purposes also.'

8. CONCLUSIONS AND POLICY RECOMMENDATIONS

Based on the above, the Study puts forward a set of policy recommendations informed by or focusing on the relationship between **Knowledge, Responsibility and Justice** as a key framework of intervention for addressing the key challenges at stake in the functioning of the Schengen system. The recommendations laid down in this Section start from the conceptual premise that the functioning of Schengen must be based on a **'merited or deserved trust'**⁴⁷² **model, instead of one based on 'mutual trust'** among EU Member States, and between these and EU institutions and agencies. Such a model is based on the assumption that EU Member States' Ministries and EU agencies must comply with the law, including EU Treaty principles – the rule of law, democracy and fundamental rights – as these are **preconditions for the legitimation of the EU Schengen system, as well as EU border, asylum and migration policies.**

8.1. Knowledge

This Study has shown the key role played by **high-quality, objective and independent evaluation and monitoring** when assessing both external and internal EU Member States' practices, as well as the use of other 'alternative measures' to formal border controls such as police surveillance, intra-EU expulsions and EU databases and their interoperability. Priority should be given to ensuring a **robust knowledge-based framework** so as to justify and inform policy shaping and decision-making, as well as effective EU enforcement of the legal foundations of the Schengen area.

'Knowledge' is different from other 'information/data' tools such as 'risk analysis' or crystal ball/futuristic methods and tools such as those used by the EU Frontex Agency. Risk analyses are not always knowledge providing objective evidence to inform Schengen-related debates and decisions. Knowledge is a central precondition for ensuring EU Better Regulation so that EU policymakers justify and assess the necessity, proportionality and fundamental rights' compliance of new EU legislative proposals or initiatives, and that Member States justify their actions falling within the scope of EU law. Based on this, the following policy recommendations are put forward:

- Member States should provide constant assessments and evidence – not risks analysis - justifying the necessity and proportionality, as well as their impacts on free movement, of any internal border controls. Their reintroduction and prolongation should *not* be merely based on a 'perceived risk' or fears of a specific phenomenon, or generalised claims artificially framing unauthorised human mobility as generally constituting threats to their internal security and public order. As time progresses, these Member States should have **an incremental burden of proof** justifying the effectiveness of border controls to address these same phenomena and that internal border controls are indeed a measure 'of last resort'. This assessment should be based on objective data and evidence regarding the nature of the identified phenomenon, and not a 'perceived risk' following a risk assessment

⁴⁷² On the notion of 'earned' rather than presumed 'trust' in the EU criminal justice area by Mitsilegas, V. (2019), 'Resetting the Parameters of Mutual Trust: From Aranyosi to LM''' in V. Mitsilegas, A. Di Martino and L. Mancano, *The Court of Justice and European Criminal Law: leading Cases in a Contextual Analysis*, Hart Publishing, pp. 421-436; and V. Mitsilegas (2015), *The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice*, *New Journal of European Criminal Law*, Vol. 6, Issue 4, pp. 457-481.

methodology. In these situations, the European Commission should consistently **conduct unannounced visits within the scope of the new Schengen Monitoring and Evaluation Mechanism (SEMM)** to evaluate those EU Member States that have introduced or prolonged internal border controls. A **Peer Review System** evaluating the quality, veracity and accuracy of these data should be set up at EU level. This system could rely on and bring together information provided by EU agencies such as the FRA, the EDPS, the European Ombudsman – as well as their networks, national human rights bodies and civil society actors.

- The European Commission should commit to only produce new legislation which strictly follows EU Better Regulation Guidelines and Toolbox. It should provide robust Impact Assessments (IAs) for all its proposals, and not choose to adopt any legislative option posing serious fundamental rights risks. The Commission should refrain from pursuing **‘policy laundering’** consisting of ‘bad regulation’ and hyper-complexity, and the *ad hoc* legalisation of EU Member States malpractices and exceptionalism to existing EU Schengen rules. New ‘hyper-complex’ legislative proposals which amend, bring in consecutive amendments or are linked to other proposals undergoing democratic scrutiny at the same time, should be avoided as they blur the EU Treaty legal basis and prioritise policing over issues related to asylum.
- **The European Parliament should develop a ‘Comprehensive Mapping Tool’** linking the ‘dots’ on key issues – centrally those impacting fundamental rights – across the various new or pending legislative acts, consecutive amendments and relevant Luxembourg Court standards. Any provision featured in new or ongoing legislative proposals, or included during inter-institutional negotiations and trilogues, which run against CJEU standards, should be identified and directly rejected by the European Parliament. The Comprehensive Mapping Tool could also include a functionality covering the key changes and issues raised by European Commission’s Implementing and Delegated Acts, which may affect the scope of existing EU databases and their functionalities.
- **The negotiations on the 2020 Proposal for an amended Eurodac Regulation should be frozen as soon as possible** until the European Commission submits a detailed Impact Assessment on the proportionality, necessity and fundamental rights’ (privacy) compliance of the suggested changes; any amendments put forward by the European Parliament on this file should be subject to European Parliament Impact Assessments *before* their formal approval in inter-institutional negotiations⁴⁷³. This should also include an assessment of the actual use and effectiveness of existing EU databases in the areas of migration and asylum. The many serious concerns expressed by both the EDPS and the FRA on the proposed reform must be satisfactorily addressed as a precondition for moving forward in the current negotiations.
- The European Commission should live up to its promise of enacting a more structured and transparent approach to the use of infringement proceedings in the field of external border

⁴⁷³ Refer to all the recommendations on the 2020 Proposal reforming Eurodac, which remain outstanding, advanced in Brouwer, E. et al., (2021), ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’, Study Commissioned by the LIBE Committee of the European Parliament, pp. 170-173.

control. There is a critical need to address the lack of transparency and accountability regarding EU infringement proceedings on Schengen, and on issues related to Justice and Home Affairs more generally. The **Commission's Infringement Database should be completely reformed** and made more user-friendly and transparent⁴⁷⁴.

- EU co-legislators need **to strengthen and extend the scope and competences of the Independent Monitoring Mechanism (IMM)** foreseen by Article 7 of the Screening Proposal. Experiences with setting up IMM in Croatia and Greece based on bilateral discussions between those states and the Commission linked to the disbursement of EU funding show how this *ad hoc* approach is not suitable for achieving more uniform EU fundamental rights monitoring at external borders.
- To achieve that aim, a common EU solution based on a clear legal basis **under the Schengen Borders Code (SBC) and extending the use of IMM to all border management and SAR activities** is necessary. The full independence of the monitoring mechanisms should be established to ensure the mechanism is able to exercise its functions without being subject to external influence or interferences. The foreseen mechanisms should rely on the work and functions already performed by existing national mechanisms⁴⁷⁵ so as to ensure synergies among them. The role of national human rights bodies should be reflected in the governance structure of the mechanism. Participation of the 'relevant national, international and non-governmental organisations and bodies' in the mechanisms' monitoring model, and the FRA Guidance, **should be made mandatory rather than optional**. The selection of civil society in such bodies need to be open and transparent and, possibly being based on open calls for application.
- The mechanism should be endowed with **a broad thematic coverage and wide investigative powers** that are required to perform its monitoring functions effectively in a challenging and increasingly **complex multi-actor environment**. **Independent border monitors** deployed by the mechanism should have the competence to be present during border surveillance operations at both air, land and sea borders, to conduct unannounced inspections/visits at both official border crossing points and green border and have access to places of initial reception or detention of third-country nationals both in border regions and outside border regions.
- Given the increasing use of modern technologies for border control and surveillance, including information technology to make decisions affecting individuals, it is key that **data protection border monitors** – part of National Data Protection Authorities (DPAs) – would also be deployed in the scope of IMM so that they can monitor the use of relevant databases and information systems of national authorities responsible for border management purposes.

⁴⁷⁴ From the available public information in the database, it is impossible to use it in a way that provides a clear and consistent – area by area and EU legal act-related – overview of infringement proceedings. More details should be included for infringement proceedings on violations of fundamental rights. All entries in this EC database include a title detailing the specific EU law instrument that a Member State has violated, transposed incorrectly, or implemented incorrectly. However, the titles can be in English or French and might refer to the specific EU instrument with its 'informal' or abbreviated title. Furthermore, there are often no details regarding the type of violation of said instruments. Only a few entries include weblinks or references to explanations or press releases which offer a better understanding of the case. It is also unclear why infringement procedures issued at the same time and related to the same instrument – and often to the same Article – are split between the Home Affairs and Justice, Fundamental Rights and Citizenship categories.

⁴⁷⁵ e.g., Ombudsman institutions, National Human Rights Institutions (NHRIs), National Preventive Mechanisms against torture (NPMs), National Data Protection Authorities (DPAs).

- **Clear consequences and follow-up procedures** must be established to respond to non-compliance of fundamental rights obligations reported in the framework of the monitoring mechanism. The monitoring mechanism should be granted the competence to directly communicate with relevant national/local prosecutorial authorities. The European Commission should start timely and effective investigations of alleged violations. When relevant, the violations should be immediately brought to national and EU courts so as to ensure effective legal remedies and justice for victims.
- **EU funding should be more effectively mobilised to support Member States in setting up IMMs.** Such funds include the Instrument for Financial Support for Border Management and Visa Policy, the Asylum, Migration and Integration Fund, and its emergency assistance grant scheme. Access to all relevant EU funding on borders should be made **conditional** on Member States' fulfilment of their legal duty to set up and effectively implement fundamental rights monitoring and effective complaint mechanisms, including the duty to cooperate in good faith within the scope of the mechanism's mandate, for example granting unimpeded access to places or information required for carrying out monitoring tasks.
- In the context of **the SEMM**, fundamental rights (including data protection) should be consistently and rigorously ensured across all the evaluation themes and priorities. EU agencies like Frontex, should be also subject to SEMM evaluations. This would likewise ensure a clearer relationship between the SEMM and Frontex Vulnerability Assessments. If a serious fundamental rights violation is identified in line with the procedures identified in the mechanism, the Commission should launch an infringement procedure against the responsible Member State or communicate the reasons for not doing so. **The links between the SEMM and infringement proceedings should be further clarified by the European Commission.** According to the Commission's obligation to enforce EU law, when SEMM results show that a Member State is facing a situation of non-application of EU law, **even if this is not 'systematic' in nature, infringement proceedings should swiftly follow.**

8.2. Justice

A second cross-cutting recommendation relates to **the justice dimension covering the Schengen area**. Priority should be given to creating, consolidating, centralising and ensuring the effectiveness of justice and complaint instruments/mechanisms for individuals subject to internal and external border, policing and surveillance practices in the EU. The following specific recommendations are proposed:

- **Intra-EU mobility of asylum seekers and 'migration' should not be legalised as legitimate grounds for Member States to reintroduce internal border controls.** The EU co-legislators should remove all references in the latest proposed reform of the Schengen Borders Code to 'irregular migration' or 'secondary movements of third-country nationals' as giving rise to a threat to public policy and internal security. The free movement of persons, regardless of their nationality, is protected by EU primary law and should not constitute a reason for the reintroduction of internal border controls. Asylum seekers and refugees have legitimate reasons to move in search of asylum between Member States, and, as a consequence, their movement between Member States should not be referred to as 'illegal' or as 'secondary movements'. Instead, the EU should adopt **the mutual recognition**

of positive asylum decisions and refugee status across all EU Member States, so as to ensure their free movement. Furthermore, following the experience of the activation of the Temporary Protection Directive to people fleeing the war in Ukraine, **intra-EU mobility should be tailored in the functioning of the EU asylum system** and the EU Dublin Regulation reform.

- The Commission recommendations for Member States to expand the use of 'alternatives to internal border controls' - i.e. intra-EU policing and expulsions, as well as the EU databases, and their interoperability - raise serious interferences to fundamental rights and free movement. The Commission and the European Parliament should carry out an **Independent Evaluation** of these 'compensatory measures' in light of **the EU Anti-Racism Action Plan 2020-2025**, which includes as a key priority area countering discrimination by law enforcement authorities⁴⁷⁶. Priority should be given to ensuring **effective police oversight mechanisms and complaint mechanisms** for anyone subject to over-policing, expulsions and identity checks by police authorities so as to prevent over-policing of certain communities and racial profiling. The use of civilian oversight of police complaints mechanisms and bodies, such as those engaged in the Independent Police Complaints Authorities' Network (IPCAN) should be supported at EU level⁴⁷⁷.
- **Interoperability and the increasing ecosystems of EU databases** make information and access to rights and justice by data subject a daunting goal. The European Parliament should carry out an **Independent Privacy Assessment** of the proportionality and fundamental rights impacts inherent to the implementation of the ETIAS and EES, and their interoperability with other EU databases. The *asymmetry* that Interoperability creates for data subjects in comparison to authorities should be tackled through an **Interoperable Justice approach** aimed at ensuring an explicit right to effective judicial protection for data subjects under all the relevant EU databases, and facilitating a centralised access to complaints through a Single Point of Contact (SPC).
- The EU should immediately **freeze and stop providing direct and indirect support – monetary and technical support and equipment, such as boats – to the Libyan Coast Guard and authorities. An EU-level Parliamentary Inquiry should be set up** to gather all the relevant background and current information regarding the whole historical tale behind the still ongoing EU support to these crimes and address the blurring of responsibilities between relevant EU and Italian actors. The inquiry should aim at a truth or fact-finding exercise as well as key recommendations to inform future EU policies on third-country cooperation on migration management and search and rescue at sea.
- **The Frontex Agency should take concrete and measurable steps to ensure the accessibility, visibility and effectiveness and of the Complaints Mechanism** established

⁴⁷⁶ The Action Plan calls for 'fair policing' and states that 'Efficient policing and respect for fundamental rights are complementary. Law enforcement authorities are key actors in ensuring that law is obeyed and that security is ensured. Recognising diversity and ensuring fair law enforcement is essential to fighting racism. Profiling is commonly, and legitimately, used by law enforcement officers to prevent, investigate and prosecute criminal offences. However, profiling that results in discrimination on the basis of special categories of personal data, such as data revealing racial or ethnic origin, is illegal. Profiling that is based solely or mainly on one or more protected characteristics amounts to direct discrimination, and therefore violates the individual's rights and freedoms and is unlawful', p., 7 and footnote 32. European Commission (2020), A Union of equality: EU anti-racism action plan 2020-2025, COM(2020) 565 final, 18.9.2020, Brussels.

⁴⁷⁷ E.P. Guittet, N. Vavoula, A. Tsoukala and M. Baylis (2022), Democratic Oversight of the Police, Study requested by the LIBE Committee, Brussels.

in Art. 111 of the Frontex Regulation. To that aim, an obligation should be included in the Code of Conduct applying to all participants in Frontex operations to accept complaints from individuals who believe they have been victims of fundamental rights violations, or their representatives, and transmit them to Frontex via the complaints' mechanism. Awareness and information of the complaints' mechanism should also be further increased, via dedicated information, with a view to encouraging its use by complainants.

- Boosting the overall capacity and financial/human resources of **the European Data Protection Supervisor (EDPS) and national Data Protection Authorities (DPAs)** should be a fundamental priority in order to effectively ensure their supervisory and monitoring tasks of EU JHA databases and their interoperability. This will become essential, as the single model of coordinated supervision, enshrined in Article 62 of the EU General Data Protection Regulation, gradually extends to all EU databases and their interoperability, in order to ensure that this mechanism evolves into an effective forum for systematising the joint supervision of the framework as a whole.

8.3. Responsibility

Knowledge and justice are conditions for effectively and timely **addressing or fighting impunity and arbitrariness** as well as the actions/inactions of states and EU agencies in the context of border controls/surveillance and policing. EU-led enforcement and investigations play a crucial role in upholding justice. **A merited trust approach, triangulating the rule of law, democracy and fundamental rights**⁴⁷⁸, has been lacking especially when it comes to Home Affairs policies such as those related to Schengen cooperation. This has meant that upholding the rule of law and EU values and principles has not always been a priority in the actions of relevant EU Member States and the European Commission's DG HOME. Based on this, the following recommendations are advanced:

- **The six Member States retaining internal border controls since 2015 should lift them without further delay** to fully comply with the time limits set by the SBC and the CJEU's ruling on the *NW* case. The analysis of the grounds used by Member States in their notifications revealed that the identified threats are, in the most part, not 'new' nor 'newly identified'. These renewed grounds have been constantly used and re-packed for about eight years to unlawfully justify the reintroduction and prolongation of internal border controls.
- As 'guarantor of the Treaties', **the Commission should without any further delay launch infringement procedures**. 'Political dialogue' with Member States has produced very limited results and enables lengthy discussions with Member States while they are still violating the law for extensive periods of time. **Dialogues and other 'informal procedures' – such as the informal pre-infringement tool EU Pilot – lack transparency and accountability, are protracted in time and often ineffective**. The Commission has an obligation to enforce the law and take meaningful actions to prevent impunity across the Member States.
- Widespread evidence gathered and published by independent monitoring bodies, NGOs and national and international media underlines how pushback practices and related

⁴⁷⁸ S. Carrera, E. Guild and N. Hernanz (2013), The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism, Study for the European Parliament, DG IPOL, Brussels.

violations of fundamental rights have, in some contexts, acquired a systemic character and even the status of an 'official policy'. **The Commission should launch infringement proceedings against all relevant EU Member States engaging in pushbacks and pullbacks at EU external borders**, and not exclusively call for or rely on national investigations. This should as a matter of priority include Member States' compliance with relevant **fundamental rights standards and administrative guarantees enshrined in the Schengen Borders Code**, and not only as regards relevant asylum legislation.

- The European Parliament and the Commission should continue monitoring the fulfilment of the FSWG recommendations and follow up on their effective implementation by Frontex, and make its delivery **conditional to EU funding of the Agency**. In line with the FSWG recommendations, the Agency should establish **clearer criteria and procedures for the adequate application of Article 46 of the Frontex Regulation**, including reinforcing the Director's accountability⁴⁷⁹ and liability, the need to consider information from external sources, as well as **the possibility to suspend or withdraw funding**. A 'reversed Article 46 procedure' entailing 'more Frontex presence' in Member States where there are fundamental rights violations runs directly contrary to the Frontex Regulation and should not be permitted. The Agency should also make further progress in **revising its Serious Incident Report Procedure (SIR)**, and specifically cases concerning fundamental rights violations⁴⁸⁰.
- **The Commission should stop indirectly funding border fences** across relevant EU Member States' external borders through EU financial instruments. Border fences are contrary to the principle of proportionality envisaged in the Schengen Borders Code and constitute a magnifying glass of fundamental rights violations. EU funding instruments should **expressly exclude and preclude any Member State from using or re-purposing EU funds** for any purpose directly or indirectly related to border fencing. This should be coupled with a **clear and transparent methodology** for the Commission **to assess and monitor the respect of fundamental rights** by Member States for EU-funded projects with the so-called Horizontal Enabling Conditions applicable to EU Home Affairs Funds.

⁴⁷⁹ In line with FSWG recommendations, Frontex should step up efforts to promote and institutionalise a culture of respect of fundamental rights in all its functions and activities, fully in line with its fundamental rights strategy and the programme of work laid down by the FRO. In parallel, the Agency should take appropriate measures to increase transparency and accountability of its work, including by ensuring proper implementation of the EU right of public access to documents.

⁴⁸⁰ Key aspects to be addressed includes ensuring that Frontex FRO has access to information related to all cases concerning fundamental rights violations and is entrusted with autonomously handling those cases. Additional steps should be taken to ensure diversification of sources when investigation of SIRs or other reported incidents. This implies that in its follow up to a SIR, the FRO should not rely only on responses by government authorities, but ensure a diversification of sources, and corroborate the information provided by national authorities with competent national human rights bodies and/or authorities such as national Ombudsmen and relevant international organisations. On the idea to use of 'reversed Article 46 procedure' refer to [Frontex rights officer suggests 'more Frontex' needed in Greece \(euobserver.com\)](https://euobserver.com).

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ANNEX 1: OVERVIEW OF SCHENGEN MEMBER STATES NOTIFICATIONS

Austria (12 November 2022 – 11 May 2023)

Austria has been retaining internal border controls with Slovenia and Hungary since 2015. The latest prolongation of internal border controls was notified on 17 October 2022 and covers the time period between 12 November 2022 and 11 May 2023⁴⁸¹. In this notification, the Austrian government tries to justify the internal border controls on **'the ongoing overland migration from Turkey as well as the outflow from the Balkan region' and 'extensive secondary movements to Austria or to the other Member States of the EU'**.

They report that Austria received 56 000 asylum applications between January and August 2022, which would represent a threefold increase over the same period the year before (i.e., during the Covid-19 pandemic), and experienced an upward trend every month. The government states that between 40 and 50% of asylum applications 'are currently based on **secondary movements, as a consequence of visa-free entry into certain Western Balkan countries**'. They provide the example of Serbia's visa liberalisation deals with India and Tunisia, which – according to the Austrian government – led to a 4,900% and 4,600% increase in the number of Indian and Tunisian nationals applying for asylum in Austria. They identify Romania and Hungary to be the primary 'transit states' based on the (limited) Eurodac hits available. **Based on Eurodac data, the Austrian government also identifies further deficiencies at the external borders of Bulgaria and Greece.**

In this notification, the Austrian government also mentions the 'heavy pressure' on its basic care system due to 'the high number of asylum applications and the double burden in terms of the admission of displaced persons from Ukraine'. They especially highlight severe issues with accommodation facilities. According to the government, 'internal border controls make a significant contribution to reduce irregular migration flows within the EU and to disrupt international smuggling networks. They further add that 'the abolition of internal border controls would send the wrong signals in the midst of a very tense migration situation in relation to visa liberalisations in the Western Balkans and irregularly arriving migrants and smugglers and would further intensify the flow of migration'. Or again, that 'internal border controls are therefore essential instruments to protect the Austrian asylum and basic care systems'.

Finally, they refer to **'the nexus between smuggling networks and terrorist groups'**: according to the government, terrorist groups would use smuggling to generate revenue, while smugglers' routes would enable the illegal entry of terrorists into Austria. **No evidence is provided in support of this so-called nexus.**

⁴⁸¹ Austrian delegation, Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Articles 25 to 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13679/22. Brussels, 17 October 2022.

The October 2022 notification is longer and more detailed than the ones from the past. Interestingly, it also includes graphs showing the figures reported in the text, despite their added value being unclear. As for Denmark, the stark difference in length and content is likely due to the release of the CJEU's judgment on C-368/20 and C-369/20 assessed in detailed in *Section 4.2* of this Study below, where the Luxembourg Court developed a number of criteria for EU Member States to legitimise the prolongation of internal border controls⁴⁸². In May 2022, in fact, Austria had already released additional statements on the currently existing threat situation⁴⁸³ as a supplement to the previous notification (20 April 2022)⁴⁸⁴.

The original notification from 20 April 2022 made reference to the 'Russian aggression war against Ukraine' and the ensuing 'massive flight movements' as well as 'secondary movements in the Schengen area'. The government specifically expressed concerns about a possible increase in migratory movements along the Western Balkans route and in the number of asylum applications in Austria. They further noted that 'the rise in prices for grain as well as food shortage' caused by the conflict in Ukraine **could intensify 'migratory pressure from other regions and especially economic migration from Africa as well as the Middle East'**. Finally, the government argued that 'the end of restrictions caused by the pandemic will lead to additional push and pull factors for migratory movements, in the medium and long term'. While they reported some figures related to the increase in asylum applications and apprehensions at the borders with Slovenia and Hungary, the notification does not include hard evidence in support of the other claims put forward by the government.

In the additional statements released after the above-mentioned CJEU judgment, the Austrian government expanded the references to the Russian invasion of Ukraine ('domestic security is not seriously affected by the movement of refugees from Ukraine per se, but by the accompanying secondary threat potential'), the ensuing risk of arms trafficking, and the use of 'flight and migration routes' by 'islamists, jihadists, foreign terrorist fighters (FTF) and by organised crime actors for illegal arms and human trafficking as well as other serious forms of crime'.

In the previous notifications from the Austrian government, **it is clear that they have been justifying the reintroduction of internal controls on the very same grounds since after the end of the Council's Implementing Decision in 2017**⁴⁸⁵. Specifically, they express concerns over the

⁴⁸² CJEU, 26 April 2022, Joined Cases C-368/20 and C-369/20, NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz.

⁴⁸³ Austrian delegation, Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Articles 25 to 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) – Additional statements on the currently existing threat situation. 8274/22. Brussels, 16 May 2022.

⁴⁸⁴ Austrian delegation, Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Articles 25 to 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8274/22. Brussels, 20 April 2022.

⁴⁸⁵ Council of the EU, Schengen area: Council recommends up to six-month prolongation of internal border controls. 11 May 2017. <https://www.consilium.europa.eu/en/press/press-releases/2017/05/11/schengen-area-six-month-prolongation-internal-border/>

'high migratory pressure on the EU', 'secondary movements' along the Western Balkan route, and 'deficiencies' at the external borders (particularly between Greece and Turkey and in the Mediterranean Sea). Like other Member States, they also loosely associate 'organised crime and terrorism' with 'migration'. In April 2021⁴⁸⁶ and October 2021⁴⁸⁷, the government also identified Covid-19 and its consequences as potential 'additional push and pull factors for migration movements. In their words, 'the Schengen area is still characterised by systematic and structural deficits in the areas of migration and security' (April 2021)⁴⁸⁸.

The nature and actual scope of the border checks are not described in detail. The notifications only express the commitment of the Austrian government to keep the measures proportionate, have a limited impact on cross-border travel and traffic, and not overly restrict EU citizens' freedom of movement. On top of these notifications concerning the borders with Hungary and Slovenia, Austria's most recent notification is dated 25 January 2023 and covers the reintroduction of internal border controls at the Austrian-Slovakian border between 27 January to 5 February 2023⁴⁸⁹. The Austrian government first reintroduced border controls with Slovakia in September 2022 for a total of 10 days. It then renewed these measures seven times for periods from 10 up to 30 days until their suspension on 5 February 2023.

The grounds cited in these notifications mainly relate to the 'strong migration pressure' along the Eastern Mediterranean and Balkan routes, specifically the '*illegal* migration via land from Turkey to Bulgaria or Greece as well as *illegal* migration movements in the Balkan region'. In the 25 January 2023 notification, the Austrian government reported a total of 101 755 asylum applications by the end of November and highlighted that 'Austria had the fourth highest burden in absolute numbers' among the EU Member States. As indicated in Section 2.2. of this Study above, however, **the scale of numbers referred to by the Austrian authorities cannot seriously qualify from a quantitative perspective as 'large-scale' when compared to the numbers witnessed since February 2022 regarding refugees fleeing the war in Ukraine across the EU.**

Together with the 'double burden of receiving displaced persons from Ukraine', these new arrivals allegedly led to the overloading of the basic care system in the country, primarily affecting accommodation facilities. As developed in *Section 4.1.* of this Study below, this crucially provides **a clear indicator that Austria's asylum system is malfunctioning and not delivering its legal**

[controls/#:~:text=Schengen%20area%3A%20Council%20recommends%20up%20to%20six%20month,prolong%20temporary%20internal%20border%20controls%20in%20exceptional%20circumstances.](#)

⁴⁸⁶ Austrian delegation, Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Articles 25 to 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 7785/21. Brussels, 13 April 2021.

⁴⁸⁷ Austrian delegation, Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Articles 25 to 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 12907/21. Brussels, 15 October 2021.

⁴⁸⁸ Austrian delegation, above n 45

⁴⁸⁹ Austrian delegation, Prolongation of border controls at the Austrian internal borders in accordance with Article 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 5715/23. Brussels, 25 January 2023.

commitments under the EU Receptions Directive⁴⁹⁰ and EU asylum law generally. They also stressed that the internal border controls in place at the time between Czechia and Slovakia could result in 'a new migration route to Austria'. The government further found that the police countermeasures at the border with Slovakia were insufficient at tackling the identified threat, making internal border controls necessary.

Denmark (12 November 2022–11 May 2023)

On 14 October 2022, Denmark announced its intention to prolong internal border control at their land borders with Germany and Sweden and in the Danish ports with ferry connections to the same two countries. **The justifications given by the government related to 'terrorism and organised crime' as well as 'secondary movements' of third-country nationals within the Schengen area⁴⁹¹.** They state that 'this decision has been reached in order to be able to effectively counter 'the significant threat to our public order and internal security caused by terrorists and organised criminals who are able to exploit the free mobility within the Schengen area as well as the current migration situation within the Schengen area'.

Like Sweden, Denmark also refers to the Russian invasion of Ukraine in their notification, and – more specifically – to the possibility that Russian nationals might enter the EU within the larger displacement flow from Ukraine. Referencing a Communication from the Commission from October 2022⁴⁹², the Danish government finds that these Russian nationals 'could pose a threat to public policy and internal security' if they were able to travel into the Schengen area. The notification also mentions smuggling and human trafficking from the EU's external borders with Belarus after the Russian invasion of Ukraine.

The Danish government also stresses the threat of terrorist attacks and the possibility for people radicalised in Syria and Iraq to return to Denmark through 'migratory routes'. They report that since 2012 at least 161 people have left Denmark for Syria and Iraq, and at least 29 of them are still residing in that region. According to them, 'it is possible that militant Islamist groups still intend to exploit [the refugee and migrant routes]'. They further stress that the number of irregular entries along the Mediterranean routes is at its highest since 2018, that 'Austria is currently experiencing more registrations than during the European migration crisis in 2015', and this can translate into secondary movements towards Denmark through Austria and Germany.

⁴⁹⁰ European Parliament/Council of the EU (2013), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). OJ L 180/96. 29.6.2013.

⁴⁹¹ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13939/22. Brussels, 21 October 2022.

⁴⁹² European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and The Committee Of The Regions Energy Emergency - Preparing, Purchasing and Protecting the EU Together. COM(2022) 533 final. 18.10.2022.

The Danish government includes a list of 'facts' in support of these claims. However, they are limited to the number of weapons confiscated and people being denied entry at the border with Germany and an observed increase in charges around the border with Sweden. **There is a clear lack of solid and substantial evidence for all the other claims put forward in the notification**⁴⁹³. The government observes that, while it is strengthening internal security measures (like new stationary and mobile automatic licence plate recognition facilities), this equipment will only be ready to use by the end of 2023 and 'these efforts do not at the moment fully remedy the need for internal border controls'.

Compared to the previous notifications, this last one appears to be much more detailed and lengthier. A notification from May 2022⁴⁹⁴ reveals that the additional information was provided after Denmark took note of the above-mentioned CJEU's April 2022 judgment on Joined Cases C-368/20 and C-369/20 studied below. Specifically, the Danish government states that the addendum 'provides additional factual information and elaborates on the circumstances and events which give rise to a *new* serious threat to our public order and internal security, while taking into account the free movement of persons in the practical execution of the border controls'. This is what led to the inclusion or expansion of grounds such as the Russian invasion of Ukraine, the concerns related to the external border with Belarus, and increased attention to human trafficking and smuggling and cross-border crime.

For example, the notification from April 2022 only mentioned the alleged threat posed by 'militant Islamist and organised criminals who are able to exploit the free mobility within the Schengen area', 'individuals among refugees and migrants arriving in Europe who can pose a terror threat' and 'the threat from organised criminals in Sweden towards Denmark'⁴⁹⁵. All previous notifications since 2017 included the threat of terrorists and criminals exploiting free mobility to access Denmark as a

⁴⁹³ The government states that they are cooperating with their neighbouring countries to minimise the impact on the traffic within the Schengen area. On the German side, the border controls consist of 'spot-checks which in terms of quantity, location and intensity are adapted to the expected number of travellers as well as the current intelligence picture, the local conditions and the traffic patterns at the individual crossing points'. They also use automatic license plate recognition technologies. At the border with Sweden instead, border controls are carried out as periodic spot-checks on traffic, trains, and ferries and '1-2 weekly controls on all larger crossing points'.

⁴⁹⁴ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) - Supplementary letter to the Member States. 8228/22. Brussels, 16 May 2022.

⁴⁹⁵ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8228/22. Brussels, 19 April 2022.

ground (see, for example, April 2018⁴⁹⁶, October 2018⁴⁹⁷, April 2019⁴⁹⁸, October 2019⁴⁹⁹, and October 2021⁵⁰⁰). Additionally, the ones from April 2020⁵⁰¹, October 2020⁵⁰², and April 2021⁵⁰³ also included the Covid-19 pandemic as a ground for internal border controls.

France (1 November 2022–30 April 2023)

The latest notification on the Council's Register for France is dated 12 October 2022 and reintroduces internal border controls from 1 November 2022 to 30 April 2023⁵⁰⁴. The French government starts by identifying four 'new' threats of terrorist character. Firstly, they report that the threat of new terrorist attacks by jihadists is at a high level. The main risk is identified in the non-detected entry of European and non-European terrorists in the Schengen area, especially in light of the developments in Afghanistan and Ukraine.

Referencing the 2022 Europol annual report on terrorism⁵⁰⁵, the French government states that 'the presence of people whose profile suggests a terrorist risk, including foreign terrorist fighters, has in fact been detected recently during the irregular crossing of external borders, but also after their arrival on European territory, on the occasion of the crossing of internal borders,

⁴⁹⁶ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8023/18. Brussels, 17 April 2018.

⁴⁹⁷ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 13106/18. Brussels, 12 October 2018.

⁴⁹⁸ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8598/19. Brussels, 15 April 2019.

⁴⁹⁹ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13009/19. Brussels, 11 October 2019.

⁵⁰⁰ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 12874/21. Brussels, 15 October 2021.

⁵⁰¹ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 7272/20. Brussels, 8 April 2020.

⁵⁰² Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 11833/20. Brussels, 14 October 2020.

⁵⁰³ Danish delegation, Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 7835/21. Brussels, 14 April 2021.

⁵⁰⁴ French delegation, Prolongation of the temporary reintroduction of border controls at the French internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/300 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13398/22. Brussels, 12 October 2022. <https://data.consilium.europa.eu/doc/document/ST-13398-2022-INIT/x/pdf> The present notification is only available in French. The direct quotes included in the text are not an official translation but were translated by the authors.

⁵⁰⁵ Europol (2022), European Union Terrorism Situation and Trend Report 2022. https://www.europol.europa.eu/cms/sites/default/files/documents/Tesat_Report_2022_0.pdf

most often having used the services of criminal networks for migrant-trafficking'. Because of the ongoing trials for the terrorist attacks in Nice and on the Thalys train, they perceive this as increasing the threat of terrorist attacks.

Secondly, the French government reports new serious threats for internal security emerging from the war in Ukraine. Particularly, they express concerns that 'radicalised individuals' might exploit the displacement of people from Ukraine to gain access to the Schengen area. They refer to people fleeing the compulsory conscription into the Russian armed forces, but also signalled individuals who fought in Chechnya in the past and members of Russian criminal networks who seek to evade the restrictions in place against Russian nationals.

Thirdly, they identify further risks in the increase of irregular entries in the Schengen area through the Western Balkans route and the possible use of this route by criminal organisations involved in drug, human and arms trafficking. Fourthly, the French authorities report an increase in the migratory flows from the Hauts-de-France region to the United Kingdom, which would be linked to cross-border criminal organisations also operating outside of France.

The French authorities argue that these four main 'new' threats – together with an observed increase in irregular entries at the external borders in the Mediterranean Sea – would justify the prolongation of internal border control. They stress that the border checks are necessary, proportionate to the threats identified; **they are not carried out in a systematic way but follow the European method 'CIRAM 2.0'⁵⁰⁶ to preserve the principle of proportionality**. In order to protect the free circulation and limit the impact on traffic, the border checks are carried out as a 'selective filter' and are targeted, dynamic and evolve based on the information available and the cooperation with neighbouring Member States. While some alternative measures are in place (e.g., joint or mixed border patrols with the Italian and German authorities), the Ministry does not consider these to be sufficient to allow lifting internal border control.

Interestingly, the notification also mentions the currently ongoing legislative reform of the Schengen Borders Code analysed in detail in *Section 6* of this Study below. The French government believes that a revision of the SBC would 'facilitate the exercise of police checks in border areas according to the most appropriate measures for the identified threat'. They further express their hope for the 'rapid adoption of an ambitious text giving suitable responses to the needs of Member States based on the situations that they might encounter'.

Like for other Member States, this most recent notification appears to list the justifications for the prolongation of internal border controls in more length. While there is not direct reference to the CJEU's ruling on C-368/20 and C-369/20, the emphasis on 'the novelty' of the identified threats and the increased length are revealing of the impact of said ruling.

⁵⁰⁶ Frontex, 'CIRAM - Situational awareness and monitoring'. <https://frontex.europa.eu/what-we-do/situational-awareness-and-monitoring/ciram/>

The previous notification from April 2022 mentioned some of the same grounds⁵⁰⁷. In particular, the heightened risk of terrorist attacks due to the media attention around the ongoing trials for previous terrorist attacks, the possible return or entry of European or foreign terrorist fighters through secondary movements within the Schengen area, the increased number of irregular entries at the external borders, as well as Covid-19. With the exception of Covid-19, these grounds appear to have remained essentially *the same* across all past notifications with some minor adjustments to fit the circumstances of the time.

Germany (12 November 2022–11 May 2023)

The latest available notification from Germany is dated 20 October 2022 and covers the period between 12 November 2022 and 11 May 2023⁵⁰⁸. The German government justifies the prolongation of internal border controls based on the ‘trends in irregular migration both at our European external borders and at our internal Schengen borders’. They report that, in the first eight months of 2022, more than 86 000 ‘irregular border crossings’ were recorded along **the Western Balkan route, with Syrian, Afghan and Turkish citizens being the most frequent nationalities among those recorded.**

They express concerns over the German–Austrian land border and report figures related to irregular entries from June to September 2022 (~2 000/month) and cases of migrant smuggling between June and August of the same year. **Like Austria, the German government also refers to Serbia’s policy of visa liberalisation and its adverse effects on ‘the irregular migration situation’.** They find that ‘temporary internal border checks at the **German–Austrian land border** are currently ‘crucial’ for an appropriate response to this escalating situation’. Police checks within the border area (Article 23 SBC) are considered insufficient measures, as also is the use of technical support and equipment.

The government further reports that **‘the federal states’ capacities to house refugees are already under growing strain’ due to the arrival of almost 1 million Ukrainian refugees, the increase in asylum applications and ‘the ongoing influx of refugees recognised by other Schengen countries who are seeking unauthorised longer-term residence in Germany, in some cases by reapplying for asylum’.** The German government finally notes that ‘limiting irregular migration’ is essential to prevent **‘involuntary homelessness and inadequate housing’** and avoid further strains on the German society, economy and infrastructure after the severe impacts of the Russian invasion of Ukraine.

The government clarifies that the current border checks ‘are not ‘systematic’, but rather are conducted as the situation requires and are targeted so as to best achieve the desired goal’. They also state that ‘their impacts on cross-border road traffic, the cross-border flow of goods, the

⁵⁰⁷ French delegation, Prolongation of the temporary reintroduction of border controls at the French internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 7975/22. Brussels, 5 April 2022.

⁵⁰⁸ German delegation, Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13902/22. Brussels, 20 October 2022.

economy and the lives and work of people in the border region will be kept to a minimum to uphold the principle of proportionality'.

Germany expressly acknowledges the CJEU ruling on C-368/20 and C-369/20. In the notification, the government states that 'in addition to the original grounds, new grounds have emerged which justify once again autonomously ordering the temporary reintroduction of internal border checks in accordance with Articles 25 and 27 of the Schengen Borders Code'.

As a result of the CJEU's ruling, the October 2022 notification appears to be more detailed than the previous ones as well. In the past, Germany mainly referred to 'irregular' secondary movements within the Schengen area: for example, in April 2022, they mentioned 'Belarus's efforts to instrumentalise migration', 'a significant and uncontrolled influx of migrants at Europe's southern and south-eastern borders' and the 'people-smuggling activities' at the border with Austria⁵⁰⁹. While they updated the grounds to reflect the migration-related developments of the time, analogous or renewed grounds were used in all the other notifications issued since 2018.

Norway (12 November 2022–11 May 2023)

On 17 October 2022, the Council received Norway's notification on the prolongation of internal border controls for six months from 12 November 2022 to 11 May 2023⁵¹⁰. The Norwegian government justifies the reintroduction of internal border controls based on an assessment of the terrorist threat to Norway by the Norwegian Police Security Service. On top of 'terrorism' *per se*, they state that 'reference was also made to the potential for **significant secondary movements into Norway of migrants with an undocumented identity, posing a risk to the internal security**'. In this notification, they also refer to the need to increase the security of on-shore and off-shore oil and gas facilities in the context of the ongoing war in Ukraine and the recent disruptions of the Nord Stream pipelines in the Baltic Sea.

The Norwegian government stresses its commitment to restoring the functioning of the Schengen area as an area without internal border controls. They state that the border controls 'will be limited in scope, both operationally and geographically to what is strictly necessary to prevent the possible threats to the internal security and public policy'. Border controls are limited to the ferry connections to the Schengen area, while police checks and cooperation are in place at the border with Sweden. With the exception of the protection of oil and gas facilities and the Russian invasion of Ukraine, the grounds for internal border controls listed in the October 2022 notification are the same as or

⁵⁰⁹ German delegation, Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Articles 25 to 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8481/22. Brussels, 27 April 2022.

⁵¹⁰ Norwegian delegation, Prolongation of the temporary reintroduction of border controls at the Norwegian internal border in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13676/22. Brussels, 17 October 2022.

equivalent to the ones included in all notifications issued between October 2017⁵¹¹ and April 2022⁵¹².

Sweden (12 November 2022–11 May 2023)

On 15 November 2022, Sweden notified the European Council of its formal decision to prolong the internal border controls in place⁵¹³. The Swedish government had already notified the Council of its intention to do so on 12 October 2022⁵¹⁴. The justifications presented for this reintroduction were the Russian invasion of Ukraine, the alleged 'substantial increase in migration' along the Western Balkan route, and the persistence of 'terrorist threats'.

Regarding the situation in Ukraine, Sweden cites concerns related to **'the possible increase' in firearms and munitions trafficked into the EU through smuggling routes**, which – they observe – could worsen the criminal gang-related gun violence in Sweden. They also referred to an increase in **human trafficking for the purpose of sexual exploitation operating out of Ukraine into the EU**. The Swedish government also expressed concerns about Russian citizens' fleeing their country and evading conscription into the Russian armed forces. As for terrorism, the current 'threat level' for Sweden is 'elevated' according to the authorities, but it is not clear what this actually means.

Finally, they cite **'secondary movements' along the Western Balkan route and the 'critical level' reached in Austria** (70 000 asylum applications between January and September 2022) as a potential risk for Sweden. In their words, 'with the migration flow not showing any signs of diminishing, the combined situation provides a real risk for an increase in secondary movements to other Member States, including Sweden'.

The Swedish government stresses that the reintroduction of border control at the internal border 'is truly a last resort' as the internal legislation is allegedly insufficient for the screening of the status of third-country nationals. The border control is limited to the Öresund Bridge, which connects Sweden to Denmark, and consists of spot checks 'unless there is a reason for a more thorough and frequent control'.

⁵¹¹ Norwegian delegation, Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13205/17. Brussels, 13 October 2017.

⁵¹² Norwegian delegation, Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8133/22. Brussels, 8 April 2022.

⁵¹³ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13593/1/22. Brussels, 21 November 2022.

⁵¹⁴ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13593/22. Brussels, 14 October 2022. [f](#)

The grounds provided in the 15 November 2022 letter seem to be **more detailed than the ones contained in the previous notification** (8 April 2022)⁵¹⁵. The April 2022 notification also made reference to the 'elevated' threat level for terrorist attacks and linked it to the shortcomings at the external borders, i.e. the potential entry of terrorists and other criminals. It did not explicitly mention secondary movements *per se* or the Russian invasion of Ukraine. The same grounds were also used in October 2017⁵¹⁶, April 2018⁵¹⁷, October 2018⁵¹⁸, January 2019⁵¹⁹, April 2019⁵²⁰, October 2019⁵²¹, April 2020⁵²², October 2020⁵²³, April 2021⁵²⁴, and October 2021⁵²⁵. This means that Sweden has retained internal border controls *on the same exact grounds* since right after the end of the measures allowed for by the Council's Implementing Decision of May 2017.

⁵¹⁵ In October and November 2022, two different notifications were issued: the first one expressing the intention to prolong internal border control and the second one notifying the entry into force of these measures and providing more details on the grounds and nature of the border controls. Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8097/22. Brussels, 8 April 2022.

⁵¹⁶ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13203/17. Brussels, 13 October 2017.

⁵¹⁷ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Articles 25 of the Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 7948/18. Brussels, 13 April 2018.

⁵¹⁸ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13213/18. Brussels, 17 October 2018.

⁵¹⁹ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 5219/19. Brussels, 11 January 2019.

⁵²⁰ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 8597/19. Brussels, 15 April 2019.

⁵²¹ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 13064/19. Brussels, 14 October 2019.

⁵²² Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 7273/20. Brussels, 14 April 2020.

⁵²³ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 11719/20. Brussels, 9 October 2020.

⁵²⁴ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 7645/21. Brussels, 8 April 2021.

⁵²⁵ Swedish delegation, Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 12808/21. Brussels, 13 October 2021.

ANNEX 2: WHAT DO THE NUMBERS TELL US?

Statistics are often used and misused in order to justify restrictive policies implemented in the name of Schengen as being in ‘crisis’. One of the key arguments often used by EU Member States is one alluding to the phenomenon of ‘irregular immigration’ in the Schengen area. What do the statistics tell us regarding the total number of entries and unauthorised external border crossings, as well as the quantitative scope of the asylum phenomenon in the EU?

If the data collected by the Frontex European Border and Coast Guard (EBCG) Agency regarding annual external border crossings into the Schengen area and the number of irregular entries are compared, it is clear that **the issue of unauthorised entries is not large in terms of scale and it is therefore disproportionate to frame it as a ‘threat’ for specific EU Member States, and even more so for the entire EU**⁵²⁶.

The number of annual crossings in the Schengen area between 2014 and 2021 ranges from a maximum of about 235 million people in 2017 to a minimum of 94 million in 2020. In contrast, the absolute rate of ‘irregular entries’ by third-country nationals into the EU varies from a maximum of 1.8 million in 2015 to a minimum of around 126 000 in 2020⁵²⁷. The median estimated value for irregular border crossings between 2014 and 2021 is just above 200 000 people, while the average rate would be just below 430 000. Comparing the total number of annual border crossings and the irregular entries thus reveals that **irregular or unauthorised entries constitute approximately between 0.05 and 0.77% of all external border crossings**⁵²⁸.

⁵²⁶ It must be noted that the number of entries does not correspond to the number of people who have crossed the EU external borders. A single or same person might cross an external border multiple times in any given year, either regularly or irregularly, and be counted more than once. Furthermore, ‘irregular entries’ are not exclusively limited to asylum seekers but might also include other categories of people.

⁵²⁷ These figures include all detected irregular border crossings between border crossing points on land and at sea. This means that the real or actual figures might be higher as some entries might not be detected. In the Risk Analyses, Frontex refers to these as ‘illegal border crossings.’

⁵²⁸ This also corresponds with the findings of J. Jeandesboz (ed.) (2020), Operational Practices of EU Entry Governance at Air, Land and Sea Borders, ADMIGOV, Advancing Alternative Migration Governance, Université libre de Bruxelles, available at: <https://admigov.eu>. Which states that despite all inherent methodological limitations and many by-design caveats to these statistical estimations or indicators, ‘What is clear, nonetheless, is that the number of irregular detections reported by the agency appears is almost insignificant compared to the number of regular entries it reports at the same time’, page 29.

Table 3: Comparison between passenger flow on entry and unauthorised external border crossings

Entry	2014	2015	2016	2017	2018	2019	2020	2021
Passenger flow on entry	219 637 523	235 392 523	282 110 685	325 050 233	305 100 859	304 320 991	94 693 457	114 929 189
Irregular border crossings	282 933	1 822 177	511 146	204 750	149 117	141 846	126 423	200 101
Percentage of irregular border crossings (%)	0.13%	0.77%	0.18%	0.06%	0.05%	0.05%	0.13%	0.17%

Source: [Frontex Risk Analyses](#) 2018-2021.

Furthermore, Member States, the European Commission and Frontex have significantly relied on a narrative artificially linking the irregular entry of third-country nationals to ‘illegal’ migration and the notion of ‘mixed migration flows’ and, consequently, assuming the ineligibility or illegitimacy of third-country nationals seeking entry, asylum and other forms of international protection in the EU. In the same manner, the above-mentioned use by Frontex statistics of the notion of ‘illegal border crossings’ problematically blurs the fact that many of these persons may in fact be seeking asylum or even qualify as refugees⁵²⁹.

An illustrative example is the 2020 European Commission Staff Working Document accompanying the Pact on Migration and Asylum which underlined as the basis backing up its entire proposed legislative reform how the EU-wide first instance recognition rate fell to 30% in 2019 from a peak of 56% in 2016⁵³⁰. As shown by a previous European Parliament Study⁵³¹, **this figure is however misleading and inaccurate**. It does not count people who have been granted ‘humanitarian protection status’ by EU Member States, nor does it consider the structural difficulties that asylum seekers experience at times of having access to justice.

Table 2 below demonstrates that when added the figure would increase from 30% to 38.1% in 2019, 40.7% in 2020 and 38.5% in 2021⁵³². This shows that **a substantial number of the third-country nationals who gained access to the territory of EU Member States, either regularly or irregularly, applied for international protection, and had access to effective remedies in case of an initial denial are granted some form of protection in the EU**. Moreover, a significant number of asylum seekers are only recognised as eligible for protection in a second instance, that is, when they have access to justice and effective legal remedies like appeal procedures. The Commission’s statistics disregard the total number of decisions that are positively challenged on appeal which as shown in Table 5 below are significant. For instance, **34.8% of the total decisions on appeal (72 400) in 2021 were positive**. These numbers need to be read in combination with a reality where there are significant barriers for asylum seekers to have access to asylum procedures and effective remedies across the EU⁵³³.

⁵²⁹ Only when non-EU nationals arrive at an EU external border irregularly and do not apply for asylum, can EU agencies and Member States treat them as irregular immigrants. Furthermore, this does not exempt a person’s right from applying for asylum subsequently.

⁵³⁰ Council of the EU, COMMISSION STAFF WORKING DOCUMENT Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], 29.9.2020. <https://op.europa.eu/en/publication-detail/-/publication/2a32e974-0254-11eb-8919-01aa75ed71a1/language-en>

⁵³¹ E. Brouwer et al. (2021), ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’, Study Commissioned by the LIBE Committee of the European Parliament. [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU\(2021\)697130_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf)

⁵³² See Ibid., p. 41.

⁵³³ UNGA, Report of the Special Rapporteur on the human rights of migrants. A/73/178. 26 July 2018. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/228/98/PDF/N1822898.pdf?OpenElement>

Table 4: Decisions at first instance

TIME	2014	2015	2016	2017	2018	2019	2020	2021
Geneva Convention status	86 375	217 285	358 060	211 080	114 435	108 980	106 130	112 660
Humanitarian status ⁵³⁴	22 515	26 890	56 010	70 900	40 265	49 575	59 455	30 170
Subsidiary protection status	56 190	54 775	255 230	155 095	60 610	51 985	50 270	61 385
Rejected	183 775	264 890	412 530	504 800	345 575	334 805	309 185	322 295
Total	341 035	558 590	1 075 490	933 780	552 900	540 830	521 000	524 325
Total positive decisions	157 265	293 700	662 955	428 985	207 325	206 025	211 815	202 035
Recognition rate (%)	46.1%	52.6%	61.6%	45.9%	37.5%	38.1%	40.7%	38.5%

Table 5: Decisions at second or higher instances

TIME	2014	2015	2016	2017	2018	2019	2020	2021
Geneva Convention status	13 290	14 080	17 485	43,455	35 535	31 950	21 595	26 740
Humanitarian status ⁵³⁵	5 505	4 320	10 975	14 955	36 380	28 755	n/a	n/a
Subsidiary protection status	5 330	4 460	7 895	30 830	38 090	29 850	22 350	19 510
Rejected	102 305	145 905	183 430	185 645	190 800	205 280	163 665	136 550
Total	124 505	167 625	218 930	274 055	299 825	294 825	232 905	209 555
Total positive decisions	22 200	21 720	35 495	88 410	109 025	89 545	69 240	73 005
Recognition rate (%)	17.8%	13.0%	16.2%	32.3%	36.4%	30.4%	29.7%	34.8%

⁵³⁴ The total number of positive decisions on humanitarian status in the EU27 is absent on Eurostat. While the database includes data for specific countries, not all Member States report this data consistently. The number of total positive decisions and the overall total, however, seem to already include the data for humanitarian status: the displayed totals are in fact higher than the sum of the other figures, and the difference is within the expected range for humanitarian status. To show the disaggregated data, we integrated the data reported in the EUAA's [Asylum Report 2022](#). For 2014 and 2015, we relied respectively on the [2018](#) and [2021](#) EUAA Reports. The data from Eurostat and the EUAA, however, have different scopes: Eurostat only includes the EU27 Member States, while the data from EUAA also EU+ countries. Therefore, to calculate the rate of positive decisions, we relied on the original Eurostat data on total positive decisions.

⁵³⁵ Like for the previous table, the data for humanitarian status was not displayed on Eurostat. The data included for 2014-19 is from the EUAA/EASO's Asylum Report. For the years 2020-21, no data could be retrieved from the EUAA's Asylum Report. If one subtracts all other figures from the total, there is a difference of 25,295 and 26,525 for 2020 and 2021 respectively, which are, presumably, the figures for humanitarian status. For the rate of positive decisions, we relied on the original Eurostat data on the total of positive decisions.

Sources: Eurostat (MIGR_ASYDCFSTA; MIGR_ASYDCFINA), EUAA, and own calculation for recognition rate.

Furthermore, in the Impact Assessment accompanying the 2021 SBC Proposal SWD/2021/462 final⁵³⁶ and in the Explanatory Memorandum, the European Commission cites the figure of first-time asylum seekers from 2015 (1 255 600) – the peak of the so-called European refugee crisis – as evidence for serious deficiencies at the EU external borders in the Schengen area. While a comparison with the lower number of asylum seekers in 2018 (631 000 first-time asylum seekers) is made, the Impact Assessment does not explicitly mention that the data from the following years show significantly lower numbers. In 2017-2022, the number of asylum seekers has consistently remained below 700 000, with a further decrease to about 470 000 in 2020 due to the Covid-19 pandemic.

It is however doubtful whether the 2015/2016 refugee developments in Europe could be considered as ‘evidence’ that Schengen is indeed in ‘crisis’. As it has been argued before⁵³⁷, the actual issue at stake back in 2015 was not one of ‘border controls’ being deficient. It rather showed **EU Member States’ incapacity and/or unwillingness to faithfully and efficiently deliver on their EU and international law obligations on refugee protection, effective access to asylum procedures and dignified reception conditions** of every person looking for international protection in the EU, and more generally delivering on the fundamental right to asylum enshrined in the EU Charter of Fundamental Rights.

When any of these numbers are compared with those covering the large-scale of refugee movements following the war in Ukraine since February 2022, which has in turn not been framed as a ‘crisis’ by either national or EU policymakers, a more proportionate picture emerges. According to the United Nations High Commissioner for Refugees (UNHCR) Operational Data Portal covering the Ukraine Refugee Situation⁵³⁸, as of February 2023 an estimated **8 100 000 refugees from Ukraine have been recorded in the EU and about 4 881 590 refugees have been registered as beneficiaries of temporary protection** or similar national protection schemes in European countries.

If the EU has been capable of receiving and offering protection to more than 8 million people leaving Ukraine without unleashing a ‘crisis’, and while many implementation and practical challenges do exist⁵³⁹, the scale of the phenomenon resulting from current Frontex statistics on irregular entries is comparatively statistically irrelevant, and provides no objective

⁵³⁶ European Commission, Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. SWD/2021/462, 14.12.2021.

⁵³⁷ Guild et al. (2016), ‘Internal border controls in the Schengen area: Is Schengen crisis-proof?’ Study for the LIBE Committee of the European Parliament, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2016\)571356](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2016)571356)

⁵³⁸ UNHCR, Operational Data Portal: Ukraine Refugee Situation. <https://data.unhcr.org/en/situations/ukraine>

⁵³⁹ S. Carrera and M. Ineli-Ciger (2023), *EU responses to the large-scale refugee displacement from Ukraine: an analysis on the temporary protection directive and its implications for the future EU asylum policy*. Florence: European University Institute.

ground/evidence for legitimising any 'crisis-led' or 'generalised threat to national security or public order' arguments by EU Member States representatives/authorities and/or EU agencies.

A key question which remains unjustified by relevant EU and national policymakers is the legitimacy of the **double standards** shown by the EU responses to Ukrainian refugees in comparison to those applied to asylum seekers and refugees originating from African and certain Asian countries, and the Middle East, which scholars have identified as evidence of **structural discrimination in EU asylum policies**⁵⁴⁰. According to the **European Commission's Anti-Racism Action Plan 2020-2025**, the fight against discrimination on specific grounds, and their intersection with other grounds, should be 'integrated into all EU policies, legislation and funding programmes', including those related to migration⁵⁴¹.

⁵⁴⁰ Ibid.

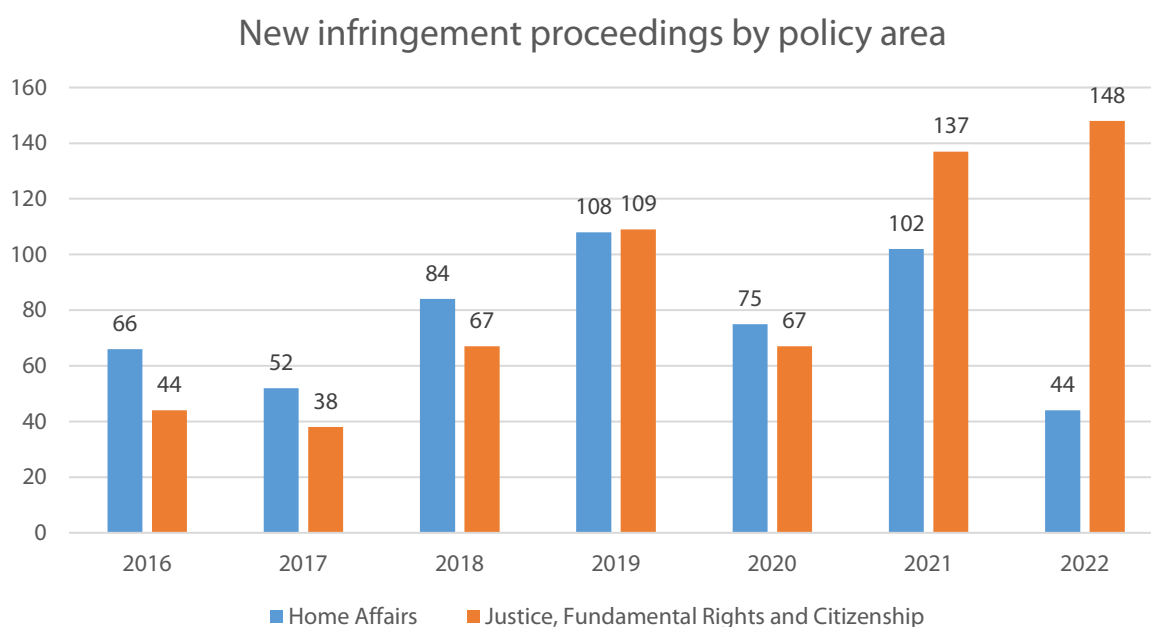
⁵⁴¹ European Commission (2020), Communication, A Union of equality : EU anti-racism action plan 2020-2025, COM(2020)565, 18 September 2020, page 19.

ANNEX 3: INFRINGEMENT PROCEDURES AND SCHENGEN

The infringement procedures launched by the Commission are collected in the Infringement Decisions database⁵⁴². The following analysis takes into consideration the policy areas of Home Affairs and Justice, Fundamental Rights and Citizenship. It was observed that there is an overlap between the two policy areas in the database, especially as regards Schengen and its governance. The database also includes a third policy area ('Justice, Freedom and Security'), which however shows no records.

As the graph below shows (Figure 5), the number of new infringement proceedings (i.e. letters of official notice, reasoned opinions, and referrals to the CJEU) have been balanced between the two policy areas⁵⁴³. However, in 2021 and 2022, the difference between the two significantly increased. Strikingly, in 2022, the difference was over 100 infringement actions.

Figure 5: Individual infringement actions by policy area



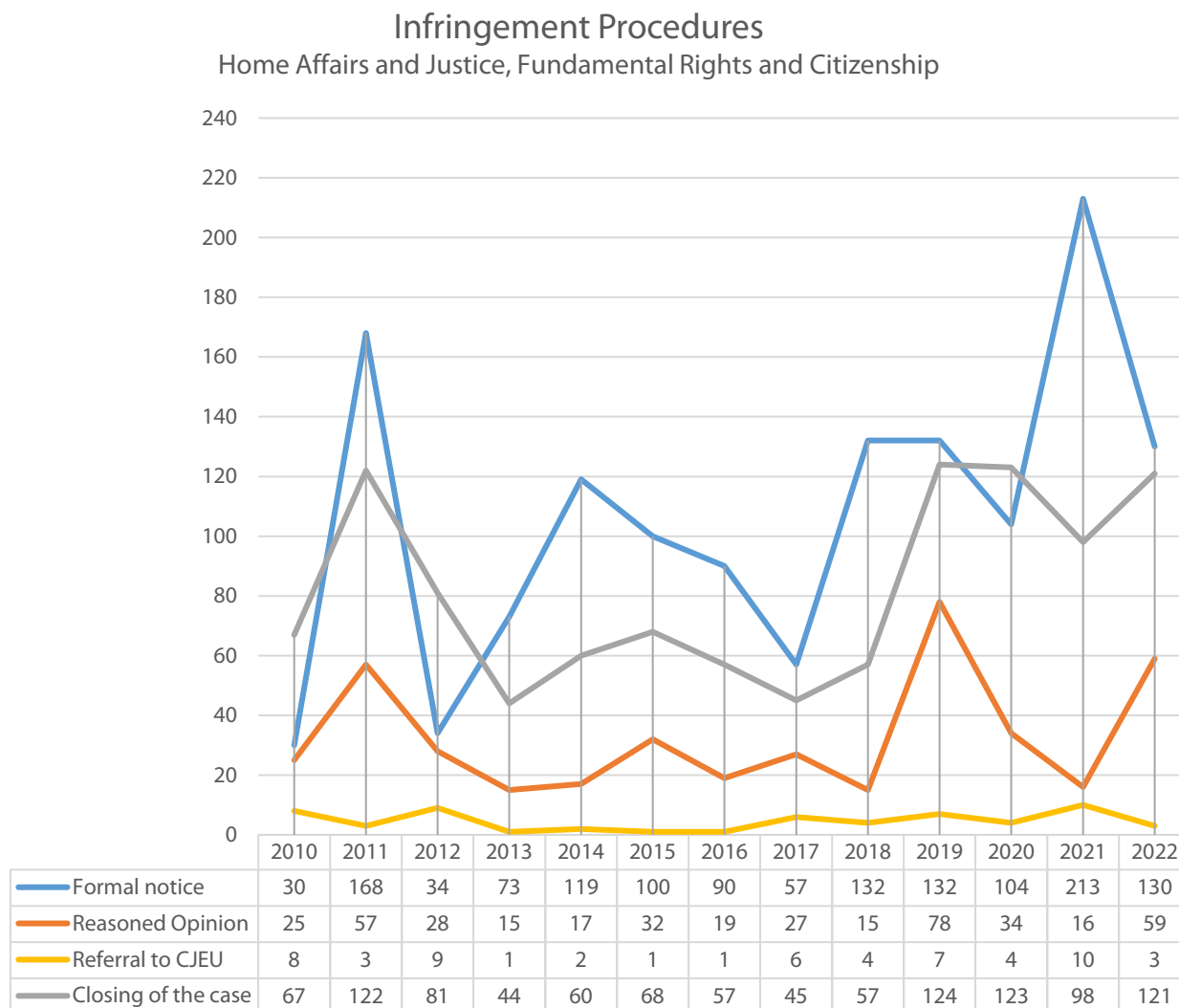
Source: Author's elaboration.

From an initial look at the numbers available (see Figure 6 below), it would appear that in recent years the Commission has launched a significant number of infringement proceedings in these two policy areas. For example, in 2021, 213 letters of formal notice were sent to Member States. At the same time, however, the number of referrals to the CJEU has remained relatively low throughout the years, ranging from a maximum of 10 in 2021 to a minimum of 1 in 2015 and 2016.

⁵⁴² The database is available at: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement-decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&rdossier=&decision_date_from=&decision_date_to=&DG=JUST&title=&submit=Search

⁵⁴³ The entries for the closing of cases or the withdrawal from the Court were excluded from this analysis. Because of this, the numbers in these figures differ from the ones provided by Commissioners Johansson and Reynders to the LIBE Committee in July 2022. If those entries are counted, the numbers perfectly match the official figures from the Commission.

Figure 6: Number of infringement procedures - Home Affairs and Justice, Fundamental Rights and Citizenship



Source: Author's own elaboration.

There are only 5 entries of measures taken in relation to Schengen by the Commission after 2016. Out of these 5, 1 entry is the closing of a case opened against Germany in 2014, and thus unrelated to the ongoing unlawful prolongation of internal border controls. The other 4 entries are all related to the same case against Estonia on the incompatibility of the Estonian 'Go Swift' system with Article 8(3)(g) SBC and are thus also unconnected to the issues under examination in this Study. Hence, it is possible to safely conclude that, as of March 2023, the Commission has not begun any infringement procedures against Austria, Denmark, France, Germany, Norway and Sweden despite their clear violation of the time limits established by the SBC.

It must be noted that the Commission's Infringement Database shows several limitations. All entries in this EC database include a title detailing the specific EU law instrument that a Member State has violated, transposed incorrectly, or implemented incorrectly. However, the titles can be in English or French and might refer to the specific EU instrument with its 'informal' or abbreviated title.

Furthermore, there are often no details regarding the type of violation of said instruments. Only a few entries include weblinks or references to explanations or press releases which offer a better understanding of the case. It is also unclear why infringement procedures issued at the same time and related to the same instrument – and often to the same Article – are split between the Home Affairs and Justice, Fundamental Rights and Citizenship categories. This is the case for several infringement procedures dating back to 2003 on Article 26 of the 1985 Convention Implementing the Schengen Agreement. From the available information, however, it is not possible to say if this is due to the different type of violation.

In the letter addressed to the LIBE Committee and co-signed by Commissioners Reynders and Johansson (11 July 2022)⁵⁴⁴, the latter underlined that DG HOME has been increasingly active in the enforcement of EU law. She mentioned several instances where DG HOME referred Member States to the CJEU with regards to asylum (Joined cases C-715/17, C-718/17 and C-719/17⁵⁴⁵, case C-808/17⁵⁴⁶ and C-821/19⁵⁴⁷) and further action with regards to legislation on firearms, terrorism and the rights of third-country nationals. As for Schengen, Johansson referred to the SEMM as ‘a key means of addressing deficiencies and the lack of implementation’ of the Schengen *acquis*. While she reaffirmed that the Commission could intervene with infringement proceedings to address these deficiencies, it is concerning that they have not done so for the Member States retaining internal border controls since 2015-2016.

⁵⁴⁴ Letter from Didier Reynders and Ylva Johansson to the Chair of the LIBE Committee, Brussels, 11 July 2022. Ares(2022)1279274.

⁵⁴⁵ CJEU, 2 April 2020, Joined cases C-715/17, C-718/17 and C-719/17, European Commission v Republic of Poland. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=224882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2829918>

⁵⁴⁶ CJEU, 17 December 2020, Case C-808/18, European Commission v Hungary. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=235703&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2830212>

⁵⁴⁷ CJEU, 16 November 2021, Case C-821/19, European Commission v Hungary. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=249322&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2830481>

Table 6: Infringement Proceedings for Home Affairs

Year	Letters of Formal Notice	Reasoned Opinion	Referral to CJEU	Closing of cases
2010	21	4	6	18
2011	79	20	1	44
2012	5	17	2	44
2013	38	7	0	15
2014	59	7	0	22
2015	58	28	1	26
2016	51	14	1	24
2017	27	21	4	34
2018	79	2	3	36
2019	60	45	3	62
2020	65	9	1	59
2021	90	7	5	66
2022	24	18	2	63

Table 7: Infringement Proceedings for Justice, Fundamental Rights and Citizenship

Year	Letters of Formal Notice	Reasoned Opinion	Referral to CJEU	Closing of cases
2010	9	21	2	49
2011	89	37	2	78
2012	29	11	7	37
2013	35	8	1	29
2014	60	10	2	38
2015	42	4	0	42
2016	39	5	0	33
2017	30	6	2	11
2018	53	13	1	21
2019	72	33	4	62
2020	39	25	3	64
2021	123	9	5	32
2022	106	41	1	58

This Study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the state of play of the EU Schengen area and the latest legal and policy developments with direct relevance to the Schengen *acquis*. It analyses the impact of these developments, and the role of 'declared crisis', on the Schengen Borders Code, Luxembourg Court standards and EU Treaty principles and fundamental rights. The Study calls for an approach based on 'merited or deserved trust' to uphold the legitimacy of the Schengen area. Such an approach should focus on the effective and timely enforcement of EU rules and Treaty values – chiefly the rule of law and fundamental rights – instead of expanding intra-EU policing and the proliferation of technological surveillance and databases leading to the (in)securitisation of people's freedom of movement.
