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Steve Peers

The Future of the Schengen System

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Preface

The Schengen system has been challenged in recent years. Some member states have expressed the wish to re-introduce border controls at internal borders. Others have had plans to introduce 'quasi-border controls' within their own territories and most member states have raised concerns about the 'Arab Spring' and its effect on the Schengen system. Challenges have, in other words, emerged from inside the Schengen States and as a consequence of events outside the EU.

The principles governing the Schengen co-operation have therefore been under review and in 2013 - after rather long and difficult negotiations - the EU institutions agreed on a new set of rules. The Future of the Schengen System, by Professor Steve Peers, analyses these rules and their significance for the free movement in the EU. The author also formulates recommendations as to how to ensure that the Schengen system will remain "transparent, effective, legitimate and compliant with human rights".

The report is published as part of the SIEPS' research project Internal and External Dimensions of a Common Asylum and Migration Policy and our aim is to give the reader a comprehensive and in-depth overview of the legislative and policy framework in a broader context of immigration and free movement in the EU.

Anna Stellinger
Director

SIEPS carries out multidisciplinary research in current European affairs. As an independent governmental agency, we connect academic analysis and policy-making at Swedish and European levels.

About the author

Steve Peers received a B.A. (Hons.) in history from McMaster University (Canada) in 1988, an LL.B. from the University of Western Ontario (Canada) in 1991, an LL.M. in EC Law from the London School of Economics in 1993, and a Ph.D from the University of Essex in 2001. His research interests include EU Justice and Home Affairs, Constitutional, External Relations, Human Rights, Internal Market and Social Law. He has written over eighty articles on many aspects of EU law in journals including the Common Market Law Review, European Law Review, International and Comparative Law Quarterly, European Law Journal Yearbook of European Law and the Cambridge Yearbook of European Legal Studies, as well as many chapters in books. Peers has worked as a consultant for the European Parliament, the European Commission, the Foreign and Commonwealth Office, the House of Lords Select Committee on the European Union and the Council of Europe, and contributed to the work of NGOs such as Amnesty International, Justice, Statewatch and the Immigration Law Practitioners' Association. He is the author of three editions of EU Justice and Home Affairs Law and the co-author of Commentary on the EU Citizens Directive, and the co-editor of EU Immigration and Asylum Law: Text and Commentary (2 editions); Commentary on the EU Charter of Fundamental Rights; and EU Law.

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Executive summary

After long and difficult negotiations, the EU has adopted changes to the key rules which govern the possible re-introduction of internal border controls between the Member States (and some associated non-Member States) applying the Schengen rules, which provide in principle that there should be no checks on border crossing between Schengen States.

While some Member States had pressed for these amendments in order to provide for greater possibilities for re-introducing controls, the European Commission instead proposed new rules which would shift the power to decide on the reintroduction of such controls to itself. Eventually the Member States and the European Parliament agreed on a compromise: there will be a new power to reintroduce internal border controls in cases where one Member State shows 'serious deficiencies' applying the rules on external borders, but subject to strict substantive and procedural conditions.

These conditions include a prior obligation to attempt to assist the Member State which is having difficulties complying with its obligations, as well as a Council recommendation following a recommendation from the Commission. It is still possible that Member States could take different views on whether to follow the Council recommendation, which could lead to chaos in practice.

In addition to these new amendments to the rules on reintroduction of internal border controls, the Schengen rules on external borders have also recently been amended. Furthermore, the role of the EU's border agency, Frontex, has recently been strengthened; the second-generation Schengen Information System began operations in spring 2013; a new system for border surveillance, Eurosur, will begin operations before the end of the year; new rules on maritime surveillance operations are under discussion; and a new entry-exit system has been proposed and might be operational in the medium term.

As regards other aspects of the Schengen system, the Visa Information System has begun operations and is being extended; new rules allowing for the fast reintroduction of visa obligations for non-EU countries will soon be adopted; the EU's visa code will likely soon be reformed; and the EU's rules on irregular migrants might be amended in the near future.

However, there are growing concerns about the human rights impact of the EU's immigration and asylum policies, of which the Schengen system is a key part.

This report assesses the likely impact upon the new rules on reimposition of internal border controls in the broader context of these recent and likely developments in the Schengen system as a whole, and makes recommendations to ensure that the Schengen system will remain transparent, effective, legitimate and compliant with human rights.

1 Introduction

The Schengen system is one of the core achievements of the European integration process. It permits all those persons who are present in any of the Schengen States – which consist of most of the EU's Member States, and several non-EU Member States besides (the 'Schengen associates') – to cross the borders between these States (known as the 'internal borders') without being checked.

But this system assumes a considerable degree of harmonisation and mutual trust among the Schengen States, because each person who crosses the external borders of any one of the Schengen States (i.e. the borders between Schengen States and other States) then has the freedom to travel to any of the other Schengen States, without being checked when he or she enters the other State's territory. For that reason the original Schengen provisions included rules on uniform control of external borders, uniform short-term visa policy, certain aspects of irregular migration, applications for asylum in multiple Schengen States, and a system for compiling a list of persons who should in principle be denied entry into all Schengen States (the Schengen Information System, or 'SIS').

Furthermore, the absence of controls on internal borders makes it easier for alleged law-breakers, whether EU citizens or third-country nationals, to cross borders without being stopped. Therefore the original Schengen provisions also included rules on the cross-border aspects of criminal judicial and police cooperation, and the SIS also included data on fugitives wanted for extradition and stolen objects.

Due to concerns about the impact upon the Schengen system of the 'Arab Spring' in 2011, and the ability of all Member States to control their share of the common external border, as well as controversies concerning some Member States' plans to introduce 'quasi-border controls' within their territory, a number of Member States (in particular France and Italy) demanded greater facility to reintroduce border control at internal borders. To this end, in June 2011, the European Council called for the introduction of a 'mechanism' which would 'respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons'. This would take the form of 'assistance' to a Member State facing 'heavy pressure' at its external borders, but 'as a very last resort', there should be 'a safeguard clause' which would 'allow the exceptional reintroduction of internal border controls in a truly critical situ-

ation where a Member State is no longer able to comply with its obligations under the Schengen rules'. This clause would apply 'on the basis of specified objective criteria and a common assessment, for a strictly limited scope and period of time'.[1] The European Council asked the Commission to make a proposal to this end by September 2011. The Commission complied with this request, and after two years of negotiation, new rules on this issue were adopted in October 2013.

This report examines the negotiation and probable impact of those new rules, in the context of the development of the broader Schengen system, compared to the problems in other areas of EU integration during this time. In particular, the report examines the impact of the creation of new information and border surveillance systems, the development of EU rules on maritime surveillance, the growth in the powers of Frontex (the EU's border control agency), the continued harmonisation of the law on visas and external border controls, and the related human rights challenges.

[1] European Council Conclusions, 23-24 June 2011 (doc EUCO 23/1/11, 29 Sep. 2011), para 22.

2 Background and Legal Framework

2.1 Background to the Schengen system

The original source of the Schengen rules was a short treaty signed in 1985, the *Schengen Agreement*, which largely set out general objectives, leaving it to a later treaty to spell out in detail how those objectives would be achieved. This later treaty, signed in 1990, is formally known as the *Convention Implementing the Schengen Agreement*, but it is referred to in this report as '*the Schengen Convention'* for the sake of brevity.

However, this treaty still needed further implementing measures to take effect in practice. So the power to adopt such measures was conferred by the Convention upon the Schengen Executive Committee, a body consisting of Schengen States' ministers, which was set up by that treaty.

The Schengen Convention entered into force in 1993, but was not put into effect until March 1995. The original parties to the Schengen Convention were seven EU Member States: France, Germany, the three Benelux countries, Spain and Portugal. Accession treaties were subsequently agreed with Italy, Austria and Greece, and then with the Nordic EU Member States (Denmark, Sweden and Finland). At this point, in order not to disrupt an existing agreement between all five Nordic countries, an association agreement was signed with two non-Member States of the EU: Norway and Iceland.

2.1.1. Integration into the EU legal order

When the Treaty of Amsterdam was negotiated in 1997, it was decided that it would be desirable to integrate the measures drawn up within the Schengen framework – which became known as the 'Schengen *acquis*' – into the EU's legal order. This was done by means of a Protocol attached to the Treaties, which provided for the Council to adopt detailed measures to this effect. The principal measures which the Council adopted, shortly after the Treaty of Amsterdam came into force on 1 May 1999, were a Decision defining the Schengen *acquis*, and a Decision allocating the Schengen *acquis* to 'legal bases' (i.e. powers for the EC or EU to act) set out in the Treaties.[2]

From this point on, Decisions on accession to the Schengen *acquis* were adopted by the Council, with the unanimous vote of the existing Schengen States and the States that wanted to participate in the Schengen rules. Further-

[2] OJ 1999 L 176. The text of the Schengen *acquis* as defined by the Council is published in OJ 2000 L 239.

more, the association of non-Member States with the Schengen *acquis* had to take the form of treaties between the EC/EU and the third States concerned. So the Council decided to extend the Schengen *acquis* to Greece in 1999, and to Sweden, Denmark and Finland in 2001.[3] At the same time as the latter Decision, treaties came into force between the EU/EC and Norway and Iceland, extending the Schengen *acquis* to those non-Member States.[4]

However, for the States which have joined the EU since 1999 (ten new Member States in 2004,[5] Romania and Bulgaria in 2007, and Croatia in 2013) a two-phase process for joining the Schengen system has been established. Firstly, the treaties governing these countries' accession to the EU specify that there are certain provisions of the Schengen *acquis* (essentially, the rules on external borders, the common visa list and most aspects of police and judicial cooperation), which apply on the date of these countries' accession to the EU. Secondly, the application of the core Schengen rules (the abolition of internal border controls, the freedom to travel, the full uniform visa policy and the use of the SIS) is delayed for some years later, until the existing Schengen States have satisfied themselves (still voting unanimously) that the countries concerned are ready to apply the Schengen rules fully,[6] although usually access to the SIS is extended earlier.

Applying this process, nine of the ten States which joined the EU in 2004 become full participants in the Schengen system in 2007.[7] The exception was Cyprus, which in practice cannot become a full Schengen participant until the government of Cyprus can exercise jurisdiction over the entire island. On the other hand, Romania and Bulgaria have not yet convinced all of the existing Schengen States that they are ready to participate fully in the Schengen system, due to concerns in some Member States about the effectiveness of external border controls in those countries.[8] A date for their participation in the Schengen system therefore has yet to be agreed. Also, the timing of Croatia's participation in the Schengen system, following the latest enlargement of the EU, remains to be discussed.

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3 *OJ 1999 L 327/58 (Greece) and OJ 2000 L 309/24 (Nordic States).*

4 OJ 1999 L 176/35.

5 Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Latvia, Lithuania, Estonia, Cyprus and Malta.

6 See, for instance, Art. 3(2) of the 2003 Act of Accession (OJ 2003 L 236/33).

7 OJ 2007 L 323/34.

8 Those States do, however, partly participate in the SIS (OJ 2010 L 166/17).

More recently, two further non-Member States – Switzerland (in 2008) and Liechtenstein (in 2011) – have become part of the Schengen system, following treaties with the EU.[9]

Furthermore, there are special rules for three of the EU's Member States as regards the Schengen system. First of all, Denmark, which participates in the system in practice, does not have to apply most of the Schengen rules as a matter of EU law.[10] In particular, Denmark must decide, according to a special Protocol attached to the EU treaties, whether it wishes to implement each new measure 'building upon' the Schengen *acquis* in its national law. If Denmark does decide to implement such a measure, this creates an obligation for Denmark as a matter of international law, instead of EU law, so the measure concerned will not have the strong legal effect of EU law.

Secondly, the UK and Ireland, which had misgivings about the basic idea of abolishing border checks between Member States but were willing to accept other aspects of the Schengen rules, can apply to opt in to either some or all of the Schengen *acquis* – subject to the approval of the Council, consisting of the EU Member States which participate in Schengen. The Council has approved the partial participation of both States in the Schengen rules, as regards the aspects which do not directly relate to the abolition of internal border controls. In practice, this means that both States participate in the Schengen measures concerning irregular migration and most policing and criminal law matters, including the policing and criminal law aspects of the Schengen Information System.[11]

Taken as a whole, the rules on many countries' participation in the Schengen *acquis* (including the measures building upon that *acquis*, as discussed below) are different from the rules concerning their participation in other EU Justice and Home Affairs (JHA) matters. For the Schengen associates, their participation in the Schengen *acquis* contrasts sharply with their non-participation in principle in any other EU JHA measures – except by means of a special separate agreement, in a small number of cases.[12] For Denmark, its application of the Schengen *acquis* contrasts nearly as sharply with its

[9] OJ 2008 L 53 (Switzerland) and OJ 2008 L 83 (Liechtenstein).

[10] By way of exception, Denmark is fully bound by the Schengen rules on visa lists and visa formats.

[11] OJ 2000 L 131/43 (UK) and OJ 2002 L 64/20 (Ireland). The former Decision was put into effect (except as regards the SIS) as from 1 Jan. 2005 (OJ 2004 L 395/70), while the latter Decision has not yet been put into effect.

[12] For instance, see the treaty between the EU, Norway and Iceland, extending the 'Dublin' rules on allocation of responsibility for asylum applications to those States (OJ 2001 L 93/38).

non-participation in most other EU JHA measures – except (again) for a small number of separate agreements, and its participation in those EU policing and criminal law measures which were adopted before the Treaty of Lisbon entered into force, on 1 December 2009.

As for the UK and Ireland, they have the right (which they sometimes exercise) to participate in other EU JHA measures on a case-by-case basis, subject only to notifying their intention to participate (within three months of the measure being proposed), or applying to the EU Commission to participate after the measure concerned is adopted. In either case, they do not need the permission of the other Member States (acting unanimously) to participate, and when they apply to opt in after the measure's adoption, the Commission is obliged to let them participate if they are willing to comply with the legislation concerned.[13]

The differences between the rules on participation in the Schengen *acquis* and the rules on participation in EU JHA law generally has led to litigation, in which the UK sought to argue that certain measures concerning visas and borders fell within the scope of the latter rules (thereby giving it a right to participate) rather than the former (thereby giving the Council the right to decide on its participation, acting unanimously – which would probably mean that the Council would insist that the UK had to participate in most or all other Schengen measures on visas and borders first.[14] The UK has lost each of these cases, since the Court of Justice has ruled that the legislation concerning the creation of an EU border control agency, rules on passport security and a Decision governing police access to the Visa Information System (a database of information concerning applicants for short-term visas to visit the Schengen area) all builds upon the Schengen *acquis*, and is subject to the rules on UK participation in that *acquis*, rather than the rules on UK participation in EU JHA law generally.

2.1.2 Development of the Schengen acquis

Since the integration of the Schengen *acquis* into the EU legal order in 1999, many further measures building upon that *acquis* (which can mean both measures amending the Schengen rules or measures closely related to those rules) have been adopted by the EU institutions. By now the large majority of the original Schengen Convention, and the measures implementing that Conven-

[13] See Protocol No. 21, attached to the Treaties, on the UK's and Ireland's participation in JHA measures.

[14] Cases: C-77/05 *UK v Council* [2007] ECR I-11459; C-137/05 *UK v Council* [2007] ECR I-11593; and C-482/08 *UK v Council* [2010] ECR I-10413.

tion, have been replaced by EU legislation, such as the Schengen borders code and the EU visa code, both discussed in this report.

While every measure concerning visas and border control (except for treaties with non-EU States) has been considered to be a measure building upon the Schengen *acquis*, none of the EU measures adopted on legal migration or asylum builds upon that *acquis*,[15] and only some EU measures on irregular migration build upon it.[16] The end result is that only a few of the original Schengen rules on these issues are still applicable.[17]

The provisions of the *acquis* on the Schengen Information System were first of all amended by EU measures,[18] and then entirely replaced by EU measures which created a second-generation Schengen Information System (SIS II), which began operations in April 2013.[19]

As for other Schengen rules on criminal law and police cooperation, the rules on extradition and the transfer of prisoners have been replaced, as have some of the rules on mutual assistance in criminal matters and cross-border police cooperation, by EU measures. However, many of the EU measures concerned are not regarded as building upon the Schengen *acquis*, since they are based on a more far-reaching form of integration (the principle of mutual recognition, entailing an obligation in principle to accept other Member States' criminal law decisions) than the Schengen rules.[20] As a result, such EU measures only bind the EU's Member States, and the Schengen Convention provisions

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[15] While, as noted above, the Schengen Convention originally contained provisions on responsibility for asylum applications (Arts. 28-38 of that Convention), these provisions were not integrated into the EU legal order in 1999, since they had already been replaced by a separate treaty between all Member States (the Dublin Convention) which came into force in 1997 (OJ 1997 C 254/1). In practice, however, the Dublin rules also apply to the Schengen associates, by means of separate treaties to this effect.

[16] For instance, Directive 2002/90 prohibiting the facilitation of unauthorised entry, movement and residence (OJ 2002 L 328/17), which replaced part of Art. 27 of the Schengen Convention.

[17] In particular, as regards the Schengen Convention itself, Arts. 2-8 on border controls, 9-17 on visas, and 23, 24 and 27 on irregular migration have been replaced. In this field, only Arts. 18-22, 25 and 26 (and possibly some of the definitions in Art. 1) of the Convention are still in force, and most of these provisions have been amended and supplemented. All of the key Schengen Executive Committee Decisions in this field have also been replaced by EU legislation.

[18] See, for instance, Reg. 871/2004 on future functionalities for SIS (OJ 2004 L 162/29).

[19] In particular, Arts. 92-119 of the Schengen Convention and all implementing measures concerning SIS have been replaced.

[20] See, for instance, the Framework Decision establishing the European Arrest Warrant (OJ 2002 L 190/1), which replaced the extradition rules in Arts. 59-66 of the Convention.

concerned still remain in force as between the EU Member States on the one hand, and the Schengen associates on the other. Moreover, some of the policing and criminal law rules (most of the provisions on firearms, for instance) were not integrated into the EU legal order, since they had been superseded by EU measures applicable to all Member States.[21] This report therefore focusses on the aspects of the Schengen *acquis* related to visas and borders.

Finally, it should be noted that an important impact of the integration of the Schengen *acquis* into the EU legal order (i.e., transforming the legal status of the Schengen rules into EU law) was the application of the EU's institutional framework to the further development of that *acquis* since 1999. Following various transitional periods, the EU's usual institutional rules, the ordinary legislative procedure, therefore apply to the adoption of most measures in this area.

As for the jurisdiction of the EU's Court of Justice, for most parts of the Schengen *acquis* (i.e. visas and border control issues), all national courts and tribunals in all participating EU Member States can send questions on the validity or interpretation of the Schengen rules to the EU's Court of Justice for a definitive ruling. The same rule will also apply to the criminal law and policing aspects of the Schengen *acquis* from 1 December 2014; until then, Member States have an option whether the Court should have jurisdiction, and most of them have exercised that option.

2.2 Overview of the legislation establishing the Schengen system

At time of writing (November 2013), the Schengen system was based upon a large number of EU legislative measures, along with some residual provisions of the original Schengen acquis. However, it is possible to identify the most important of these legislative measures, as follows:

a) a Regulation establishing the **Schengen borders code**, which sets out the main rules governing both the **abolition of internal border checks** and the uniform **control of external borders**;[22]

[21] For instance, most of the rules on firearms in Arts. 77-91 of the Convention.

[22] See respectively Chapters 3 and 4.2 below.

b) a Regulation establishing the framework for special rules on **local border traffic**, which are then put into effect by means of treaties between Member States and neighbouring third countries;[23]

c) a Regulation establishing the **second-generation Schengen Information System**, as regards immigration law issues;[24]

d) a Regulation establishing an **EU borders agency**, known as **Frontex**;[25]

e) a Regulation setting out rules on **passport security**;[26]

f) the rules on **freedom to travel**, which are still set out in the Schengen Convention (as amended);[27]

g) a Regulation establishing a **visa code**, which sets out uniform rules for considering short-term visa applications;[28]

h) a Regulation setting out a **common list of third countries** whose nationals do or do not need **visas**;[29]

i) a Regulation establishing a **Visa Information System** (VIS), which contains data on all applicants for a visa to visit the Schengen area;[30]

j) **visa facilitation** or **visa waiver** treaties with third States, which respectively simplify or abolish the visa requirements applicable to travel to most of the EU Member States;[31]

k) the **Returns Directive**, a set of rules governing the key issues in the expulsion process, which is connected to the Schengen *acquis* as regards persons who were never authorised to enter the territory of the States concerned;[32] and

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[23] See s. 4.1 below.
[24] See s. 4.3 below.
[25] See s. 4.4 below.
[26] See s. 4.1 below.
[27] See s. 5.3 below.
[28] See s. 5.2.2 below.
[29] See s. 5.2.1 below.
[30] See s. 5.2.3 below.
[31] See s. 5.2.1 below.
[32] See ss. 4.3 and 5.4 below.

l) a Regulation establishing **Eurosur**, a system to share information relating to border surveillance.[33]

There are also some important proposed measures under discussion at time of writing, namely:

a) a Regulation setting out rules for **maritime interception actions**, when coordinated by Frontex;[34] and

b) two Regulations establishing in turn an **entry-exit system** and a **registered travellers' programme**.[35]

[33] See s. 4.5 below.
[34] See s. 4.6 below.
[35] See s. 4.7 below.

3 Internal border controls in the Schengen area

3.1 The rules on internal border controls

The basic rule that internal border checks between Schengen countries must be abolished was originally set out in Article 2 of the Schengen Convention, which was implemented by several Decisions of the Schengen Executive Committee. These measures were all repealed by the Regulation establishing the Schengen Borders Code in 2006, which now includes rules on internal border checks in Title III of that Regulation. The recent changes to these rules adopted in October 2013, following the agreement of the European Parliament and the Council, are discussed in section 3.4 below.

Title III of the Schengen Borders code contains two chapters, dealing in turn with the abolition of internal border checks[36] and the procedure for reintroducing them temporarily.[37]

3.1.1 Abolishing internal border checks

First of all, Article 20 of the Schengen Borders Code sets out the basic rule:

> Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.

However, Article 21 of the Schengen Borders Code then describes 'checks within the territory' that can legally be carried out, without infringing the basic rule of free internal border crossing set out in Article 20. In particular, the right to cross internal borders freely 'shall not affect' four different issues, according to Article 21. It is not clear whether this list is exhaustive or not.

These issues are the following:

The exercise of police powers

Article 21(a) of the Schengen Borders Code says that police powers can be exercised in accordance with national law, as long as the exercise of such powers 'does not have an effect equivalent to border checks'. This also applies to border areas.

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[36] Articles 20-22.
[37] Articles 23-31.

Article 21(a) further specifies that 'in particular' the exercise of police powers is not equivalent to border checks where those measures:

(i) do not have border control as an objective;

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

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

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

The case law of the Court of Justice of the European Union has clarified the interpretation of these rules (see s. 3.3 below).

Security checks on persons
Article 21(b) of the Schengen Borders Code allows security checks to be carried out at ports or airports, by national officials or by port or airport officials or carriers, as long as such checks are also carried out on persons travelling within that Member State.

Obligation to hold or carry papers or documents
Article 21(c) of the Schengen Borders Code says that a Member State may decide to specify in its law an obligation to hold or carry papers or documents.

Obligation to report presence on the territory
Article 21(d) of the Schengen Borders Code states that each Member State may decide to provide in its national law for an obligation for third-country nationals to report their presence on its territory, referring to Article 22 of the Schengen Convention. This is the only form of check within the territory that applies to third-country nationals, but not to EU citizens.

Article 22 of the Schengen Convention provided (until its recent amendment, discussed below) that third-country nationals who had legally entered the territory of a Schengen State had to be obliged to report to the authorities of the State which they had entered, under the conditions which each State laid down in its national law. Each Schengen State had to decide whether this reporting obligation applied upon entry, or within three working days of entry. This rule also applied to those third-country nationals who were already

legally resident within a Schengen State, and who exercised the freedom to travel to another Schengen State (see section 5.2 below).

However, this rule was not absolute: each Schengen State had to lay down some exceptions from this rule. According to Article 37 of the Schengen Borders Code, these exceptions had to be reported to the Commission.

Finally, Article 22 of the Schengen Borders Code states that Member States must remove obstacles to fluid traffic flows, although they must leave themselves some flexibility to provide for facilities for checks in case of temporary reimposition of border checks.

3.1.2. Re-imposition of controls

The rules on the reimposition of internal border checks have been amended as from October 2013, but this section sets out those rules as they stood before these amendments. First of all, the basic rule on the reimposition of internal borders checks appeared in Article 23(1) of the Schengen Borders Code:

> Where there is a serious threat to public policy or internal security, a Member State may exceptionally reintroduce border control at its internal borders for a limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days…

This procedure for re-introducing such control had two variants: the procedure for 'foreseeable events' (Article 24) and the procedure for 'urgent cases' (Article 25).

There was also a rule on the proportionality of the re-imposition of controls:

> The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

According to the Schengen Borders Code,[38] in the event that the 'serious threat to public policy or internal security' continued for more than 30 days, the internal border controls could continue in force, 'for renewable periods of up to 30 days', subject to the procedural rules in Article 26 of the Code.

As regards 'foreseeable events', the Member State concerned had to notify the Commission and the other Member States of its plans, and provide the fol-

[38] Art. 23(2), Schengen Borders Code.

lowing information 'as soon as available': the reasons for the planned reimposition of controls, including details of 'the events that constituted a serious threat to public policy or internal security'; the 'scope' of the reimposition, i.e. where controls would be applied; the names of the crossing-points that had to be used; the date and duration of the controls; and possibly measures that other Member States had to take.[39]

The Commission could issue an opinion (i.e. a non-binding expression of its point of view) on the planned decision, 'without prejudice' to Member States' competence over internal security.[40] The information supplied by the Member State, as well as the Commission's opinion (if one was issued), 'shall be the subject of consultations between the Member State planning to reintroduce border control, the other Member States and the Commission, with a view to organising, where appropriate, mutual cooperation between the Member States and to examining the proportionality of the measures to the events giving rise to the reintroduction of border control and the threats to public policy or internal security.'[41] This consultation had to take place at least fifteen days before the planned re-introduction of internal border controls.[42]

Where 'urgent action' was required, due to 'considerations of public policy or internal security in a Member State', Article 25 of the Schengen Borders Code provided for different rules. In that case, 'the Member State concerned may exceptionally and immediately reintroduce border control at internal borders'.[43] That Member State had to notify the other Member States and the Commission 'without delay', and provide the information referred to in Article 24 of the Schengen Borders Code, along with the reasons which justified the use of the urgent procedure.[44]

Article 26 of the Schengen Borders Code provided for the possible prolongation of reimposed internal border controls. Before prolonging such controls, the Member State concerned had to notify other Member States and the Commission.[45] That Member State also had to supply other Member States and the Commission with 'all relevant information' on its reasons for prolonging

[39] Art. 24(1), Schengen Borders Code.
[40] Art. 24(2), Schengen Borders Code.
[41] Art. 24(3), Schengen Borders Code.
[42] Art. 24(4), Schengen Borders Code. On the practice regarding such consultations, see section 3.2 below.
[43] Art. 25(1), Schengen Borders Code.
[44] Art. 25(2), Schengen Borders Code.
[45] Art. 26(1), Schengen Borders Code.

internal border controls. Again, the Commission could offer an opinion on the Member State's plans.[46]

Next, Article 27 of the Schengen Borders Code provided that the Member State concerned or the Council had to inform the European Parliament of the measures taken to re-impose internal border controls or to prolong such re-imposition. After three prolongations of controls, the Member State concerned had to, if requested, report to the European Parliament on this issue.

In any event, according to Article 29 of the Schengen Borders Code, the Member State reimposing controls had to confirm the date when the control is lifted 'and, at the same time or soon afterwards, present a report to the European Parliament, the Council and the Commission on the reintroduction of border control at internal borders, outlining, in particular, the operation of the checks and the effectiveness of the reintroduction of border control'.

Article 28 of the Schengen Borders Code made clear that if internal border controls are re-imposed, the rules in the Code on external border checks were applicable.

Finally, according to Article 30 of the Schengen Borders Code, the public had to be informed of the re-imposition of internal border checks, unless there were security reasons not to do so. Article 31 of the Code specified that if the Member State concerned requested it, the other Member States, the European Parliament and the Commission had to observe the confidentiality of any information supplied as regards the re-imposition of controls or the reports referred to in Article 29.

3.2 Re-imposition of controls in practice

In 2010, the Commission, as required by Article 38 of the Schengen Borders Code, produced a report on the application of the rules in the Code on the abolition of internal border controls.[47]

This report began by analysing the rules about the definition of checks, in particular as regards police checks (Article 21(a) of the Schengen Borders Code). Since border zones might present 'a particular risk for cross-border

[46] Art. 26(2), Schengen Borders Code.

[47] COM (2010) 554, 13 Oct. 2010. Art. 38 of the Code required the Commission to produce a report on this issue by 13 Oct. 2009. The Commission had to 'pay particular attention to any difficulties arising from' the reintroduction of internal border controls, and 'present proposals to resolve such difficulties' where appropriate.

crime', police checks could validly be more intense and frequent in those zones than in other parts of national territory. However, in the Commission's view, such checks had to be 'targeted and based on concrete and factual police information and experience' regarding public security threats, and could not be 'systematic'. Such information had to be reassessed constantly, and so checks had to be random and based on risk assessment.

Most Member States stated that their checks met such criteria, but it was difficult to check whether checks to enforce immigration law met them. The objective of checks (whether on goods or persons) was also important, but Member States were free to assign different responsibilities to different authorities.

In the Commission's view, the *frequency* of police checks at or near internal borders, as compared to checks in the rest of a Member State's territory in a similar situation, was a crucial factor in determining whether the former checks breached the Schengen Borders Code. But most Member States do not keep data on such issues, and some consider that it is not possible to make such comparisons, because 'practice and priorities' are different in the two areas. Others state that the frequency of checks near the internal borders is the same as in the rest of the territory. In fact, research into the effect of the abolition of internal border controls indicated that, following the application of the Schengen rules, the powers and size of internal police forces were increased considerably.[48]

The Commission concluded that a 'strict definition of the appropriate frequency and regularity' of checks near the internal borders was not possible, since the decision in such issues has to take account of differing situations in each Member State. While a 'high frequency' of such checks could be an 'indication' of a breach of the rules in the Schengen Borders Code, it was still 'difficult to assess in individual cases' whether this had an effect equivalent to border checks (s. 3.1.3 of the report).

Having analysed the legal issues, the Commission took the view that it needed more information from Member States on the reasons for and frequency of police checks in border zones, in order to monitor the situation and address complaints that some travellers are automatically checked in some internal

[48] K Groenendijk, 'New Borders Behind Old Ones: Post-Schengen Controls Behind the Internal Borders – Inside the Netherlands and Germany', in E Guild, P Minderhoud and K Groenendijk, eds, *In Search of Europe's Borders* (Kluwer, 2003), 131.

border zones. To that end, the Commission was planning to request statistics on police checks within national territory, particularly at the border.[49] It was also planning to provide for unannounced border visits in its then-upcoming revised proposal to amend the rules on Schengen evaluations,[50] to check whether Member States were applying the rules properly.

As regards the possibility of checks on persons, pursuant to Article 21(b) of the Schengen Borders Code, the Commission recommends that airport, port or carrier personnel do not combine various checks on persons in order to verify their identity (although such a combination of checks is legal), in order to avoid the *perception* that such checks are obstacles to citizens' free movement rights. Furthermore, these checks should only identify the person concerned on the basis of a travel document, although carriers could identify persons on the basis of other documents, such as driving licences and bank cards. In the Commission's view, such checks could only be carried out for 'commercial or transport security reasons', so cannot be used to check whether a person holds a visa or a residence permit. Member States cannot request such checks and the carriers are not subject to liability if the persons concerned do not meet the criteria for entry or stay in another Member State, as the EU's carrier liability legislation does not apply.[51] Nor can carriers require third-country nationals to prove the legality of their stay, or include such a rule in the contract with travellers.

Next, as regards Article 22 (the provision on obstacles to traffic flows), the Commission first of all points out that Schengen associates may maintain infrastructure for checking *goods* at Schengen borders, since those States do not participate in the EU's customs union. Secondly, the Commission observes that some EU Member States have maintained obstacles to traffic flows, in part because they only joined the Schengen area relatively recently and such obstacles took time to remove. Some Member States intend to use the old infrastructure if border controls are reimposed temporarily, while others use, or plan to use, mobile equipment in that case.

In the Commission's view, permanent infrastructure can be maintained at internal borders, in light of the possible reintroduction of internal border controls, as long as this is 'not an obstacle to fluid traffic flow and speed limits are

[49] At time of writing, there is no information as to whether the Commission has followed up on its intentions.

[50] See s. 3.4 below.

[51] Art. 26 of the Schengen Convention, as supplemented by Directive 2001/51 (OJ 2001 L 187/45).

not reduced'. But the Commission also emphasises that mobile infrastructure could be used for this purpose (s. 4 of the report).

Moving on to the reintroduction of border controls, the Commission reported that since the Schengen Borders Code became applicable in 2006, 12 Member States had reintroduced border controls on 22 occasions (until the date of the report).[52] None of the Member States concerned had applied the rules on the prolongation of border controls, indicating that no specific long-term problems had arisen as regards the abolition of internal border controls.

As for the substantive grounds for the reimposition of internal border controls, the Commission concluded that 'from the information available, Member States have not abused the possibility to reintroduce border controls'. However, the Commission was critical of Member States' application of the *procedural* rules applicable to the reimposition of such controls. In particular, the timeframe for the Commission to give a view on the planned reimposition of controls was too short for the Commission to give the formal opinion which the Schengen Borders Code provided for. Also, Member States often did not supply sufficient information in order for it to assess whether the reimposition of border controls was justified. Therefore the Commission had not yet issued any opinions on the issue. It argued that Member States need to supply more information, as well as updates to the information already submitted, and intended to suggest the use of a standard form to this end.[53]

In the Commission's view, Member States had difficulty allocating resources to apply reimposed internal border controls effectively. Usually cooperation with neighbouring States had been positive, due to early consultation, coordination of planned measures, regular contacts and exchange of information. Operational cooperation between States had included joint risk assessments, joint checks and liaison officers.

As for the applicable law when internal border controls were reintroduced (Article 28 of the Schengen Borders Code), the Commission argued that the principle of proportionality applied, meaning that measures could only be taken if 'necessary for the public policy or internal security of the Member

[52] For more detail, see Annex I to the report. The 2010 report refers to the rules as they stood before the October 2013 amendment. For details on the reimposition of internal border controls before the adoption of the Code, see K Groenendijk, 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?'. (2004) 10 ELJ 150.

[53] Note that the subsequent amendment of the rules on the reimposition of internal border controls (see s. 3.4 below) does not provide for such a standard form.

States'. It argued that not all persons need to be checked at the internal border if internal border controls are reintroduced, and checks must be targeted on the reasons for the reintroduction of internal border controls, carried out proportionately and 'based on risk analysis and available intelligence'. Persons can only be refused entry for reasons linked to the reintroduction of internal border controls, and in particular, EU free movement law still governs the entry of EU citizens. The Commission took the view that the Schengen rules on stamping of documents and carriers' liability do not become applicable, even when internal border controls are reintroduced, and that the EU's external borders agency, Frontex, does not have any role as regards reimposed internal border controls.

As regards information for the public,[54] the Commission believed that the public has been 'sufficiently informed' about the reimposition of border controls in each case, and the provisions for confidentiality had only been used once.

Overall, the Commission concluded that the then-current legal framework applicable to the temporary reimposition of internal border controls was 'sufficient', and called for Member States to give it more information on time, reiterating also the points made above about police checks and barriers to traffic flow.

3.3 Case law on abolition of internal controls

The Court of Justice has delivered two judgments on the interpretation of the rules on the abolition of controls in the Schengen Borders Code, which respectively criticised the French legislation concerned,[55] and then upheld the relevant Dutch legislation.[56] These two judgments therefore give a broad indication of what is – and is not – permissible under the current rules regulating the abolition of internal controls.

First of all, the issue in the *Melki and Abdeli* judgment was a French police check within a border zone, which resulted in the apprehension of two unlawfully present Algerian citizens. The Court of Justice noted that the checks concerned were not carried out at the border, so were not prohibited by Article 20 of the Schengen Borders Code. The objective of the checks concerned was not border control (which would have been prohibited by Article 21(a)(i) of the Schengen Borders Code), but rather to check the national obligation

[54] Art. 30, Schengen Borders Code.
[55] Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667.
[56] Case C-278/12 PPU *Adil*, judgment of 19 July 2012, not yet reported.

to hold or carry papers or documents (which was permitted by Article 21(c) of the Code).

Next, the national rules did not breach the rules in the Schengen Borders Code merely because those rules only applied to border zones. However, those national rules contained 'neither further details nor limitations on the power thus conferred – in particular in relation to the intensity and frequency of the controls which may be carried out', for the purpose of preventing those checks from infringing the rules of the Code. A national rule which gave the police the power to carry out identity checks specifically in border regions, where those powers did 'not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order', had to 'provide the necessary framework for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power', so that the exercise of that power in practice did not have an effect equivalent to border checks, and therefore breach Article 21(a) of the Code.

The Commission's 2010 report on the application of the rules in the Schengen Borders Code on reimposition of internal border controls took particular account of the *Melki and Abdeli* judgment. In the report, the Commission called upon Member States to amend their laws granting specific competence on police in border zones to ensure that the Code was complied with correctly.

In the subsequent *Adil* judgment, the Court of Justice ruled on the compatibility with the Schengen Borders Code of a Dutch law which resulted in the apprehension of a purported Afghan national, following police checks on a bus in the border zone. Again, the Court of Justice started out by observing that the checks in question were not carried out at the internal border as such, and so were not prohibited by Article 20 of the Schengen Borders Code, but were carried out on the territory, so fell within the scope of Article 21 of the Code. Next, again the checks carried out in this case did not have border control as an objective, since they did not aim to regulate the authorisation of *entry*, but rather sought 'to establish the identity, nationality and/or residence status of the person stopped in order, principally, to combat illegal *residence*',[57] even though there were special rules in national law as regards carrying out such checks in border zones as compared to the rest of the territory.

[57] Emphasis added.

The absence of a reference to combating unauthorised residence in Article 21(a) of the Schengen Borders Code was irrelevant, since the list of rules specifying when the exercise of police powers is not equivalent to border checks was not exhaustive ('in particular'). Moreover, both the Treaty and the Code still provided for Member States to retain powers 'with regard to the maintenance of law and order and the safeguarding of internal security.'

Also, the national rules did not breach Article 21(a) of the Schengen Borders Code just because they were limited in scope to border areas. The crucial question was whether there was a legal framework in place to ensure that the exercise of those controls in practice did not have an effect equivalent to border checks. Nor was it problematic that the national law did not require 'reasonable suspicion of illegal residence, in contrast to the identity checks for that purpose carried out in the remainder of the national territory.' It was sufficient that such checks were being carried out on the basis of 'general police information and experience', as set out in Article 21(a)(ii) of the Code.

Having said that, the Court insisted that the greater the possibility of an 'equivalent effect' to internal border controls, evidenced by the objective of the checks in a border zone, the territorial scope of these checks and from the creation of a distinction between those checks and the checks carried out in the rest of national territory, 'the greater the need for 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'. Applying that principle to the Dutch law: the objective of the checks was distinct from border controls; the checks were based on 'general police information and experience regarding illegal residence after the crossing of a border'; the checks were clearly distinct from systematic checks at the external borders, since they were carried out only for a limited period and not on all vehicles; and they were carried out on the basis of spot-checks, since vehicles were stopped based on sampling or profiling.

The Court of Justice's judgments have provided contrary examples of police checks which were, in turn, incompatible and compatible with the rules of the Schengen Borders Code. It emerges from the case law that police checks can be applied uniformly throughout national territory (in which case Article 21 of the Schengen Borders Code is unlikely to be breached), or that specific rules can apply to police checks at internal border zones. In the latter case, to avoid a breach of the Schengen Borders Code, the specific rules must be

accompanied by detailed safeguards, in particular to ensure that any checks are selective and targeted. The checks can focus specifically on irregular residence, which in practice will often entail detecting those who have crossed an internal border without authorisation, given that such checks will take place in the border zone under specific rules. So the requirement that such checks must be selective and targeted is the only feature that distinguishes them in practice from checks at internal borders.

3.4 October 2013 changes to the rules

As noted already, in September 2011, prompted in particular by calls from then-President Sarkozy of France and then-Prime Minister Berlusconi of Italy, and subsequently by the full European Council, the Commission proposed legislation which would change the rules in the Schengen Borders Code regarding the re-imposition of border checks.[58] The Council and the European Parliament initially separately agreed on their preferred version of this proposal, and after difficult negotiations, reached joint agreement on the legislation concerned in May 2013. This legislation was then adopted formally in October 2013,[59] and will enter into force on 26 November 2013. The text of the new rules – as compared to the pre-existing rules – can be found in an appendix to this report.

The controversy between the European Parliament and the Council was partly due to an institutional dispute about the parallel proposal for a Regulation relating to the Schengen evaluation mechanism (also agreed in May 2013, and adopted in October 2013), where the European Parliament argued that the Danish Presidency of the Council had failed to observe the 'Community method' when it changed the 'legal base' of this proposal from Article 77 of the Treaty on the Functioning of the European Union (TFEU), which pro-

[58] COM (2011) 560, 16 Sep. 2011. See also the parallel revised proposal to amend the rules concerning the 'Schengen evaluation mechanism', a peer-review system for assessing Schengen States' implementation of the Schengen rules (COM (2011) 559, 16 Sep. 2011), and the Commission's communication on Schengen governance (COM (2011) 561, 16 Sep. 2011). For more on the political background, see: the EPC/Notre Europe Policy Paper by Y. Pascaou, 'Schengen and solidarity: the fragile balance between mutual trust and mistrust', online at: <http://www.epc.eu/documents/uploads/pub_2784_schengen_and_solidarity.pdf>; H. Brady, 'Saving Schengen: How to protect passport-free travel in Europe', published by the Centre for European Reform, online at: http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/rp_041_km-6422.pdf; and S. Carrera and others, 'A race against solidarity: The Schengen regime and the Franco-Italian affair', Centre for European Policy Studies, April 2011, online at: < http://www.ceps.be/book/race-against-solidarity-schengen-regime-and-franco-italian-affair>. .

[59] Reg. 1051/2013, OJ 2013 L 295/1.

vides for the ordinary legislative procedure (equal power for the European Parliament and the Council) to Article 70 of that Treaty, which gives the European Parliament no formal role at all. It has been argued that the Council made a legal error here, since Article 70 TFEU was designed to provide for the adoption of measures concerning the evaluation of policies which the EU has not yet harmonised, whereas the EU has extensively harmonised rules on external border controls, the subject-matter of Article 77 TFEU.[60] The controversy was also due in part to disagreements about the main proposal to amend the borders code, in particular the limited role for the EU institutions as regards the reintroduction of border controls and the information available to the European Parliament. Indeed, the European Parliament was so concerned about these developments that it blocked a number of other Justice and Home Affairs legislative proposals until it reached a satisfactory agreement with the Council on the borders control proposals (this was known in practice as the 'Schengen freeze').[61]

The positions of the three institutions (Commission, European Parliament and Council), and then the final agreement on the text (now formally adopted), will be considered in turn.

3.4.1 Commission proposal

The Commission's proposal to amend the Schengen Borders Code[62] would have replaced most of the rules in Title III of the Code, which (as noted above) deals with the abolition of internal border checks and the procedure for reintroducing them temporarily.[63] This proposal attracted great controversy, mainly because the Commission proposed to shift most of the power to decide on reimposition of border controls from Member States to itself.

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[60] See S. Carrera (2011), An Assessment of the Commission's 2011 Schengen Governance Package: preventing abuse by EU member states of freedom of movement?" CEPS Liberty and Security Series, Centre for European
Policy Studies, Brussels. The adopted text of the measure amending the Schengen evaluation system is Council Reg. 1053/2013, OJ 2013 L 295/27.

[61] For further details, see the EPC/Notre Europe Policy Paper by Y. Pascaou, 'Schengen and solidarity: the fragile balance between mutual trust and mistrust', online at: <http://www.epc.eu/documents/uploads/pub_2784_schengen_and_solidarity.pdf>. See further S Carrera, N Hernanz and J Parkin, Local and Regional Authorities and the EU's External Borders: A Multi-Level Governance Assessment of Schengen Governance and 'Smart Borders', report for the Committee of the Regions and the Centre for European Policy Studies, online at: <http://cor.europa.eu/en/documentation/studies/Documents/LRAs_and_EU_external_borders/LRAs_and_EU_external_borders.pdf>.

[62] COM (2011) 560, 16 Sep. 2011.

[63] Arts. 23-27, 29 and 30 of the Schengen Borders Code would have been replaced. There would have been new Arts. 23a and 33a of the Code.

First of all, the general rules in Article 23 of the Code would have referred to a possible threat 'at the Union or national level', specified that border control could be re-introduced in 'all or specific parts' of the internal borders, and provided for it to be re-introduced in 'one or several Member States'.[64] Next, a new provision would have confirmed that internal border control could 'only be reintroduced' pursuant to the rules in the Schengen Borders Code, and would have required that the criteria set in the new Article 23a (see below) 'must be taken into account' every time the reimposition of internal border controls 'is contemplated'.[65]

Next, it would still have been possible to prolong the reimposition of internal border controls, now subject also to the criteria set out in the new Article 23a.[66] A new clause would have set an overall time limit of six months on the reimposition of internal border controls, although this limit could have been extended in cases of 'persistent serious deficiencies' (see discussion below).[67]

The proposed new Article 23a of the Schengen Borders Code would have set out detailed criteria for assessing the necessity of the reimposition of internal border controls. Before reimposing such controls, the Commission or the Member State concerned would have to 'assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security at the Union or national level, and shall assess the proportionality of the measure to that threat'. This assessment would have been 'based on' the information submitted by the Member State(s) concerned and also any other relevant information, including any information which the Commission obtained from any EU agencies or following an inspection visit.

The assessment of whether to introduce internal border controls would have had to take into account, 'in particular': 'the likely impact of any threats to public policy or internal security at the Union or national level, including following terrorist incidents or threats as well as threats posed by organised crime'; possible 'technical or financial support measures which could be or have been resorted to at the national and/or European level, including assistance by Union bodies…and the extent to which such measures are likely to adequately remedy the threats to public policy or internal security at the Union or national level'; 'the current and likely future impact of any serious deficiencies related to external border control or return procedures identi-

[64] Proposed revised Art. 23(1), Schengen Borders Code.
[65] Proposed new Art. 23(2), Schengen Borders Code.
[66] Proposed new Art. 23(3), Schengen Borders Code (replacing Art. 23(2) of the Code).
[67] Proposed new Art. 23(4), Schengen Borders Code.

fied by Schengen evaluations in accordance with' the proposed Regulation on Schengen evaluations; and 'the likely impact of such a measure on free movement within' the Schengen area.

The proposed revised Article 24 of the Schengen Borders Code would, as noted already, have shifted the decision-making power in such cases from Member States to the Commission. Member States would have had to make a *request* to the Commission to re-introduce controls, in principle six weeks before their planned re-imposition. However, this period could have been shorter if the circumstances justified it. As compared to the rules being amended, the request would have had to include 'all relevant data', and it could have been made by more than one Member State, acting jointly.[68] The Member State concerned would also have to had to submit this information to the European Parliament.[69]

The rules providing for the Commission to issue an opinion (possibly) and for consultation with other Member States and the Commission would have been dropped. Instead, the new rules would have simply set out a process for the Commission to decide on whether internal border controls could be reimposed, acting in accordance with a procedure to adopt 'implementing acts'.[70] This procedure would have meant that a draft Commission decision could have been blocked by a qualified majority of Member States, but the European Parliament would have had no role. The Commission would also have had the sole power to decide on whether to prolong internal border controls.[71] In cases of 'urgency', where the circumstances leading to a need to prolong border controls were not known until ten days before such controls would expire, a special urgent procedure would have applied.[72]

The proposed revised Article 25 of the Schengen Borders Code would have amended the rules on 'urgent action' to reimpose internal border controls – which would now have been referred to as 'immediate action' instead. The grounds for imposing controls in such cases would have been the same as the

[68] Proposed revised Art. 24(1), Schengen Borders Code.
[69] Proposed new Art. 24(2), Schengen Borders Code.
[70] Proposed new Art. 24(3), Schengen Borders Code, in conjunction with a new Art. 33a of the Code.
[71] Proposed new Art. 24(4), Schengen Borders Code.
[72] Proposed new Art. 24(5), Schengen Borders Code, in conjunction with a new Art. 33a(3) of the Code.

general grounds to reimpose controls,[73] and the validity of the decision would have been limited to five days.[74]

A Member State invoking this clause would have had to inform and supply information to other Member States and the Commission 'at the same time' that it took the decision, and the Commission could have consulted with other Member States as soon as it had received such notification.[75] Again, the decision to prolong controls in such cases would now have been in the hands of the Commission, by means of implementing measures, and the urgency procedure would have applied in all such cases.[76]

The proposed Article 26 of the Schengen Borders Code would have been a wholly new provision,[77] which would have addressed 'cases of persistent serious deficiencies'. If the Commission had found such deficiencies 'related to external border control or return procedures' pursuant to procedures set out in the parallel proposal for a Regulation on Schengen evaluation, and if such deficiencies 'constitute a serious threat to public policy or internal security at the Union or national level', internal border control could have been reimposed for six months. If those deficiencies were not remedied, such controls could have been extended for up to three further periods of six months.[78]

The sole power to make decisions to reimpose or prolong border controls in such cases would again have been granted to the Commission, by means of implementing measures.[79] An urgent procedure would again have applied where the circumstances leading to a need to prolong border controls were not known until ten days before such controls would have expired.[80]

The proposed revised Article 27 of the Schengen Borders Code would have been replaced by a general requirement upon either the Commission or the

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[73] Namely 'a serious threat to public policy or internal security', rather than (as before) 'considerations of public policy or internal security in a Member State'.

[74] Proposed revised Art. 25(1), Schengen Borders Code.

[75] Proposed revised Art. 25(2), Schengen Borders Code.

[76] Proposed new Art. 25(3), Schengen Borders Code.

[77] Art. 26 of the Schengen Borders Code, which contains procedural rules on prolongation of controls, would have been dropped entirely.

[78] Proposed revised Art. 26(1), Schengen Borders Code.

[79] Proposed revised Art. 26(2) and (3), Schengen Borders Code, in conjunction with a new Art. 33a of the Code.

[80] Proposed revised Art. 26(4), Schengen Borders Code, in conjunction with a new Art. 33a(3) of the Code.

Member State concerned to notify the European Parliament 'of any reasons which might trigger the application of' the rules on reimposition of internal border controls. This would have replaced the existing obligation to inform the European Parliament after such controls were reimposed.

Next, the proposed revised Article 29 of the Schengen Borders Code would now have included a precise deadline (four weeks) for a Member State which had reimposed internal border controls to report to the European Parliament, the Council and the Commission.

Finally, the proposed revised Article 30 would have required the Commission, rather than the Member State concerned, to inform the public about the reimposition of internal border control, and would have specified that the public would have had to be told the start and end date of such controls.

3.4.2 Council position

The Council's preferred text[81] would first of all have included a new clause, Article 19A of the Schengen Borders Code, which would have given the power to the Commission to recommend specific measures to a Member State (in particular the use of certain provisions of the Frontex Regulation),[82] if a Schengen evaluation revealed that there were 'serious difficulties or deficiencies in the carrying out of external border control'.[83] These recommendations would be adopted in the form of implementing measures; the Council text would have provided for Member States to block draft recommendations by a simple majority.[84]

The Commission would have had to inform a committee of Member States' officials 'on a regular basis on the progress in the implementation of' such measures, 'and on its impact on the difficulties or deficiencies identified'. It would also have had to inform the European Parliament and the Council, 'as appropriate'.[85]

Furthermore, the Commission would have had the power to trigger a new procedure to deal with serious deficiencies by a Member State (see Article 26, discussed below), if it had already concluded that this Member State 'was se-

[81] For the Council's version, see the consolidated text of the planned amendments to the Code set out in: <http://www.statewatch.org/analyses/no-180-schengen-border-code.pdf>, in particular Arts. 19A, 23-30 and 33A.

[82] On Frontex, see s. 4.3 below.

[83] Proposed new Art. 19A(1), Schengen Borders Code.

[84] Proposed new Art. 33A(2), Schengen Borders Code.

[85] Proposed new Art. 19A(2), Schengen Borders Code.

riously neglecting its obligations' and had then found three months later that this situation still persisted.[86] However, these rules would have been 'without prejudice' to the possibility of the Council adopting measures pursuant to Article 78(3) of the Treaty on the Functioning of the European Union 'in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries.[87]

As for the power to reimpose border controls, first of all the Council text would have rejected a number of the amendments proposed by the Commission to Article 23 of the Schengen Borders Code. In particular, the Council would have rejected any reference to a possible threat 'at the Union or national level', or the possibility of controls being re-introduced in 'one or several Member States', although the Council could agree to specify that border control could be re-introduced in 'all or specific parts' of the internal borders.[88] The Council could also agree to the new clauses clarifying the grounds and procedures for reimposing internal border controls, and specifying criteria and time limits for the prolongation of such controls.[89]

Next, the Council would have only partly accepted the Commission's proposed new Article 23A, setting out detailed criteria for assessing the necessity of the reimposition of internal border controls. It would have dropped all references to a threat at the 'Union level', and made clear that the same criteria would apply to prolonging controls. But the reference to basing this decision on information would have been dropped, and the assessment would only have had to be based on the criteria of, 'in particular', 'the likely impact of any threats to public policy or internal security in the Member State concerned, including following terrorist incidents or threats as well as threats posed by organised crime' and 'the likely impact of such a measure on free movement within' the Schengen area. The other specific criteria proposed by the Commission would only have been relevant in cases of serious deficiencies (proposed new Article 26A of the Schengen Borders Code), and so are discussed further below.

As for the criteria and procedure to reimpose internal border controls, the Council's preferred version of Article 24 of the Schengen Borders Code

[86] Proposed new Art. 19A(3), Schengen Borders Code.

[87] Proposed new Art. 19A(4), Schengen Borders Code. Art. 78(3) TFEU provides that such measures can be adopted by a qualified majority vote of the Council, on a proposal from the Commission and after consulting the European Parliament.

[88] Proposed revised Art. 23(1), Schengen Borders Code.

[89] Proposed revised Art. 23(2) to (4), Schengen Borders Code.

would have left such decisions entirely in the hands of Member States. The time period to submit information in advance about the planned reimposition of controls would have been specified at four weeks, not six weeks as the Commission had proposed, although again this period could have been shorter if the circumstances justified it. The Council would also have accepted a requirement to submit 'all relevant data', and the possibility of a reimposition of controls by more than one Member State, acting jointly. Its version would also have added the possibility for the Commission to request additional information, and for Member States to classify some of the information.[90] The Council would also have accepted the obligation for the Member State concerned to submit this information to the European Parliament; the information would have had to be submitted to the Council as well.[91]

In the absence of any power for the Commission to decide on whether internal border controls could be reimposed, the rules providing for the Commission to issue an opinion (possibly) and for consultation with other Member States and the Commission would have been retained. However, these rules would have been revised to add the possibility for other Member States to issue an opinion on the planned reintroduction of internal border controls, and to change the time limit for consultation (at least ten days before the planned reintroduction of internal border controls, instead of fifteen days previously).[92]

Next, the rules in Article 25 of the Schengen Borders Code would have been revised, as the Commission had proposed, to rename 'urgent action' to reimpose internal border controls as 'immediate action', and to align the grounds for such reimposition with the grounds for reimposing internal border controls generally. The Council would also have accepted a time limit on such urgent reimposition – although it would be ten days, not five days as the Commission had proposed.[93] Furthermore, the Council would have accepted the obligation for a Member State to inform and supply information to other Member States and the Commission 'at the same time' that it took the decision, and the Commission could have consulted with other Member States as soon as it received such notification.[94]

However, the decision to prolong controls in such cases would have been left in the hands of each Member State, which would have to 'take into account'

[90] Proposed revised Art. 24(1), Schengen Borders Code.
[91] Proposed new Art. 24(2), Schengen Borders Code.
[92] Proposed revised Art. 24(3) to (5), Schengen Borders Code.
[93] Proposed revised Art. 25(1), Schengen Borders Code.
[94] Proposed revised Art. 25(2), Schengen Borders Code.

the criteria set out in Article 23A, 'including an updated assessment of the necessity and the proportionality of the measure', as well as any new elements. The general rules on an opinion by the Commission and consultation of other Member States would now apply, and the consultation would have had to take place as soon as possible after prolonging controls.[95] However, there would have been a total time limit of prolongation of two months.[96]

Article 26 of the Council's preferred version of the Schengen Borders Code would have accepted the idea of a wholly new provision to apply in 'cases of persistent serious difficulties or deficiencies', although reimposition of internal border controls in such cases could only have applied 'in exceptional circumstances'.[97] Otherwise the criteria and time limits would be the same as proposed by the Commission.[98] However, in contrast to the Commission's proposal, it would apparently have been up to Member States to decide on the reimposition of controls.

The Council would have had the power, 'as a last resort and as a measure to protect the common interests within' the Schengen area, and 'where all other measures, in particular those referred to in Article 19A(1), are incapable of effectively mitigating the serious threat identified', to recommend that one or more specific Member States should reimpose internal border controls at some or all of its (or their) internal borders. Member States could have requested the Commission to submit such a recommendation to the Council.[99] This recommendation would have had to indicate the 'main elements' set out in Article 24(1) of the Schengen Borders Code (see above), and the Council could have recommended a prolongation subject to the same procedure. Any Member State imposing controls in such circumstances would have had to notify the Commission, the European Parliament and the other Member States.

If there were 'duly justified grounds of urgency', because the circumstances giving rise to the need to prolong border control at internal borders were not known until less than ten days before the end of the previous period of reimposed controls, period, the Commission could have adopted 'any neces-

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[95] Proposed new Art. 25(3), Schengen Borders Code.

[96] Proposed new Art. 25(3a), Schengen Borders Code.

97 Proposed new Art. 26(1), Schengen Borders Code.

[98] The idea of widening the grounds for reimposition of controls as compared to the Commission proposal was not accepted: see the EPC/Notre Europe Policy Paper by Y. Pascaou, 'Schengen and solidarity: the fragile balance between mutual trust and mistrust', online at: <http://www.epc.eu/documents/uploads/pub_2784_schengen_and_solidarity.pdf>.

[99] Proposed new Art. 26(2), Schengen Borders Code.

sary recommendations' straight away. However, in that case, the Commission would have had to make a recommendation to the Council within two weeks.[100]

The new rule would have been 'without prejudice' to reimposition of internal border controls in other cases provided for in the Schengen Borders Code, or to measures which the Council could adopt pursuant to Article 78(3) of the Treaty on the Functioning of the European Union in the event of an 'emergency situation characterised by a sudden inflow of nationals of third countries'.[101]

Article 26A of the Council's preferred version of the Schengen Borders Code would have required the Council to consider, before making a recommendation to reimpose internal border controls because of serious deficiencies in external border controls, the same criteria which the Commission proposed would have had to apply as regards the reimposition of internal border controls in all cases.[102] Before making its proposal for a Council recommendation, the Commission would have had the power to gather information from any EU agencies or following an inspection visit.[103]

Article 27 of the Council's preferred version of the Schengen Borders Code would have accepted the Commission's proposal to require the Commission or the Member State concerned to notify the European Parliament 'of any reasons which might trigger the application of' the rules on reimposition of internal border controls. The Council would also have had to be informed.

Similarly, Article 29 of the Council's preferred version of the Schengen Borders Code would have accepted the Commission's proposal to include a precise deadline (four weeks) for a Member State which had reimposed internal border controls to report to the European Parliament, the Council and the Commission.

Article 30 of the Council's preferred version of the Schengen Borders Code would have left it to the Member State concerned to inform the public about the reimposition of internal border controls, and would have agreed to specify that the public would have to be told the start and end date of such controls.

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[100] Proposed new Art. 26(3), Schengen Borders Code.
[101] Proposed new Art. 26(4a) and (4b), Schengen Borders Code. On Art. 78 TFEU, see above.
[102] Proposed new Art. 26A(1), Schengen Borders Code.
[103] Proposed new Art. 26A(2), Schengen Borders Code.

3.4.3 European Parliament position

The European Parliament would have first of all amended Article 23 of the Schengen Borders Code, to specify that the threats in question would have had to be 'imminent' before internal border controls could have been reimposed and that border controls could only have been reimposed as a 'last resort'.[104] Also, the European Parliament would have strengthened the binding nature of the criteria set out in the proposed new Article 23a of the Code ('shall apply' instead of 'taken into account').

Next, the European Parliament would have accepted the Council's position that the criteria for reimposing internal border checks set out in Article 23a of the Schengen Borders Code would apply differently depending on the grounds for reimposing the checks. The European Parliament would also have amended this clause, to give the Commission power to 'issue guidelines on the reintroduction of control at internal borders…in order to ensure coherent implementation of the Schengen rules'. These guidelines would have had to 'provide clear indicators to facilitate the assessment of threats to public policy and internal security.' The Commission would also have been given the power to 'issue an opinion on ex-post evaluation of the temporary reintroduction of border control'.

Next, the European Parliament would not have accepted that the Commission should be given power to decide on the reintroduction of internal border controls or the prolongation of such controls, pursuant to Article 24 of the Schengen Borders Code. Instead, the European Parliament (like the Council) wanted to give the Commission the power to request more information, and to retain the rules on the Commission issuing an opinion and on consultation on the planned reimposition of controls.

As for the immediate reimposition of internal border checks (Article 25 of the Schengen Borders Code), the European Parliament, like the Council, would have set a limit of ten days, rather than five, for the initial reimposition of internal border checks. Unlike the Council, it would not have accepted the new clause on the Commission's consultation of Member States. But otherwise the European Parliament agreed with the Council, wanting to leave the

[104] For the European Parliament's version of the planned amendments to the Code, see: <http://www.europarl.europa.eu/document/activities/cont/201205/20120507ATT44593/20120507ATT44593EN.pdf >.

power to prolong such internal border checks with Member States subject to the same conditions and final time limit set out in the Council text.[105]

Next, in cases of serious deficiencies at the external borders (Article 26 of the Schengen Borders Code), the European Parliament would have provided for the Commission to issue a recommendation, with the European Parliament and the Council giving their opinions within one month, after which the Commission could decide on the reimposition of internal border controls. The same rules would apply in the event of prolongation, and the European Parliament also accepted that the Commission could decide to prolong internal border controls in the event of urgency.

Finally, the European Parliament would have amended the proposal to revise Article 29 of the Schengen Borders Code,[106] in order to explain the context of the reporting process ('to enhance the dialogue' between the EU institutions), to refer specifically to the principles of transparency and accountability, to require an assessment of proportionality, to require the Commission to make an annual report on reimposition of internal border controls, and to invite the Member States which have reimposed internal border controls to the meeting where the annual report is discussed.

Taken as a whole, the European Parliament and the Council largely agreed on the revision of the *previously existing* rules in the Schengen Borders Code relating to the reimposition of internal border controls. In particular, both institutions agreed that the Commission should not obtain the power to decide upon or prolong the reimposition of internal border controls as regards those rules. They also agreed that the pre-existing provisions on Commission opinions and advance consultation should be retained. A crucial difference was, however, the relative power of the Commission and the Member States as regards the new 'serious deficiencies' ground for imposing internal border controls.

3.4.4 Adopted text

First of all, the European Parliament accepted (without amendment) the Council's proposed new Article 19a of the Schengen Borders Code, which

[105] There was one difference between the two institutions: the Council text included a time limit of twenty days upon each prolongation of controls, but the European Parliament's text included no time limit in such cases.

[106] The European Parliament accepted the proposed revisions of Arts. 27 and 30 of the Code, and the proposed new Art. 33a(3) of the Code, without amendment. Unlike the Council, it would not have inserted a new Article 19A into the Code.

(as discussed above) sets out a power for the Commission to make recommendations to Member States to address serious deficiencies carrying out external border controls which are identified in a Schengen evaluation. The European Parliament also accepted that Member States can block draft recommendations by a simple majority. However, the Council agreed to drop cross-references to the power to adopt emergency measures, as set out in Article 78 of the Treaty on European Union.[107]

The basic criteria for reimposing border controls have been strengthened, as the European Parliament had wished, by providing that the reintroduction of such controls must be a 'last resort' in all cases.[108] There is no provision for the Commission to issue guidance on these issues, however. Otherwise the European Parliament accepted the Council's text on the criteria and procedure to reintroduce border controls in ordinary cases, with the addition of a clause requiring classified documents which justify the reimposition of controls to be available to the European Parliament,[109] an obligation for the Commission to give an opinion on the planned reintroduction of border controls if it 'has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders, or if it considers that a consultation on some aspect of the notification would be appropriate',[110] the possibility of 'joint meetings…especially with those [Member States] directly affected by a reintroduction of border control',[111] and a requirement for the Commission to inform the European Parliament without delay of Member States' notifications of the urgent reintroduction of internal border controls.[112]

As for the new 'serious deficiencies' ground for reimposing border controls, the two institutions compromised, with the key change from the Council's preferred text being a requirement for the Council to act on a proposal from the Commission when it makes a recommendation to Member States.[113] But the Commission is not able to take the ultimate decision on the reintroduction of border controls. Crucially, though, it is still not clear if Member States can *only* reimpose border controls on this ground following such a Council recommendation, rather than on their own initiative. But it is clear that a Member State is *not* obliged to follow the Council's recommendation to re-

[107] In particular, Arts. 19A(4) and 26(4b) of the Code in the Council's draft were dropped.
[108] Revised Arts. 23(2) and 23a(1) of the Code.
[109] Revised Art. 24(2) of the Code.
[110] Revised Art. 24(4), second sub-paragraph, of the Code.
[111] Revised Art. 24(5) of the Code.
[112] Revised Art. 25(5) of the Code.
[113] Revised Art. 26(1) of the Code. The final text also states that the threat to public policy or internal security might affect only 'parts of' the Schengen area.

introduce border controls, for there is also a new rule setting out a procedure which applies if a Member State does not follow the Council's recommendation: it must report to the Commission in writing with the reasons for its decision, and the Commission must then produce a report assessing those reasons and the effect of that Member State's decision upon the 'common interest'.[114]

The provisions on the content of the report which a Member State must produce after reimposing border controls were strengthened, in part reflecting the European Parliament's wishes, to add that the Member State must give an 'initial assessment and the respect of the criteria referred to in Articles 23a, 25 and 26a…, the practical cooperation with neighbouring Member States, [and] the resulting impact on the free movement of persons,… including an ex-post assessment of the proportionality of the reintroduction of border control'.[115] These provisions were also amended to provide for a possible Commission opinion on these issues, as the European Parliament had wished, and to require the Commission to produce an annual report on the Schengen system, including a list of Member States' reimpositions of border controls. Where border control is reimposed, both the Commission and the Member State concerned must provide information to the public, in a 'coordinated manner'.[116] Finally, a new Article 37a of the Schengen Borders Code makes a cross-reference to the separate Regulation on the rules for Schengen evaluations and the essential features of that Regulation. This means that fundamental changes to the text of that Regulation would also entail amendments to the text of the Schengen Borders Code, and so will not take place without the European Parliament's approval pursuant to the ordinary legislative procedure.

The separate measure amending the rules on the Schengen evaluation system will apply both to evaluations of existing Schengen States and to evaluations to assess the readiness of non-Schengen States to join the Schengen system. The new rules give the Commission an enhanced role, responsible for 'overall coordination' as regards 'establishing annual and multiannual evaluation programmes, drafting questionnaires and setting schedules of visits, conducting visits and drafting evaluation reports and recommendations', as well as ensuring 'the follow-up and monitoring of the evaluation reports and recommendations'.[117] Frontex, the EU's border agency, will also have a

[114] Revised Art. 26(3) of the Code.

[115] Revised Art. 29 of the Code.

[116] Revised Art. 30 of the Code.

[117] Art. 3, evaluation Regulation. For details of the programmes, see Arts. 5 and 6; on questionnaires, see Art. 9; on the visits and evaluations, see Arts. 10-15.

role producing risk analyses.[118] However, ultimately any recommendations to Member States will be adopted by the Council. Member States will have three months to reply to any recommendations to address deficiencies (or only one month, in cases of 'serious neglect'), and will also have to report regularly on the implementation of this action plan until the deficiencies have been addressed. The Commission will evaluate these reports, and ultimately has the power to recommend the possible reimposition of internal border controls pursuant to the criteria in the Borders Code if it deems that the relevant criteria (discussed above) are satisfied.

3.5 Conclusions

Ultimately, the procedures for Member States to reintroduce internal border controls on the *pre-existing* grounds of public policy, et al have not been changed very much by the new revisions to the Schengen Borders Code. The most significant changes are: the requirement that such measures must be a 'last resort', which suggests a stronger application of the proportionality requirement,[119] the requirement for the Commission to give its opinion on the planned reintroduction in some cases; and the more detailed rules on criteria and time limits.

What of the new 'serious deficiencies' ground for reimposing border controls? While this is widely seen as a significant new power for Member States, it is not clear whether they can exercise such power without a prior recommendation from the Council, which will clearly have to be based on a prior recommendation from the Commission. It should not be forgotten that the Commission now has powers to issue recommendations beforehand to a Member State to 'fix' the deficiencies in question, and it might be argued that even if a Member State does have the unilateral power to reintroduce border controls on this ground, it would be infringing the 'last resort' requirement if it does not give the Member State whose border controls are deficient an effective opportunity to try and solve the problems,[120] particularly when the Commission has made recommendations to this end and there are signs that the 'deficient' Member State is acting or will shortly act upon those recommendations. It has been argued that this new ground for reimposing border

[118] Art. 7, evaluation Regulation. On other EU bodies, see Art. 8.

[119] See by analogy the Court of Justice's interpretation of a 'last resort' requirement as regards the authorisation of enhanced cooperation in Joined Cases C-274/11 and C-295/11 Spain and Italy v Council, judgment of 16 April 2013.

[120] See again by analogy the judgment in Spain and Italy v Council (ibid).

controls is in tension with the EU principles of solidarity, fair sharing of responsibility and loyal cooperation.[121]

In this light, and in light of the 'exceptional' nature of the reintroduction of internal border controls in such circumstances, the new rules should be interpreted to mean that Member States can *only* reimpose border controls on the 'serious deficiencies' ground following a Council recommendation (which must follow a Commission recommendation). Moreover, even where such recommendations have been issued, the reintroduction of controls will not be justified unless the Council and Commission have clearly demonstrated that there is no significant doubt that the criteria for such reintroduction are satisfied, and that all relevant procedural steps have been taken. Any Member State accepting such recommendations and reintroducing controls must also act in compliance with any national law which regulates the government's decision-making. An alleged failure to comply with these obligations could be the subject of a legal challenge to any Member State's decision to reintroduce internal border controls on this basis.

The accountability of Member States *after* they reintroduce border controls has been significantly enhanced, in particular by the more detailed criteria that Member States' reports on such reintroduction have to satisfy, the possibility of a Commission opinion on those reports, and the requirement for the Commission to produce annual reports on the Schengen system, which will list such reintroductions of border controls. The Commission's suggestion (in its 2010 report) that there should be a standard form for supplying information about the planned reimposition of border controls should have been followed up, as this might have helped to fill the information gap that the Commission complained of in that report. Also, the European Parliament's proposed amendments relating to guidelines on the reintroduction of internal border controls would have been a useful contribution to ensuring consistent practice.[122] Possibly the greater emphasis on accountability will deter Member States from reintroducing border controls except where the criteria to reintroduce them are clearly satisfied, although it should not be forgotten that any views expressed by the Commission or European Parliament on wheth-

[121] D Vanheule, J van Selm and C Boswell (2011), *The Implications of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of responsibility on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration,* Study for the the European Parliament's Committee on Civil Liberties, Justice and Home Affairs..

[122] However, recital 7 in the preamble to Reg. 1051/2013 refers to the possibility of the Commission adopting guidelines as regards the pre-existing grounds for reintroduction of border controls.

er those criteria are satisfied will not be binding. The only way to obtain a binding decision on whether the rules have actually been broken would be to obtain a ruling of the Court of Justice on that point, either pursuant to an infringement action brought by the Commission against the Member State concerned, or following a reference from a national court on this issue, by analogy with the case-law on the definition of internal border controls discussed in section 3.3 above. In any event, this case law leaves some leeway for Member States to control areas near the internal borders *without* this constituting a reimposition of internal border controls; and the legislation on this point has not been amended.

So overall, this new legislation is neither a fundamental increase in the power of Member States to reimpose internal border controls (as some Member States had apparently desired), or a fundamental shift of power to the Commission to control the process of reimposing border controls (as the Commission had proposed). Rather, it represents a compromise between these two extreme views, with a crucial issue that would determine whether the balance of power was shifting towards Member States or the Commission – namely whether Member States can reintroduce border controls in the absence of a Commission and Council recommendation on their own initiative, in the case of 'serious deficiencies' – not expressly clarified. Ultimately, if a Member State does attempt to judge for itself that there have been 'serious deficiencies' and impose border controls in the absence of a Commission and Council recommendation, it will likely face a legal challenge from the Commission and/or via the national courts which will resolve this issue.

One important aspect of the new rules is their likely impact upon local and regional authorities, which usually have an important role as regards local police forces who have competence to patrol areas near the internal and external borders.[123]

The new rules on reimposing border controls leave open the possibility that Member States could take a divergent approach on whether they wish to reintroduce border controls in response to another Member State's alleged 'serious deficiencies' as regards external border control. In other words, it is possible that some Member States may act upon a Council recommendation to reimpose border controls as regards the Member State concerned, whereas

[123] See further S Carrera, N Hernanz and J Parkin, Local and Regional Authorities and the EU's External Borders: A Multi-Level Governance Assessment of Schengen Governance and 'Smart Borders', report for the Committee of the Regions and the Centre for European Policy Studies, online at: <http://cor.europa.eu/en/documentation/studies/Documents/LRAs_and_EU_external_borders/LRAs_and_EU_external_borders.pdf>.

others will not. If this scenario transpires, the consequences could be chaotic, since it would be easy to circumvent the reimposed border controls by means of travelling to Member States which have not imposed them. There could be similarly difficult problems even if all Member States reintroduce such controls at the same time, if those Member States subsequently decide to end those controls at different times. It is therefore regrettable that the new rules did not ensure that all Member States would start and end the reimposition of border controls at the same time as regards a Member State which was responsible for 'serious deficiencies' as regards external border control.

Also, in light of the Commission's view on the interpretation of Article 28 of the Borders Code, it would have been useful to take the opportunity to clarify whether reimposing internal border controls means that the borders concerned must be treated exactly the same as external borders for the time being – or whether only a more limited form of border control (and if so, what) is possible, as the Commission argued in its report on this issue. Again, in the absence of clarification of this issue, divergences among different Member States are likely on this issue, with the result that travellers and Member States' officials will be confused about the legal position, and the controls reimposed by the Member States with a stricter interpretation of the rules could be circumvented by travellers who cross the borders of Member States with a more liberal interpretation.

4 The Schengen system and border control developments

The controversy over the application of border controls at the internal borders of the Schengen States needs to be seen within the broader context of the recent and ongoing development of the Schengen system.[124] The most significant developments concern the strengthening of external border controls, as discussed in detail in this chapter. However, there are also important developments – discussed in the following chapter – as regards visas, the freedom to travel and the expulsion of irregular migrants.

The main EU measures concerning external borders are: the Schengen Borders Code; the Schengen Information System (SIS); the EU's external border agency (known as 'Frontex'); a border surveillance system (known as 'Eurosur'); rules concerning maritime surveillance; and the creation of an entry-exit system (with the parallel creation of a registered travellers' system). Every one of these measures is the subject of recent or ongoing development, as is the broader reform of Schengen governance. Each of these developments will be considered in turn.[125]

4.1 Schengen Borders Code

As noted above, the Schengen Borders Code not only sets out the rules regarding the abolition of internal border controls, but also the main rules concerning the control of external borders,[126] 'without prejudice to' the rules of

[124] For further analysis of these issues, see chapter 5 of H. Brady, 'Saving Schengen: How to protect passport-free travel in Europe', published by the Centre for European Reform, online at: http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/rp_041_km-6422.pdf.

[125] There are a small number of other EU measures concerning external borders, namely: *Reg. 2252/2004 on biometric features in EU passports (OJ 2004 L 385/1), amended by Reg. 444/2009 (OJ 2009 L 142/1);* Reg. 1931/2006 on a regime for local border traffic on external borders (OJ 2006 L 405/1), amended by Reg. 1342/2011 (OJ 2011 L 347/41); and a Decision establishing the European Borders Fund (OJ 2007 L 144/22), amended by Decision 259/2013 (OJ 2013 L 82/6). A proposal for a new Borders Fund is currently being negotiated (COM (2011) 750, 15 Nov. 2011). On the border traffic rules, see Case C-254/11 Shomodi, judgment of 21 March 2013.

[126] The Code is set out in Reg. 562/2006 on a Code for crossing of borders by persons (OJ 2006 L 105/1), as amended in particular by Reg. 296/2008 (OJ 2008 L 97/60) and Reg. 81/2009, regarding use of the Visa Information System (OJ 2009 L 35/56). For judicial interpretation of the external borders provisions of the Code, see: *Joined Cases C-261/08 and C-348/08 Zurita Garcia and Choque Cabrera [2009] ECR I-10143; Case C-430/10 Gaydarov [2011] ECR I-11637; Case C-606/10* Association Nationale d'Assistance aux Frontières pour les Etrangers, *judgment of 14 June 2012, not yet reported; and Case C-23/12 Zakaria, judgment of 17 Jan. 2013.*

EU free movement law and 'the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.[127] The Code is supplemented by a practical handbook for border guards.[128] It has recently been amended, in order to clarify a number of issues; these new amendments are discussed separately below.

According to the Schengen Borders Code, external borders must be crossed at official points during official hours,[129] although derogations are permitted, subject to certain conditions, for pleasure boating or coastal fishing, seamen, individuals or groups where there is a 'requirement of a special nature', or individuals or groups 'in the event of an unforeseen emergency situation'.[130] Member States must impose penalties for breach of the obligation to cross at official points; these penalties shall be 'effective, proportionate and dissuasive',[131] but this obligation is 'without prejudice to . . . [Member States'] international protection obligations'.[132]

The key provision of the Schengen Borders Code sets out the conditions for entry for short-term stays (three months within a six-month period). These conditions 'shall be the following':[133]

a) possession of valid documents necessary to cross the border;[134]
b) possession of a visa if required by EU visa list legislation,[135] unless the person concerned holds a residence permit or a long-stay visa;[136]
c) justification of the purpose and conditions of the stay, and possession of sufficient means of subsistence;
d) absence from the list of persons banned from entry set up within the Schengen Information System ('SIS');[137] and
e) absence of a 'threat to public policy, national security or the international relations' of *any* of the Member States, 'in particular' where there is no alert in Member States' national databases refusing entry on such grounds.

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[127] Art. 3, Schengen Borders Code.
[128] For the most recent text of the Handbook see Council doc. 18062/12, 20 Dec. 2012.
[129] Art. 4(1), Schengen Borders Code.
[130] Art. 4(2), Schengen Borders Code.
[131] Art. 4(3), Schengen Borders Code.
[132] On this point, see Art. 31 of the Geneva Convention on the status of refugees.
[133] Art. 5(1), Schengen Borders Code.
[134] See the Decision on travel documents (OJ 2011 L 287/9).
[135] On this legislation, see s. 5.1.1 below.
[136] On the definition of 'residence permit', see Art. 2(15) of the Schengen Borders Code. The reference to a long-stay visa was added by Reg. 265/2010 (OJ 2010 L 85/1), which entered into force on 5 Apr. 2010 (Art. 6, Reg. 265/2010).
[137] On the SIS, see s. 4.2 below.

There are three exceptions to the rules concerning entry conditions:[138]

a) persons with a residence permit, a long stay visa or a re-entry visa from a Member State who wish to cross the external borders in transit back to the State which issued the permit 'shall' be allowed to cross the external border, unless they are listed on the watch-list of the Member State they wish to cross, along with instructions to refuse entry or transit;
b) persons who do not meet the visa requirement, but who satisfy the criteria for obtaining a visa at the border set out in EU visa legislation, may be authorised to enter if a visa is issued at the border pursuant to those rules; and
c) a person may be permitted to enter if a Member State 'considers it necessary' to derogate from the criteria for entry on humanitarian grounds, national interest or international obligations, although in such cases the permission to enter should be limited to the territory of that Member State.

If a person does not meet the criteria for entry and does not fall into any of the exceptions, he or she must be denied entry at the external borders, 'without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'[139] Refusals of entry must be notified and justified by means of a standard form,[140] and the person concerned has the right to appeal the refusal, in accordance with national law.[141]

As for the substance of such checks, the Schengen Borders Code requires that all persons crossing the external borders must be subject at least to a 'minimum check' to establish their identity on the basis of their travel documents, to see whether the document concerned is stolen, lost or invalid, or has 'signs of counterfeiting or falsification'.[142] Although such checks are the 'rule' for persons exercising EU free movement rights, border guards can also check databases on a 'non-systematic basis' in order to determine that such persons 'do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or

[138] Art. 5(4), Schengen Borders Code. On the interpretation of the first exception, see the judgment in Association nationale d'assistance aux frontières pour les étrangers (Anafé), n. 126 above.
[139] Art. 13(1), Schengen Borders Code. These 'special provisions' are not further defined.
[140] Art. 13(2), Schengen Borders Code.
[141] Art. 13(3), Schengen Borders Code.
[142] Art. 7(2), first sub-paragraph, Schengen Borders Code.

a threat to the public health'.[143] All checks on persons with free movement rights must be carried out 'in accordance with' EU free movement law.[144]

In contrast with EU citizens, third-country nationals (other than those with EU free movement rights) must be subject to 'thorough checks' on entry and exit. In particular, upon entry they must be checked as regards their documents and the purpose and period of stay including subsistence requirements, along with checks in national databases and the SIS.[145] Also, now that the Visa Information System ('VIS') has become operational, third-country nationals must also (if they hold a visa) be checked in the VIS on entry to check their identity and the validity of their visa, using their fingerprints and the visa sticker number.[146] However, this rule is subject to a derogation, valid until 2017,[147] which permits border guards not to check fingerprints in the VIS at external borders, *inter alia* where there is intense traffic which has resulted in excessive delay at border crossing points.[148]

Checks on third-country nationals on exit must include a check on the validity and genuineness of their travel documents, and also, 'whenever possible' a verification that the persons concerned are not a threat to 'public policy, internal security, or the international relations of any of the Member States'.[149] Exit checks *may* also involve verification of a visa (including use of the VIS, now it is operational), checks as to whether a person overstayed and checks in the SIS or national databases.[150] Member States also have an option to check persons in the VIS to identify potential illegal immigrants.[151]

Border checks can be relaxed in limited circumstances, 'as a result of exceptional and unforeseen circumstances', which are 'deemed to be those where unforeseeable events lead to traffic of such intensity that the waiting time at the border crossing point becomes excessive, and all resources have been exhausted as regards staff, facilities and organisation.'[152] In that case, entry

[143] Art. 7(2), second and third sub-paragraphs, Schengen Borders Code.
[144] Art. 7(6), Schengen Borders Code.
[145] Art. 7(3)(a), Schengen Borders Code.
[146] Art. 7(3)(aa), Schengen Borders Code, as inserted by Reg. 81/2009 (n. 126 above). For the details of the VIS, see s. 5.2.3 below.
[147] Art. 7(3)(ae), Schengen Borders Code, as inserted by Reg. 81/2009 (ibid); the six-year derogation period began when the VIS began operations in 2011.
[148] Art. 7(3)(ab), Schengen Borders Code, as inserted by Reg. 81/2009 (ibid).
[149] Art. 7(3)(b), Schengen Borders Code.
[150] Art. 7(3)(c), Schengen Borders Code.
[151] Art. 7(3)(d), Schengen Borders Code, inserted by Reg. 81/2009 (OJ 2009 L 35/56). No derogation is permitted.
[152] Art. 8(1), Schengen Borders Code.

checks must take priority over exit checks, and each travel document must still be stamped on entry and exit.[153] Checkpoints must take the form of separate lanes at airports for EU and EEA citizens and their family members, on the one hand, and for all (other) third-country nationals, on the other hand. Such separate lanes are optional at sea and land borders.[154]

Another key element of immigration control (in particular to prevent overstaying without authorisation) is the obligation to stamp the travel documents of third-country nationals on entry and exit,[155] which would in future be replaced by an entry-exit system if the proposals to this end are adopted.[156] This obligation does not apply to Heads of State or dignitaries, certain transport workers and travellers, and the nationals of several micro-States, and '[e]xceptionally' may be waived if stamping a travel document 'might cause serious difficulties' for an individual.[157]

If a travel document is not stamped on entry, Member States may presume that the person concerned does not fulfil the conditions for the duration of stay in the Member State concerned.[158] This presumption can be rebutted by the traveller,[159] but if he or she cannot rebut it, they may be expelled.[160] According to the Court of Justice, there is no obligation to expel persons in such circumstances.[161]

The Commission reported on the application of the provisions on stamping of documents and presumptions of irregular stay in 2009.[162] According to this report, there have been no problems applying the stamping obligations fully. In particular the obligations have not caused long waiting times at borders. Difficulties have arisen where a passport was full, where the stamping was confusing or illegible (due to stamping on top of a previous stamp), where children did not have a separate passport and as regards whether the passport of a third-country national with a residence permit from a Schengen State should be stamped.

[153] Art. 8(2) and (3), Schengen Borders Code,
[154] Art. 9, Schengen Borders Code.
[155] Art. 10(1), Schengen Borders Code.
[156] See s. 4.6 below.
[157] Art. 10(3), Schengen Borders Code. Art. 10(2) of the Code also implies that the travel documents of third-country national family members of EU citizens with residence cards should not be stamped.
[158] Art. 11(1), Schengen Borders Code.
[159] Art. 11(2) and Annex VIII, Schengen Borders Code.
[160] Art. 11(3), Schengen Borders Code.
[161] *Zurita Garcia and Cabrera* (n. 126 above).
[162] COM (2009) 489, 21 Sep. 2009.

Next, the Code contains basic rules on border surveillance, addressing the purposes of surveillance, the types of units to be used, the numbers of border guards to be used and their methods and the requirement to survey sensitive areas in particular.[163] Further measures concerning surveillance may be adopted in the form of implementing measures.[164] One such implementing measure (relating to maritime border surveillance) was adopted, but has been struck down by the Court of Justice, and the Commission has instead proposed legislation to the same end.[165]

The Schengen Borders Code then sets out rules on cooperation between national authorities, as well as staff and resources for border controls.[166] Member States must deploy 'appropriate staff and resources' in order to carry out border checks, 'to ensure an efficient, high and uniform level of control at their external borders'.[167] Checks must be carried out by border guards in conformity with national law; the guards must be sufficiently specialised and trained, and encouraged to learn relevant languages. Member States must ensure effective coordination of all relevant national services, and notify the Commission of the services responsible for border guard duties.[168]

As for cooperation between Member States, there is a general requirement of assistance and cooperation in accordance with other provisions of the Code. Member States must also exchange relevant information. The Code furthermore refers to the role of Frontex in coordinating border operations,[169] as well as Member States' role as regards operational coordination, including the exchange of liaison officers, as long as this does not interfere with the work of the Agency. Member States must also provide for training of border guards on border control and fundamental rights, taking account of the standards developed by Frontex.[170]

Finally, Chapter IV of Title II of the Code sets out specific rules for border checks in certain cases, concerning respectively different types of borders and different categories of persons.[171]

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[163] Art. 12(1) to (4), Schengen Borders Code.
[164] Art. 12(5), Schengen Borders Code, as amended by Reg. 296/2008 (n. 126 above).
[165] See further s. 4.5 below.
[166] Arts. 14-17, Schengen Borders Code.
[167] Art. 14, Schengen Borders Code.
[168] Art. 15, Schengen Borders Code.
[169] See further s. 4.3 below.
[170] Art. 16, Schengen Borders Code.
[171] Arts. 18–19, Schengen Borders Code. The detailed rules appear in Annexes VI and VII of the Code.

The recent amendments to the Schengen Borders Code as regards internal borders have already been discussed above.[172] A proposal for further amendments to the Code is linked to the more recent proposals on an entry-exit and registered travellers system, so is discussed further below.[173]

As noted already, the Schengen Borders Code was also recently amended in order to clarify a number of legal issues.[174] These amendments mostly took effect from 19 July 2013.[175] The main changes to the Schengen Borders Code were as follows:

a) there is no longer a reference to 're-entry' permits;[176]
b) there are several new or revised definitions, in particular the definition of 'residence permit';[177]
c) there is a new general clause on human rights protection;[178]
d) the exceptions to the general rule that external borders may only be crossed at border crossing points at fixed hours have been narrowed;[179]
e) the conditions of entry have been clarified, to change the method of calculating stays and to add details about the validity of travel documents;[180]
f) border guards have a specific obligation to respect the dignity of vulnerable persons;[181]
g) there are new exceptions to the obligation to stamp travel documents, namely train passengers and crew and third-country national family

[172] See s. 3.4 above.

[173] See further s. 4.6 below.

[174] Reg. 610/2013, OJ 2013 L 182/1.

[175] Art. 7, Reg. 610/2013; the amendments relating to the definition of 'visa' instead applied from 18 Oct. 2013. For an informally codified text of the Borders Code following these amendments and the Council's version of the amendments concerning internal border controls, see n. 53 above.

[176] On the position of persons holding such permits before the Code was amended, see Association Nationale d'Assistance aux Frontières pour les Etrangers (n. 126 above).

[177] Art. 2(15) of the Code. The amendment makes clear that this definition applies not only to residence permits issued pursuant to the EU legislation on residence permit formats (Reg. 1030/2002, OJ 2002 L 157/1), but also 'residence cards' issued to third-country national family members of EU citizens pursuant to the Directive on EU citizens' free movement rights (OJ 2004 L 158/77). It also makes clear that the definition only covers other documents authorising a stay in national territory where those documents have been notified and published, and excludes visas from the definition.

[178] New Art. 3a of the Schengen Borders Code, discussed further in s. 6.3 below.

[179] Revised Art. 4(2) of the Schengen Borders Code. See also the new Art. 7(8) of the Code, which provides for derogations from the rules on border checks in some of these cases.

[180] Revised Art. 5(1) and new Art. 5(1a) of the Schengen Borders Code.

[181] Revised Art. 6(1) of the Schengen Borders Code. See the judgment in Zakaria (n. 126 above).

members of EU citizens who have a residence card;[182]

h) the possibility to expel those persons whose travel documents do not have an entry stamp has been clarified, and also extends to those persons whose travel documents do not have an exit stamp;[183]
i) persons who have crossed the border without authorisation must be apprehended and made subject to procedures respecting the EU's Returns Directive;[184]
j) training for border guards must include training relating to vulnerable persons, such as unaccompanied minors and victims of trafficking in persons;[185]
k) the special rules on certain types of travel have been amended;[186] and
l) special rules can be adopted relating to border checks on rescue services, police and fire brigades, border guards and offshore workers.[187]

Taken as a whole, these amendments clarified a number of disputed issues, without changing any of the fundamental aspects of the external borders rules in the Code. In particular, they addressed an issue concerning the definition of 'residence permits', which had led to a dispute in practice during the 'Arab Spring' in 2011, when it was alleged that Italy was giving Tunisians a form of simplified residence permit simply to facilitate their onward movement to other Schengen States (see further the discussion of the rules on freedom to travel, in section 5.2 below). The clarification (in the new rules) that documents can only be considered 'residence permits' for the purposes of the Code if they have been notified and published in accordance with the Code should curtail such practices in future.

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[182] Revised Art. 10(3) of the Schengen Borders Code. See the further amendments proposed as regards an entry-exit system (s. 4.6 below).

[183] Revised Art. 11 of the Schengen Borders Code. The Code now specifies where the presumption that a person has overstayed has not been rebutted, that person 'may' be expelled in accordance with the Returns Directive (Directive 2008/115 (OJ 2008 L 348/98). This still does not appear to constitute an obligation. While the Returns Directive includes an obligation in principle to expel persons who are not legally resident or legally present (see further s. 5.3 below), that Directive is 'without prejudice' to 'more favourable provisions' in EU legislation 'relating to immigration and asylum' (Art. 4(2) of the Directive). So the optional expulsion in the Code should take precedence over the mandatory expulsion in the Directive, where the two rules overlap. See again the further amendments proposed as regards an entry-exit system (ibid).

[184] Revised Art. 12(1) of the Schengen Borders Code. The Council takes the view (see Council doc. 18006/12, 19 Dec. 2012) that Member States still have the option not to apply that Directive to border cases: see further s. 5.3 below.

[185] Revised Art. 15(1) of the Schengen Borders Code.

[186] Amendments to Annex VI of the Schengen Borders Code.

[187] Revised Art. 19(1) of the Schengen Borders Code, and amendments to Annex VII of the Code.

4.2 Schengen Information System and the Returns Directive (entry bans)

The control of persons onto the territory of the Schengen States (i.e. decisions on admission at the border and issue of a visa) is also exercised by means of the Schengen Information System, the rules for which were originally set out in the Schengen Convention.[188] In 2006, legislation was adopted to establish a second-generation Schengen Information System ('SIS II')[189], which became operational on 9 April 2013.[190] The Commission has adopted several measures implementing the Regulation.[191] SIS II is managed by an EU agency established to manage large-scale databases relating to security matters, the EU Agency for large-scale IT systems, known as 'EU-LISA'.[192]

The Regulation governing the use of SIS II for immigration control first of all sets out general provisions dealing with objectives and scope, definitions, technical architecture and costs.[193] Next, it sets out the responsibilities of the Member States,[194] including rules on the exchange of supplementary information (the SIRENE system) and data security and confidentiality,[195] and then the responsibilities of the agency managing SIS II, including rules on data security, confidentiality and a public information campaign.[196]

The key issue is the grounds for listing a third-country national as a person to be denied entry or stay to the territory of the Schengen States. The SIS II Regulation specifies that an 'alert' for the purpose of refusing entry or stay 'shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law taken on the basis of an individual assessment'. Any appeals against such decisions 'shall lie in accordance with national legislation'.[197] The references to an individual assessment and an appeal are new compared to the rules in the Schengen Convention.[198]
Alerts on security grounds are mandatory: they 'shall be entered' if a national

[188] OJ 2000 L 239, Arts. 92-119.
[189] Reg. 1987/2006 (OJ 2006 L 381/4).
[190] OJ 2013 L 87/10.
[191] OJ 2008 L 123/1 (SIRENE manual), revised in OJ 2013 L 71/1; and OJ 2010 L 112/31 (security).
[192] The agency was established by Reg. 1077/2011 (OJ 2011 L 286/1). It began operations on 1 Dec. 2012.
[193] Chapter I of Reg. 1987/2006 (Arts. 1-5).
[194] Chapter II of Reg. 1987/2006 (Arts. 6-14).
[195] Respectively Arts. 8, 10 and 11 of Reg. 1987/2006.
[196] Chapter III of Reg. 1987/2006 (Arts. 15-19).
[197] Art. 24(1), Reg. 1987/2006.
[198] Art. 96(1), Schengen Convention.

alert 'is based on a threat to public policy or public security or to national security which the presence of the third-country national in question in the territory of a Member State may pose'. Such a threat 'shall arise in particular' in two situations: where the person concerned 'has been convicted in a Member State of an offence carrying a penalty involving deprivation of liberty of at least one year', and where 'there are serious grounds for believing that he [or she] has committed a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State'.[199] This rule is stronger than under the previous Schengen Convention,[200] in that the issue of such alerts is now mandatory, and the threshold regarding the second category of such alerts is now lower ('clear *indications*' of an intention to commit a serious criminal offence, instead of 'clear *evidence*' of such an intention). However, the notion of a mandatory alert is hard to reconcile with another provision of the SIS II Regulation, titled 'Proportionality', which provides that '[b]efore issuing an alert, Member States shall determine whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II'.[201]

On the other hand, an alert in SIS II on grounds of breaching immigration law is optional. Such alerts 'may' be issued where the person concerned 'has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of third-country nationals'.[202] On this point, there is no real change from the rules in the Schengen Convention.[203]

These provisions must be reviewed by the Commission three years after SIS II begins operations (so by April 2016), and the Commission must then make proposals for amendments in order 'to achieve a greater level of harmonisation of the criteria for entering alerts'.[204] However, in the meantime, the Returns Directive, which *inter alia* regulates the issue of 'entry bans' by Member States' authorities, has been adopted.[205] While there is no specific obligation in that Directive to issue an alert in SIS II following a national

[199] Art. 24(2), Reg. 1987/2006.
[200] Art. 96(2), Schengen Convention.
[201] Art. 21, Reg. 1987/2006.
[202] Art. 24(3), Reg. 1987/2006.
[203] Art. 96(3), Schengen Convention.
[204] Art. 24(5), Reg. 1987/2006.
[205] Directive 2008/115, OJ 2008 L 348/98. Member States had to apply this Directive from Christmas Eve 2010 (Art. 24(1), Returns Directive).

decision to issue an entry ban, Member States may well frequently decide to do so.

According to the Returns Directive,[206] an 'entry ban' prohibits entry into the territory of the Member States for a specified period.[207] Member States 'shall' impose an entry ban in two situations:[208] if no period for voluntary departure has been granted,[209] or if an obligation to return has not been complied with.[210] In other cases, Member States have an option to impose an entry ban.[211]

But there are many exceptions to this basic rule. First of all, Member States 'shall' consider withdrawing or suspending an entry ban when the third-country national can demonstrate that he or she has left a Member State's territory in compliance with a return decision.[212] Secondly, victims of trafficking in human beings cannot be subject to an entry ban, subject to certain conditions.[213] Thirdly, Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.[214] Finally, Member States have an option to withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.[215]

The length of the entry ban 'shall be determined with due regard to all relevant circumstances of the individual case', and 'shall not in principle exceed five years'.[216] However, Member States may impose a longer entry ban if a third-country national 'represents a serious threat to public policy, public security or national security'.[217]

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[206] For further discussion of the content of the Returns Directive, see s. 5.3 below.

[207] Art. 3(6), Returns Directive.

[208] Art. 11(1), first sub-paragraph, Returns Directive.

[209] For the rules on voluntary departures, see Art. 7 of the Returns Directive, and the definition in Art. 3(8) of that Directive.

[210] Under the Directive, such obligations to return are stated or established by 'return decisions'. For the rules on return decisions, see Art. 6 of the Returns Directive, and the definition in Art. 3(4) of that Directive.

[211] Art. 11(1), second sub-paragraph, Returns Directive.

[212] Art. 11(3), first sub-paragraph, Returns Directive. This provision only applies to optional entry bans.

[213] Art. 11(3), second sub-paragraph, Returns Directive.

[214] Art. 11(3), third sub-paragraph, Returns Directive.

[215] Art. 11(3), fourth sub-paragraph, Returns Directive.

[216] Art. 11(2), first sentence, Returns Directive. See also Recital 14 of the Directive, which adds that 'particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban'.

[217] Art. 11(2), second sentence, Returns Directive.

There are also rules in the Returns Directive on procedural safeguards relating to entry bans. Entry bans must be issued in writing and give reasons in fact and in law, as well as information about available legal remedies.[218] If the third-country national requests, Member States must translate the main elements of the entry ban, including information about remedies, into a language that the third-country understands or may reasonably be presumed to understand.[219] However, Member States do not have to provide such translations when the third-country national illegally entered the territory and did not subsequently obtain an authorisation or a right to stay.[220]

As for remedies against entry bans, third-country nationals have the right to appeal or review such bans before 'a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence'.[221] This authority or body has the power to suspend temporarily the enforcement of an entry ban, unless such suspension is already provided for in national law.[222] The persons concerned are entitled to obtain legal advice, representation and legal assistance.[223] Finally, Member States must ensure that the persons concerned have the right to obtain legal assistance and representation free of charge in accordance with relevant national legislation on legal aid, and may establish conditions for legal aid equivalent to those in the asylum procedures Directive.[224]

Another category of persons subject to SIS II immigration alerts are persons who are subject to a travel ban established by an EU foreign policy measure, 'including' EU measures implementing travel bans established by the UN Security Council.[225] Alerts relating to such persons 'shall' be entered into SIS II, Member States do not have to carry out a specific assessment or permit appeals in such cases.[226] On the other hand, there is no exception from the proportionality rule referred to above.

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[218] Art. 12(1), first sub-paragraph, Returns Directive. However, Art. 12(1), second sub-paragraph, provides for an exception to the obligation to give information about factual reasons.
[219] Art. 12(2), Returns Directive.
[220] Art. 12(3), Returns Directive. In these cases, Member States 'shall' use standard forms instead.
[221] Art. 13(1), Returns Directive.
[222] Art. 13(2), Returns Directive.
[223] Art. 13(3), Returns Directive.
[224] Art. 13(3), Returns Directive, referring to Directive 2005/85 (OJ 2005 L 326/13).
[225] Art. 26, Reg. 1987/2006.
[226] Art. 24(4), Reg. 1987/2006.

There is a special rule for persons who have the right of free movement within the EU (i.e. the third-country national family members of EU citizens).[227] Any alert concerning them 'must be in conformity' with the Directive on the rights of EU citizens and their family members.[228] Where there is a 'hit' concerning such persons (indicating that they must be denied entry or a visa), the Member State executing the alert must immediately contact the Member State issuing the alert via means of the 'SIRENE' procedure (the rules which set out how authorities should contact each other after a SIS II 'hit') to determine what action to be taken.[229] These rules reflect a judgment of the Court of Justice on the relationship between the previous SIS rules and EU free movement law.[230]

Another key change in SIS II compared to the previous SIS is the type of data kept in the system. Previously the system contained only a few lines of 'alphanumeric' data (letters and numbers) concerning each alert, although further information on the person concerned was subsequently transferred between national authorities using the SIRENE system in the event of a 'hit'. SIS II now provides for the inclusion of photographs and fingerprints,[231] along with data on multiple nationalities (not just a sole nationality), the authority issuing the alert, a reference to the decision giving rise to the alert and links to other alerts (a new functionality of SIS II).[232]

There are, however, special rules for biometric data (photographs and fingerprints) in SIS II.[233] This data will only be entered into SIS II following a 'special quality check' in order to ensure data quality;[234] the details of this quality check will be established by the Commission. At first, biometric data will only be used to 'confirm the identity' of a person whose name has been found in SIS II following an alphanumeric search, likely meaning in practice that his or her name matches a name in the SIS.[235] Subsequently, biometrics will be used to 'identify' persons 'as soon as technically possible'.[236] There will be no further vote before this functionality is put into practice.

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[227] Art. 25, Reg. 1987/2006.
[228] Art. 25(1), Reg. 1987/2006, referring to Directive 2004/38, OJ 2004 L 158/77.
[229] Art. 25(2), Reg. 1987/2006. On the SIRENE system, see further Art. 38, Reg. 1987/2006.
[230] Case C-503/03 *Commission v Spain* [2006] ECR I-1097.
[231] Art. 20(2), Reg. 1987/2006.
[232] On links between alerts, see further Art. 37, Reg. 1987/2006.
[233] Art. 22, Reg. 1987/2006.
[234] Art. 22(a), Reg. 1987/2006.
[235] Art. 22(b), Reg. 1987/2006.
[236] Art. 22(c), Reg. 1987/2006.

The authorities who have access to SIS II data are those responsible for border checks and other police and customs checks within the territory and the coordination of such checks, along with judicial authorities and authorities responsible for visas and applying immigration legislation.[237] Users may only search the data necessary to perform their tasks.[238]

Alerts must be kept only for the time required,[239] and must be reviewed after three years at a maximum.[240] Any alerts on persons who obtain EU citizenship should be deleted as soon as the Member State which entered the alert becomes aware of this fact.[241]

There are necessary data processing rules, including rules on data quality: the Member State which entered an alert is responsible for the accuracy, lawfulness and timeliness of the data.[242] Only the Member State issuing an alert may delete or in any way alter that alert,[243] so if another Member State believes an alert is unlawfully stored or factually incorrect, it must inform the Member State which issued the alert, which must then check this point.[244] If a person complains that he or she is wrongly identified in an alert, the Member States concerned must exchange supplementary information and inform that person about Article 36 of the Regulation (see further below).[245] There are also new rules, as compared to the Schengen Convention, for distinguishing between persons with similar characteristics,[246] and addressing the issue of misused identity, in order to protect persons whose identity has been stolen by a person who is the subject of an alert.[247] Furthermore, SIS II immigration data cannot be transferred to third countries and international organisations.[248]

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[237] Art. 27, Reg. 1987/2006. Member States are obliged to notify the list of such authorities, and that list must be published in the EU's *Official Journal* (Art. 31(8), Reg. 1987/2006). That list has now been published: OJ 2013 C 103/1.

[238] Art. 28, Reg. 1987/2006.

[239] Art. 29(1), Reg. 1987/2006.

[240] Art. 29(2) to (4), Reg. 1987/2006.

[241] Art. 30, Reg. 1987/2006, which is a new express provision as compared to the Schengen Convention.

[242] Art. 34(1), Reg. 1987/2006.

[243] Art. 34(2), Reg. 1987/2006.

[244] Art. 34(3), Reg. 1987/2006. Compared to the Schengen Convention, there is now a ten-day deadline to inform the first Member State and a reference to the exchange of supplementary information.

[245] Art. 34(5), Reg. 1987/2006. This important safeguard did not appear in the Schengen Convention.

[246] Art. 35, Reg. 1987/2006.

[247] Art. 36, Reg. 1987/2006.

[248] Art. 39, Reg. 1987/2006. This issue was not expressly addressed in the Schengen Convention.

As for data protection rules, SIS II cannot store 'sensitive' information such as racial and religious information as defined in EU data protection legislation (and also in the Council of Europe data protection Convention).[249] An individual's right of access to SIS II data concerning him or her shall be exercised in accordance with the law of the Member State in which that access is invoked.[250] Communication of the data may be refused if this is indispensable for the performance of a task connected to the alert or to protect the rights and freedoms of others.[251] An applicant must be informed as soon as possible about his or her application, by 60 days after the application at the latest,[252] and also has the right to correction or deletion of incorrect data and other procedural rights.[253]

There is a right of review before the courts or authorities of any Member State as regards the right of access, correction or deletion or as regards obtaining information or compensation.[254] Member States undertake to recognise final decisions of other national authorities in such cases.[255]

Taken as a whole, the rules in the SIS II Regulation, which became applicable in the spring of 2013, strengthen the obligation to issue alerts, at least on security-related grounds, and also provide (in the near future) for the storage of biometric data relating to the third-country nationals concerned. The data processing and data protection rules have, however, been improved to some extent, in particular as regards the right to information, deadlines to apply the data protection rules, misused or confused identity and the transfer of data to third States. Furthermore, the effect of the Regulation was strengthened even before SIS II became operational, by means of the obligation to issue entry bans for many irregular migrants as set out in the Returns Directive.

[249] Art. 40, Reg. 1987/2006.
[250] Art. 41(1), Reg. 1987/2006.
[251] Art. 41(4), Reg. 1987/2006.
[252] Art. 41(6), Reg. 1987/2006. This is a new provision as compared to the Schengen Convention.
[253] Arts. 41(5) and (7) and 42, Reg. 1987/2006. These provisions are mostly new as compared to the Schengen Convention.
[254] Art. 43(1), Reg. 1987/2006.
[255] Art. 43(2), Reg. 1987/2006. The review of these rules provided for in Art. 43(3) of the Reg. has not yet taken place.

4.3 Frontex

The legal basis for the EU's external borders agency is a Regulation adopted in 2004,[256] which was subsequently amended in 2007 and 2011.[257] First of all, the purpose of Frontex is to facilitate and render more effective the application of EU measures concerning external border management, while acknowledging that Member States retain primary responsibility for the control and surveillance of borders.[258] Frontex must carry out its tasks 'in full compliance with' EU law, including the EU Charter of Fundamental Rights, the Geneva Convention on Refugee status, and 'obligations related to access to international protection, in particular the principle of non-refoulement', i.e. the obligation not to return a person to a country where their life or safety is threatened.[259]

Frontex has a number of tasks: coordinating operational cooperation between Member States in the field of management of external borders; assisting Member States in the training of national border guards, including the establishment of common training standards; carrying out risk analyses; participating in the development of research relevant for the control and surveillance of external borders; assisting Member States in circumstances requiring increased technical and operational assistance at external borders; setting up European Border Guard Teams to be deployed during joint operations, pilot projects and rapid interventions; providing Member States with the necessary support, including coordination or organisation, of joint return operations; deploying border guards from European Border Guard Teams to Member States in joint operations, pilot projects or in rapid interventions; developing and operating information systems concerning risks at the external border; and providing assistance for the development and operation of a European border surveillance system.[260]

Member States may still engage in operational cooperation with other Member States or third countries at external borders, if such cooperation complements Frontex activities and is reported to Frontex. Member States must also

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[256] Reg. 2007/2004 (OJ 2004 L 349/1): the 'Frontex Regulation'.

[257] Reg. 863/2007 (OJ 2007 L 199/30) and Reg. 1168/2011 (OJ 2011 L 304/1). For an informal codification of the Frontex Regulation, see S. Peers, et al, EU Immigration and Asylum Law: Text and Commentary, 2nd ed. (Brill, 2011), ch. 5. The Frontex Regulation has again been amended by the Eurosur Regulation (see s. 4.4 below).

[258] Art. 1(2), first sub-paragraph, Frontex Regulation.

[259] Art. 1(2), second sub-paragraph, Frontex Regulation, inserted by Reg. 1168/2011. See further s. 6.3 below.

[260] Art. 2(1), as amended by Reg. 863/2007 and Reg. 1168/2011.

refrain from engaging in activities that are likely to jeopardise the objectives of Frontex.[261]

The Frontex Regulation also specifies that 'no-one shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle'. Also, the 'special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with' EU and international law.[262] To this end, Frontex must draw up a Code of Conduct, to ensure that Frontex operations respect the 'principles of the rule of law and the respect of fundamental rights with particular focus on unaccompanied minors and vulnerable persons, as well as persons seeking international protection'.[263]

The Regulation sets out precise rules on the Agency's activities as regards: the evaluation, approval and coordination of proposals for joint operations and pilot projects made by Member States;[264] the deployment of European Border Guard Teams;[265] training;[266] research;[267] technical equipment;[268] support to Member States needing increased assistance;[269] rapid interventions;[270] and cooperation on return.[271] On the latter issue, Frontex has to adopt a Code of Conduct on return proceedings, which must apply during all joint return operations coordinated by Frontex, which describes 'common standardized procedures' to (inter alia) 'assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non-discrimination'.[272] This Code of Conduct must 'in particular pay attention to the obligation' set out in the EU's Returns Directive 'to provide for

[261] Art. 2(2), Frontex Regulation; see also Art. 16(3) of the Schengen Borders Code.
[262] Art. 2(1a), Frontex Regulation, inserted by Reg. 1168/2011. See further s. 6.3 below.
[263] Art. 2a, Frontex Regulation, inserted by Reg. 1168/2011. See further s. 6.3 below.
[264] Arts. 3 and 3a, Frontex Regulation, as amended and inserted by Reg. 1168/2011.
[265] Arts. 3b and 3c, Frontex Regulation, inserted by Reg. 1168/2011.
[266] Art. 4, Frontex Regulation, as amended by Reg. 1168/2011.
[267] Art. 5, Frontex Regulation, as amended by Reg. 1168/2011.
[268] Art. 6, Frontex Regulation, as amended by Reg. 1168/2011.
[269] Art. 8, Frontex Regulation, as amended by Reg. 863/2007 and Reg. 1168/2011.
[270] Arts. 8a to 8h, Frontex Regulation, inserted by Reg. 863/2007 and amended by Reg. 1168/2011.
[271] Art. 9, Frontex Regulation, as amended by Reg. 1168/2011.
[272] Art. 9(2), Frontex Regulation, inserted by Reg. 1168/2011. See further s. 6.3 below.

an effective forced-return monitoring system', as well as the Fundamental Rights strategy which Frontex must adopt (see below).[273]

Frontex must cooperate with the UK and Ireland,[274] as well as a number of EU agencies and bodies and international organisations,[275] and third countries.[276]

Finally, Frontex has to 'draw up and further develop and implement' a Fundamental Rights Strategy, and must 'put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency'. It must establish a 'Consultative Forum' to assist its senior staff as regards fundamental rights issues, and must invite the European Asylum Support Office, the EU's Fundamental Rights Agency, the United Nations High Commissioner for Refugees and other relevant organisations to participate in this Forum. In particular, the Consultative Forum must be 'consulted on the further development and implementation of the Fundamental Rights Strategy, Code of conduct and Common Core Curriculum [for training of border guards]'. Frontex must also designate a Fundamental Rights Officer, must be 'independent in the performance of his/her duties as a Fundamental Rights Officer', reporting on a regular basis and contributing to the mechanism for monitoring fundamental rights.[277]

4.4 Eurosur

Eurosur, a system for information sharing to ensure enhanced surveillance of the external borders, has been created in order to control Schengen external borders more effectively. The plans for its creation were initially outlined in a 'roadmap' presented by the Commission in 2008,[278] and the Commission subsequently reported on the practical development of the system in 2009 and 2011.[279] Ultimately, the Commission proposed a Regulation to establish the Eurosur system in December 2011;[280] the Council and the European Parliament completed their negotiations on the text in June 2013; and the legislation was adopted in October 2013.[281] This Regulation will apply from 1 De-

[273] Art. 9(3), Frontex Regulation, inserted by Reg. 1168/2011. See further s. 6.3 below. On the Returns Directive, see s. 5.3 below.

[274] Art. 12, Frontex Regulation.

[275] Art. 13, Frontex Regulation, as amended by Reg. 1168/2011.

[276] Art. 14, Frontex Regulation, as amended by Reg. 1168/2011, *inter alia* as regards the deployment of Frontex liaison officers in third countries.

[277] Art. 26a, Frontex Regulation, as inserted by Reg. 1168/2011.

[278] COM (2008) 68, 13 Feb. 2008.

[279] See SEC (2009) 1265, 24 Sep. 2009 and SEC (2011) 145, 28 Jan. 2011.

[280] COM (2011) 873, 12 Dec. 2011.

[281] Reg. 1052/2013, OJ 2013 L 295/1.

cember 2013 to the Member States on the EU's eastern or southern borders, and from 1 December 2014 to all other Member States.[282]

According to the Eurosur Regulation, its purpose is to establish 'a common framework for the exchange of information and cooperation between Member States and' Frontex, so as 'to improve the situational awareness and to increase the reaction capability at the external borders', applying to border surveillance with the purpose of 'detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants'.[283] It does not apply to actions taken following interception of the persons concerned.[284]

A general clause on human rights protection requires Member States and Frontex to observe 'fundamental rights, including the principles of non-refoulement and human dignity and data protection requirements, when applying' the Eurosur Regulation. They have to 'give priority to the special needs of children, unaccompanied minors, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation'.[285]

The framework for Eurosur consists of:[286] national coordination centres;[287] national situation pictures;[288] a communication framework;[289] a European situational picture;[290] a common pre-frontier intelligence picture;[291] and common application of surveillance tools.[292] To apply the Eurosur Regulation, each Member State will divide its land and sea borders into sections, and inform Frontex.[293] In agreement with each Member State, Frontex will then designate each section 'high-impact', 'medium-impact' or 'low-impact', as regards unauthorised migration and cross-border crime.[294] The Regulation

[282] Art. 21.
[283] Arts. 1 and 2(1).
[284] Art. 2(2).
[285] Art. 2(3).
[286] Art. 4(1). On the relationship between these elements, see Art. 4(2) to (4). See also Art. 6, on the role of Frontex.
[287] On the role of the national coordination centres, see Art. 5.
[288] On this concept, see Art. 9. For the definitions of 'situational picture', see Arts. 3(c) and 8.
[289] On the communication framework, see Art. 7.
[290] On this concept, see Art. 10.
[291] On this concept, see Art. 11. For the definition of 'pre-frontier', see Art. 3(f).
[292] On this concept, see Art. 12.
[293] See Art. 13.
[294] See Art. 14.

then spells out the levels of surveillance which Member States should apply to each section, depending on the classification of risk. It also provides for possible requests for assistance from Frontex, and for coordination between neighbouring Member States.[295]

Within the framework of the Eurosur system, Frontex is obliged to cooperate with a number of relevant EU agencies, 'in particular': Europol, the EU Satellite Centre, the European Maritime Safety Agency, the European Fisheries Control Agency, the European Commission, the European External Action Service, and the European Asylum Support Office, as well as international organisations.[296] There are also special rules on cooperation with the UK and Ireland,[297] as well as non-EU countries.[298] The EU Commission will draw up a handbook on the operations of Eurosur.[299]

Finally, there must be regular monitoring of the functioning of Eurosur 'against the objectives of achieving an adequate situational awareness and reaction capability at the external borders and the respect for fundamental rights'.[300] Frontex has to report on the functioning of Eurosur every two years, while the Commission will evaluate it every four years.[301] The Frontex Regulation has been amended to include tasks relating to Eurosur and to regulate the processing of personal data in the context of Eurosur.[302]

4.5 Maritime surveillance

An important aspect of external border controls is maritime surveillance, i.e. the control of vessels which are likely heading for the territory of Member States, whether those vessels are in Member States' territorial waters, the territorial waters of third States, or the high seas. This form of border control is highly controversial, because some forms of maritime interception breach human rights, and because the disembarkation of intercepted migrants in coastal Member States is often resented by the local population, and exceeds the local capacity to receive such persons. Also, migrants who attempt to cross the external borders without authorisation frequently travel in unsafe conditions, and so need rescuing or drown, most notably in the tragedy of autumn 2013 when hundreds of lives were lost.

[295] See Art. 15.
[296] See Art. 17.
[297] See Art. 17a.
[298] See Art. 18.
[299] See Art. 19.
[300] See Art. 20(1).
[301] See Art. 20(2) and (3).
[302] See Art. 20a.

EU rules regulating Member States' maritime surveillance operations, when such operations are coordinated by Frontex, were originally set out in a Council Decision implementing the Schengen Borders Code, adopted in 2010 (the '2010 Decision').[303] The 2010 Decision was challenged before the Court of Justice by the European Parliament, which believed that the measure exceeded the scope of the concept of implementing powers, because it introduced new 'essential elements' into the Schengen Borders Code, in that it regulated coercive powers by border guards, it addressed new issues such as search and rescue and disembarkation, which went beyond the concept of border surveillance (the subject-matter of the grant of implementing powers in the Code), and it exceeded the territorial scope of the Schengen Borders Code to the extent that it applied outside territorial waters. The European Parliament also argued that the 2010 Decision amended an existing 'essential element' of the Schengen Borders Code (the rules on refusal of entry), and implicitly amended the Frontex Regulation, which the Council had no authority to do.

In September 2012, the Court of Justice annulled the 2010 Decision,[304] accepting the European Parliament's argument that the measure went beyond the scope of an implementing act and should have been adopted in the form of legislation, because it regulated issues concerning the coercive powers of border guards as regards interception, search and rescue and disembarkation, and which impacted considerably upon human rights. The Court did not rule on the European Parliament's other arguments.

The Court maintained the 2010 Decision in force until it was replaced by another measure, and the Commission proposed legislation to replace it in April 2013 (the '2013 proposal').[305] This proposal is similar (but not identical) to the 2010 Decision. It remains to be seen whether the 2013 proposal is adopted at all, and if so, whether the proposed changes to the 2010 Decision are retained (and/or whether there are further changes made to that Decision).

The 2010 Decision includes two sets of provisions in its Annex, both of which apply to sea border operations coordinated by Frontex. First of all, there are 'rules' on such operations (Part I of the Annex) and secondly there are 'non-binding guidelines' (Part II of the Annex). However, the Court of Justice has ruled that the latter set of measures must nevertheless be considered binding, due to the obligation to include those guidelines in the operational plan drawn up by Frontex.[306]

[303] OJ 2010 L 111/20.
[304] Case C-355/10 *European Parliament v Council*, judgment of 5 Sep. 2012, not yet reported.
[305] COM (2013) 197, 16 April 2013.
[306] Judgment in Case C-355/10, paras. 80-82.

The first rule in the 2010 Decision is that sea border surveillance operations coordinated by Frontex 'shall be conducted in accordance with fundamental rights and in a manner that does not put at risk the safety of persons intercepted or rescued as well as of the participating units'.[307] Next, the Decision expressly prohibits the disembarkation or other form of handing over of individuals to authorities of another country 'in contravention of the principle of non-refoulement'; this also applies where there is a risk of indirect refoulement (i.e. disembarkation or handing over to a country 'from which there is a risk of expulsion or return to another country in contravention of that principle').[308] Furthermore, persons intercepted or rescued must be 'informed in an appropriate way so that they can express any reasons for believing that' their disembarkation in a particular State would breach the principle of non-refoulement.[309] The Decision then sets out detailed rules which must be followed as regards maritime surveillance in various different circumstances.

As for the 2013 proposal, first of all, it is clear from the explanatory memorandum to this proposal that the entire proposed Regulation would, if adopted, be binding[310] – although as noted above, the 2010 Decision was anyway binding in its entirety, despite its wording, according to the Court of Justice.

Secondly, the 2013 proposal addresses the European Parliament's concern about the territorial scope of the relevant rules by clarifying the concept of 'border surveillance' in the preamble to the proposal.[311] However, from the point of view of legal certainty, the definition of 'border surveillance' in the Schengen Borders Code should be clarified,[312] or a different definition used for the purposes of the 2013 proposal.[313]

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[307] Part I, Point 1.1, 2010 Decision.

[308] Part I, Point 1.2, 2010 Decision.

[309] Ibid.

[310] The first sentence in recital 9 to the 2010 Decision, which refers to 'non-binding guidelines', has been dropped from the 2013 proposal.

[311] Recital 1 to the 2013 proposal, new fourth sentence.

[312] Art. 2(11) of the Schengen Borders Code defines 'border surveillance' as (*inter alia*) 'the surveillance of borders between border crossing points'; which means 'any crossing point authorised by the competent authorities for the crossing of external borders': see Art. 2(8) of the Code. On a literal interpretation, then, 'border surveillance' pursuant to the Code can in practice only take place at land borders or very close to the coastline; but it could be argued that the effectiveness of the Code cannot be ensured unless the concept is interpreted more broadly, to apply beyond each Member State's territorial waters.

[313] The 2013 proposal does contain a number of other definitions (Art. 2, 2013 proposal; there is no definitions clause in the 2010 Decision).

Next, the general rule on observing safety and human rights protection has been limited to safety issues only.[314] However, the detailed provisions on human rights protection have been bolstered as compared to the 2010 Decision. The 2013 proposal now spells out the meaning of non-refoulement ('a serious risk that such person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment').[315] A new clause would require participating units to 'take into account the general situation in [a] third country' before deciding to disembark persons there, and prohibit disembarking persons there if the host Member State or participating Member States 'are aware or ought to be aware that this third country is engaged in' the practice of the death penalty, et al.[316] The 'personal circumstances' of the persons concerned would have to be assessed before they were disembarked in a third country, and they would have to be 'given an opportunity' to express their reasons for believing that disembarkation in a particular State would violate the non-refoulement principle.[317] Also, the obligations relating to the specials needs of children, et al would be stronger.[318]

According to the explanatory memorandum, the human rights provisions of the proposal take account of a recent judgment of the European Court of Human Rights, *Hirsi Jamaa and others v. Italy*.[319] On this issue, the 2013 proposal would also amend the provision in the preamble of the 2010 Decision which refers to Member States' obligations under various international treaties, including human rights treaties, to refer as well to obligations of Frontex under those treaties, would furthermore add express references to the United Nations Convention Against Torture and the International Covenant on Civil and Political Rights.[320] Another provision in the preamble concerning interception measures, which refers to proportionality, fundamental rights,

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[314] Compare Art. 3, 2013 proposal, Part I, Point 1.1, 2010 Decision.

[315] Compare Art. 4(1), 2013 proposal, to Part I, Point 1.2, first sentence, 2010 Decision. The 2013 proposal would also amend the wording concerning indirect refoulement (referring to a 'serious risk of expulsion, removal or extradition' to a third State in the 2013 proposal, in place of 'a risk of expulsion or return' in the 2010 Decision).

[316] Art. 4(2), 2013 proposal.

[317] Compare Art. 4(3), 2013 proposal, to Part I, Point 1.2, second sentence, 2010 Decision. Also, the obligation to give information about the place of disembarkation is no longer 'without prejudice' to the general rule about safety and human rights (as set out in Part I, Point 1.1, 2010 Decision, and now Art. 3 of the 2013 proposal, as revised).

[318] Art. 4(4) of the 2013 proposal states that participating units 'shall address' such needs, whereas the 2010 Decision (Part I, Point 1.3) states that such needs 'shall be considered'. Art. 4(5) of the 2013 proposal does not differ substantively from the 2010 Decision (Part I, Point 1.4).

[319] Judgment of 23 Feb. 2012, not yet reported.

[320] Recital 4 in preamble, 2013 proposal; compare to recital 6 in the preamble to the 2010 Decision.

the rights of refugees and asylum-seekers, and the application of the EU *acquis* on asylum, 'in particular' the Directive on asylum procedures, would be amended, to include references to human dignity and non-discrimination and to specify that Frontex is also bound by the asylum *acquis*.[321] The wording of this provision still leaves the false impression that all the measures of the EU asylum *acquis* apply only on the territory or at the borders of Member States.[322] In practice, this might result in Frontex staff or national authorities mistakenly believing that no EU asylum rules apply on the high seas.

Another new provision in the preamble to the 2013 proposal would specify that an agreement with a third State 'cannot absolve' Member States of their human rights obligations if 'they are aware or ought to be aware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that third country amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment or where they are aware or ought to be aware that this third country is engaged in practices in contravention of the principle of *non-refoulement*.'[323] This proposed new provision appears to be based upon the Court of Justice's approach to the possible disapplication of the rules in the 'Dublin Regulation', which allocates responsibility for an asylum application between Member States (and a small number of associated third States),[324] but the case law of the European Court of Human Rights examines rather whether there is a threat of torture or inhuman or degrading treatment in *individual* cases, with the existence of such systemic deficiencies simply constituting one type of evidence that such threats exist.[325]

Finally, the general recital in the preamble stating that the 2010 Decision respects the rights recognised by the EU Charter of Fundamental Rights, notably a list of rights such as the prohibition of torture et al or *non-refoulement*, would be supplemented by adding references to the right to life and the right

[321] Recital 5 in preamble, 2013 proposal; compare to recital 3 in the preamble to the 2010 Decision.

[322] While this is true of the asylum procedures Directive and some other EU asylum measures, the EU's qualification Directive does not contain a limitation of its territorial scope (Directive 2004/83, OJ 2004 L 304/12). Therefore that Directive can apply even if an issue is outside the scope of other EU measures (see by analogy Case C-277/11 MM, judgment of 22 Nov. 2012, not yet reported).

[323] Recital 6, 2013 proposal.

[324] See Joined Cases C-411/10 and C-493/10 NS and ME, judgment of 21 Dec. 2011, not yet reported.

[325] See *Hirsi* (n. 319 above).

to asylum.[326] A provision that Member States should apply the Decision in accordance with such rights would be dropped.

As regards detection, the 2013 proposal would clarify that the rules only apply where a ship was 'suspected of crossing or intending to cross the border in an irregular manner'.[327] The rules on interception in territorial waters would be amended to add 'the smuggling of migrants by sea' to the grounds justifying interception, although this ground would usually cross over anyway with the ground for justifying interception in the 2010 Decision (an intention to circumvent border checks).[328] There would be a stronger obligation to take one of the acts listed in the EU measure,[329] which would no longer include conducting a vessel or handing over a person to a third state,[330] although it would still be possible to order a ship to change course towards a third state.[331] A new clause would provide that interception measures would have to be authorised by a Member State where the ship in question had no flag, or could be assimilated to a ship with no flag.[332] Essentially identical rules apply to interception in the contiguous zone.[333]

As for interception on the high seas, it would have to take place in cases of reasonable suspicion of smuggling of migrants, 'subject to' the authorisation of the flag State pursuant to the Palermo Protocol on the smuggling of migrants.[334] In this case, it would still be possible to conduct a vessel or hand over a person to a third State.[335] There would be a stronger obligation to authorise interception where the ship was flying the flag of a Member State.[336]

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[326] Recital 11 in preamble, 2013 proposal; compare to recital 10 in the preamble to the 2010 Decision.

[327] Compare Art. 5(1) of the 2013 proposal to the 2010 Decision (Part I, Point 2.1). Art. 5(2) and (3) of the 2013 proposal do not differ substantively from the 2010 Decision (Part I, Points 2.2 and 2.3).

[328] Art. 6(1) of the 2013 proposal, replacing in part Part I, Point 2.4 of the 2010 Decision.

[329] The 2013 proposal, states that participating units 'shall take one or more of the following measures', whereas the 2010 Decision states that measures 'may include'. The change in wording also suggests that the list of possible measures set out in Art. 6(1) of the 2013 proposal would be exhaustive.

[330] Part I, Point 2.4(f) of the 2010 Decision would be dropped.

[331] Art. 6(1)(e), 2013 proposal, retaining Part I, Point 2.4(e) of the 2010 Decision.

[332] Art. 6(3), 2013 proposal; on the concept of ship without nationality, see further the definition in Art. 2(9) of the proposal. Art. 6(2) and (4) of the 2013 proposal would retain Part I, Point 2.5.1.1 of the 2010 Decision.

[333] Art. 8, 2013 proposal.

[334] Art. 7(1), 2013 proposal; the ground for taking action appears to be exhaustive. As with Art. 6(1) of the proposal, the list of potential interception actions would apparently be exhaustive, and there would be a stronger obligation to intercept than in the 2010 Decision.

[335] Art. 7(1)(f), 2013 proposal.

[336] Art. 7(2), 2013 proposal: compare to Part I, Point 2.5.2.1, 2010 Decision.

The specific rules on interception on the high seas would otherwise be essentially unchanged,[337] with the addition of rules on informing flag States, the process of verifying whether a ship has the right to fly a particular flag, and the monitoring of ships which are not suspected of carrying smuggled persons but which are still suspected of carrying persons who intend to circumvent border controls.[338]

The final two substantive provisions of the 2013 proposal contain rules on search and rescue and disembarkation – which were the subject-matter of the 'guidelines' in Part II of the Annex to the 2010 Decision. The search and rescue rules in the 2013 proposal start by re-iterating the obligation to render assistance to any person or vessel at sea, regardless of nationality.[339] The specific rules to this end would be clarified by defining what is meant by 'a situation of uncertainty, alert or distress as regards a ship or any person on board'.[340] The obligations to take all appropriate measures to ensure the safety of the persons concerned while awaiting instructions would be strengthened,[341] as would the remaining rules relating to search and rescue.[342] Generally, these rules have been aligned to the text of the 1979 International Convention on Maritime Search and Rescue and the International Aeronautical and Maritime Search and Rescue Manual. In particular, the criteria to define when a ship is considered to be in a situation of uncertainty, alert or distress, and the definition of a rescue coordination centre,[343] have been based on these international instruments.[344]

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[337] Compare Art. 7(3) to 7(8) of the 2013 proposal to Part I, Point 2.5.2.2 to 2.5.2.6, 2010 Decision.

[338] Art. 7(9) to (11), 2013 proposal.

[339] Art. 9(1), 2013 proposal, which is identical to Part II, Point 1.1, second and third sentences, 2010 Decision. The first sentence of Part II, Point 1.1, 2010 Decision, which sets out a requirement to act in accordance with search and rescue treaties and with fundamental rights, has been moved to the preamble of the proposal (recital 8, new first sentence), and made less binding ('should' in place of 'shall'). However, this new clause does refer back to the 'obligation' to assist persons in distress, which is set out in recital 7 of the 2013 Decision (unchanged from recitals 7 and 8, 2010 Decision).

[340] Art. 9(2), 2013 proposal, replacing the general reference to 'a situation in which uncertainty or apprehension exists as to the safety of a ship or of any person on board' (Part II, Point 1.2, first sub-paragraph, 2010 Decision). Each of the key terms ('uncertainty', 'alert' and 'distress') is defined in Art. 9(3) to (5), 2013 proposal.

[341] Art. 9(7), 2013 proposal, amending Part II, Point 1.2, third sub-paragraph and part of Part II, Point 1.3, 2010 Decision. In each case 'shall' replaces 'should', and the assessment would have to be communicated 'promptly'.

[342] Art. 9(8) to (11), 2013 proposal, amending respectively: Part II, Point 1.4; Part II, Point 1.2, second sub-paragraph; Part II, Point 1.5; and Part II, Point 1.6 of the 2010 Decision. In each case 'shall' would replace 'should'.

[343] Art. 2(12), 2013 proposal.

[344] Explanatory memorandum, 2013 proposal.

Finally, as regards disembarkation, the rules on disembarkation plans and communication would be revised to make them more binding,[345] and to clarify certain issues.[346] More significantly, there would be a number of new rules on the place of disembarkation. As noted already, the 2010 Decision sets out a general rule that 'priority should be given to disembarkation' in the third State which the vessel left from, or the territorial waters or search and rescue region which the ship travelled through, or in the host Member State only if those options were 'not possible', unless it was necessary to act otherwise to ensure persons' safety.[347] Instead of this, the 2013 proposal would set out different rules for disembarkation in cases of interception, on the one hand, or search and rescue, on the other hand.

First of all, if an interception takes place in the territorial waters or contiguous zone of a Member State, disembarkation would have to take place in the relevant Member State.[348] Secondly, if a ship is intercepted in the high seas, then 'subject to' the guarantees in the 2013 proposal on fundamental rights and *non-refoulement*, then disembarkation 'may' take place in the third State which the ship left. If this is not possible, then disembarkation would have to take place in the host Member State.[349]

Thirdly, in search and rescue cases, participating units would have to cooperate with the relevant Rescue Coordination Centre, 'to provide a suitable port or place of safety for the rescued persons and to ensure their rapid and effective disembarkation'.[350] The Member States would have to identify such a port or place of safety 'as soon as possible', and would have to take into account 'relevant factors, such as distance to the closest ports or places of safety, risks and the circumstances of each case'.[351] A 'place of safety' is defined in turn as a place where 'the survivors' safety of life including' their fundamental rights 'is not threatened, where their basic human needs can be met and from which

[345] Art. 10(1), first sentence, and Art. 10(5), first sentence, 2013 proposal, would replace 'should' with 'shall': compare to Part II, Point 2.1, first sentence, and Part II, Point 2.2, first sentence, 2010 Decision.

[346] The rules on the operational plan relating to disembarkation would no longer have to be 'in accordance with international law and applicable bilateral agreements', and non-participating Member States would be obliged as regards disembarkation if they gave express authorisation for measures to be taken in their territorial waters or contiguous zone (Art. 10(1), 2013 proposal).

[347] Part II, Point 2.1, second sub-paragraph, 2010 Decision.

[348] Art. 10(2), 2013 proposal.

[349] Art. 10(3), 2013 proposal.

[350] Art. 10(4), first sub-paragraph, 2013 proposal.

[351] Art. 10(4), second sub-paragraph, 2013 proposal.

transportation' can be arranged for their next or final destination.[352] But if a participating unit has not been released of its obligation to render assistance to a person or ship in distress 'as soon as reasonably practicable', taking into account the safety of that unit and the rescued persons, it must be allowed to disembark the persons concerned in the host Member State.[353]

According to NGO comments on the 2013 proposal, it is an improvement on the 2010 Decision from the perspective of international law and human rights, but further amendments are necessary in order to ensure coherence with other EU law, as well as full compliance with international law and human rights rules.[354] More precisely, first of all, the 2013 proposal does not fully reflect the *Hirsi* judgment of the European Court of Human Rights, because that judgment requires that there must be 'effective remedies' to ensure 'a thorough and rigorous assessment' of any requests for asylum before an asylum-seeker is sent to a third State, referring particularly to interpreters and legal advisers. Also, remedies should have suspensive effect, entailing access to an independent authority before removal is enforced. Secondly, the proposal should be aligned with the Schengen Borders Code rules on border checks, so that checks on persons on board boats should be linked to the grounds for admission set out in the Code, and removals should only take place once a decision on refusal of entry pursuant to the Code has been adopted. Thirdly, the potential conflict with some of the provisions of the asylum procedures Directive ought to be addressed. Fourthly, the rules on interception within the contiguous zone go beyond what is permitted by international law. Finally, the rules should apply to all maritime interception operations by Member States, not just those coordinated by Frontex. Such suggestions for amendments should be supported, otherwise there is a risk that the application of the rules will conflict with human rights law and/or international law and will not be consistent with the Borders Code or EU law relating to asylum, and that Member States will revert to purely national maritime interception operations in an attempt to evade the standards in the proposed Regulation.

The negotiations on the 2013 proposal have been complicated by coastal Member States' insistence that it should contain few (if any) rules on search

[352] Art. 2(11), 2013 proposal. According to the explanatory memorandum, the rule 'refers to' the definition set out in 'the Guidelines on the Treatment of Persons Rescued at Sea issued by the International Maritime Organisation' (Resolution MSC.167(78), adopted on 20 May 2004), 'taking into account aspects of fundamental rights' (Resolution 1821(2011) of the Parliamentary Assembly of the Council of Europe).

[353] Art. 10(4), third sub-paragraph, 2013 proposal.

[354] Comments of the Meijers Committee, online at: <http://www.statewatch.org/news/2013/may/meijers-committee-note-surveillance-external-sea-borders.pdf>.

and rescue and disembarkation, on the grounds that such measures are the responsibility of Member States, acting in accordance with international law. However, these objections are legally not convincing, and would mean that the EU law would not play a significant role in addressing the ongoing tragedy of migrants' deaths at sea or resolving disputes about where migrants should be disembarked. [355]

4.6 Entry-exit system and registered travellers' programme

For some years, it has been suggested that an 'entry-exit system', which would in principle record the details of the movements all third-country nationals across the external borders, is the next logical major step in the development of the Schengen system, in particular because it would enable national authorities to determine quickly which individuals had overstayed their permitted period of stay on the territory. Because the implementation of such a system would likely result in delays for travellers crossing the external borders, due to the extra time which would be needed to process each traveller at those borders (in order to take their fingerprints, et al), it would arguably have to be accompanied by a 'registered travellers' programme', which would provide for a fast-track system of border crossing for those registered in that programme.

The ideas for an entry-exit system and a registered travellers' programme were initially fleshed out in a Commission communication of 2008, which also discussed the possibility of an EU system of electronic travel authorisation.[356] Following a further communication on the options for implementing these plans,[357] the Commission proposed legislation to establish the entry-exit system and the registered traveller programme in February 2013.[358] It remains to be seen whether these proposals are adopted, and even if they are, the Council and the European Parliament may well agree amendments to the Commission's proposals.

First of all, the legislation to establish the entry-exit system (EES) would apply to all third-country nationals admitted for a short stay in accordance

[355] See S. Peers, Statewatch analysis, 'EU rules on maritime rescue: Member States quibble while migrants drown', online at: <http://www.statewatch.org/analyses/no-243-eu-search-and-rescue.pdf>. See also Y. Pascouau, European Policy Centre, 'People Dying at the EU External Borders: Can the Summit find the right answer?', online at: <http://www.epc.eu/pub_details.php?cat_id=4&pub_id=3839>.

[356] Communication on the next steps in border management (COM (2008) 69, 13 Feb. 2008).

[357] COM (2011) 680, 25 Oct. 2011.

[358] See respectively COM (2013) 95 and COM (2013) 97, both 27 Feb. 2013. There is also a parallel proposal to amend the Schengen Borders Code (COM (2013) 96, 27 Feb. 2013).

with the Schengen Borders Code, whether or not they were subject to a visa obligation, apart from: family members of EU citizens who hold a 'residence card'; those who have residence permits; and nationals of Andorra, Monaco and San Marino.[359] The purpose of the system would be to manage external borders and to fight against unauthorised immigration, by providing information on the time of entry and exit of migrants, in order to enhance external border checks, to calculate and monitor periods of stay, to identify third-country nationals who have 'overstayed' their period of permitted stay and to assist the identification of anyone who might not, or no longer, fulfil the conditions for entry or stay on the territory.[360]

The system will record data on the names, travel documents and visas of third-country nationals, as well as information on their participation in the registered traveller programme (see below), the time and place of entry and the length of authorised stay.[361] Where a person is not subject to a visa obligation, the authorities will also have to take his or her fingerprints, although this rule will not apply until three years after the EES starts operations.[362] Further data would be added if a period of stay is revoked or annulled.[363]

Access to the EES would be granted primarily to border guards for the purpose of carrying out border control tasks,[364] but also to authorities deciding on visa applications, applications for registered traveller status, and for verifying or identifying persons for other immigration control reasons.[365] Information in the EES will only be kept for six months, unless there is no record of exit, in which case it will be kept for five years.[366] The system will automatically generate a list of overstayers,[367] but a name must be taken off this list if the person concerned can provide evidence that he or she was forced to overstay due to an 'unforeseeable and serious event', has acquired a legal right to stay or in the event of errors (i.e. he or she had left in time after all).[368]

As for data processing rules and data protection rights, in principle, EES data could not be given to third countries or international organisations, but as an

[359] Art. 3, proposed EES Regulation.
[360] Art. 4, proposed EES Regulation.
[361] Art. 11, proposed EES Regulation.
[362] Art. 12, proposed EES Regulation.
[363] Art. 14, proposed EES Regulation.
[364] Art. 15, proposed EES Regulation.
[365] Arts. 16-19, proposed EES Regulation.
[366] Art. 20, proposed EES Regulation.
[367] Art. 10(2), proposed EES Regulation.
[368] Art. 21(2), proposed EES Regulation.

exception, it could be necessary to prove identity, including for the purpose of return, if a number of further conditions are met.[369] Data subjects would have the right to information, and also rights to access the data, and to correct or delete the data in case of error.[370]

According to the second proposal, which would establish the registered traveller programme (RTP), that programme would be based on a system relying upon tokens held by travellers, on the one hand, and a central repository of the RTP data, on the other hand.[371] This Regulation would set out the process for applying for RTP status, which would entail filling in an application form, presenting a travel document, providing fingerprints and supporting documents, and paying a fee.[372]

The grounds for admitting a person into the RTP would be: fulfilment of the entry conditions in the Schengen Borders Code; that the person's travel document and other documents were valid and not counterfeited, et al; no prior record of overstaying and proof of the applicant's 'integrity and reliability, in particular a genuine intention to leave the territory in due time'; justification of the intent and purpose of the intended stays; proof of the applicant's financial situation and subsistence; no alert in the Schengen Information System; absence of a threat to public policy, et al; and the prior record of applications for the RTP which were refused or granted, et al.[373]

National authorities would have to decide upon RTP applications within 25 days of submission.[374] A successful applicant would initially be granted access to the RTP for one year, which could be extended for two years upon request and a further two years automatically for travellers who have complied with Schengen rules.[375] There would be expedited access to the RTP for persons holding long-stay visas, residence permits, multiple-entry visas, and for family members of EU citizens.[376]

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[369] Art. 27, proposed EES Regulation.

[370] Arts. 33 and 34, proposed EES Regulation. The remedies to this end are set out in Arts. 36 and 37 of the proposal (respectively concerning individual remedies and the role of supervisory authorities).

[371] Art. 2, proposed RTP Regulation.

[372] Arts. 4-10, proposed RTP Regulation.

[373] Art. 12, proposed RTP Regulation. However, Art. 12(7) of the proposed Regulation specifies that applications by third-country national family members of EU citizens shall be subject to the same rules as their visa applications, i.e. the less stringent conditions of EU free movement law.

[374] Art. 13, proposed RTP Regulation.

[375] Art. 14(1), proposed RTP Regulation.

[376] Art. 14(2), proposed RTP Regulation.

If the applicant did not satisfy the criteria for registration on the RTP, access to the programme would have to be refused. National authorities would have to give reasons for the refusal by means of a standard form, and the person concerned would have a right to a review of that decision. Information on the refusal would be added to the central repository of RTP data.

Finally, the Schengen Borders Code would be amended to take account of the two new measures. In addition to new definitions,[377] the Code would contain a new provision on data to be entered into the entry-exit system.[378] Data would be entered into that system except as regards groups of persons who benefit from the facilitation of border checks or who are exempt from such checks, pursuant to the Code: Heads of State and members of their delegation; specified transport crew members or passengers; and persons who are exempt from the obligation to cross at border crossing points during their opening hours. Information on the holders of border traffic permits 'may' be entered into the system, depending on whether border crossing has been facilitated for such persons. Where border checks are relaxed, information would still have to be entered into the entry-exit system.[379]

The rules on border checks would be amended,[380] in order to provide for an obligation to check the entry-exit system upon entry and exit, instead of an obligation to check the entry and exit stamps in the person's travel document, to ascertain whether the person concerned has overstayed. Checks on entry and exit would also have to include checks on the identity of a registered traveller and access to the registered traveller programme.

A new provision would set out specific rules on border checks of registered travellers, and the use of automated means for border checks.[381] Registered travellers would be exempted from most of the rules on entry checks, and checks on them on entry and exit 'may' be carried out in automated border gates. Persons whose fingerprints are registered in the Visa Information System and also stored on their travel document 'may' also be checked on entry and exit in automated border gates. Both categories of persons could also use 'fast-track' lanes at border crossing points.[382]

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[377] Revised Art. 2, Schengen Borders Code.
[378] New Art. 5a, Schengen Borders Code.
[379] Revised Art. 8(3), Schengen Borders Code.
[380] Revised Art. 7, Schengen Borders Code.
[381] New Art. 7a, Schengen Borders Code.
[382] Revised Art. 9, Schengen Borders Code.

The rules on stamping of travel documents would be deleted,[383] and the rules on presumption of fulfilment of the conditions of stay would be revised to refer to use of the entry-exit system, instead of the stamps in the travel document, to determine whether the person concerned can be presumed to have overstayed. If that presumption is rebutted, a new file in the entry-exit system would have to be created.[384]

Member States have expressed an interest in amending these proposals in order to collect data also on third-country nationals who reside in the Schengen area, and to make the information available to law-enforcement authorities.[385] The necessity of the former suggestion can be doubted, because immigration control for legal residents of the European Union is carried out at the point when they apply for (renewal of) a residence permit or long-stay visa. Do these persons really form a large proportion of those who overstay within the Schengen area?

Similarly, is there any real point applying the system to those who do not need a visa at all? If the nationals of a particular third State present a significant risk of overstaying, then they should in principle be subject to a visa requirement. But there seems little point applying the system to the nationals of those States who do not present such a risk. If it is not applied to such persons, the cost and complications of the new system would presumably be significantly reduced.

In fact, the new proposals have generated significant controversy and their cost and necessity has frequently been doubted.[386] In particular, it has been suggested that in the absence of any facility to assist in determining the exact location of overstayers, the entry-exit system will amount to 'little more than an extremely expensive mechanism for gathering migration statistics'.[387] From a human rights perspective, it should be ensured that overstayers are not removed if they have applied for asylum, in accordance with EU asylum legislation.[388]

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[383] Current Art. 10, Schengen Borders Code.

[384] Revised Art. 11, Schengen Borders Code.

[385] See: <http://www.statewatch.org/news/2013/may/11eu-entry-exit-system.html>.

[386] See the report by B Hayes and M Vermeulen, 'Borderline: Assessing the Costs and Fundamental Rights Implications of Eurosur and the Smart Borders' proposals, online at: <http://www.statewatch.org/news/2012/jun/borderline.pdf>,

[387] See the report by D Bigo and S Carrera, et al (2012), 'Evaluating current and forthcoming proposals on JHA databases and a smart borders system at EU external borders', Study for the European Parliament.

[388] See Bigo and Carrera (ibid) and Hayes and Vermeulen (n. 386 above).

4.7 Schengen governance

A more systematic approach to Schengen governance was launched by a Commission communication on this subject in September 2011,[389] which was a response to the concerns about the operation of the Schengen system that had arisen during the Arab Spring. This communication, which was released alongside the proposals (subsequently adopted) to permit further reintroduction of border controls and to reform the Schengen evaluation system,[390] confirmed the Commission's willingness to issue guidelines 'to ensure a coherent implementation of the Schengen rules', following the identification of 'shortcomings and areas where there might be need for further clarification on the Schengen *acquis*'. Along with these guidelines, and the reports that will follow from the revised rules on Schengen evaluations and border controls, the Commission committed itself to produce a bi-annual overview on the Schengen system, to 'provide the basis for a regular debate in the European Parliament and in the Council and contribute to the strengthening of political guidance and cooperation in the Schengen area'. As noted already (in s. 3.4 above), the agreed amendments to the Borders Code now require the Commission to produce an annual report on the entire Schengen system.

Pursuant to the commitment which it undertook in 2011, the Commission has produced three reports on the overall functioning of the Schengen area.[391] The first report started by examining the situation at the external borders, in particular at the 'limited number of hot spots', where the numbers of persons crossing increased considerably in late 2011. Within the Schengen area, there was a drop in the number of irregular migrants detected, and two short reimpositions of internal border controls. The Commission had queried whether some measures which Member States had taken were compatible with the abolition of internal border controls, and criticised Greece for turning back people at the external borders, in light of the EU asylum rules. As regards the outcome of Schengen evaluations, there were 'serious shortcomings' in Greece, which had developed an action plan to address them, with EU support. The Commission was working with Member States to address operational issues as regards the SIS. As regards visas, the Commission reported on the start of operations of the Visa Information System, and the monitoring of visa-free travel with the Western Balkans, suggesting that it was necessary to examine whether the current monitoring system should be improved.[392] Finally, the

[389] COM (2011) 561, 16 Sep. 2011.

[390] See also the compilation of measures which the EU could take to support Member States facing difficulties at the external borders (Annex I of the report).

[391] COM (2012) 230, 16 May 2012; COM (2012) 686, 23 Nov. 2012; and COM (2013) 326, 31 May 2013.

[392] On these issues, see further chapter 5.

Commission produced detailed guidelines on two key issues: the issue of residence permits and travel documents, and police measures at internal borders.

The second report indicated that there was a significant drop in irregular border crossings, and a further drop following a Greek operation at the Greek/Turkish border in August 2012. The information on the detection of irregular stay within the EU was still incomplete, and the Commission was working on ways to improve it. Again, internal border controls were reimposed twice. As for internal border controls, the Commission invited Member States to take account of the recent *Adil* judgment, if they had legislation specific to controls in border areas. The Commission was studying the application of EU border traffic legislation and practice during maritime surveillance by several Member States for possible breaches of EU law. As for Schengen evaluations, Greece had made some progress addressing deficiencies, but needed to make more. Further improvement needed to be made as regards the number of asylum-seekers from Western Balkan countries.

The third report indicated that the numbers crossing the external borders irregularly had dropped further, with some sign of a displacement effect away from the Greek/Turkish border. The number of Syrians entering irregularly had dropped, '[d]espite the desperate situation in their home country'. There were plans to start regular collections of data on apprehensions within the Schengen area, from the start of 2014. Only one Schengen State had reimposed internal border checks, for a short period. The Commission was satisfied with Italy's response to the *Hirsi* judgment of the European Court of Human Rights, and urged Greece to continue implementing its action plan on external border controls. Asylum applications from some Western Balkan countries had continued to increase, while applications from some other Western Balkan States continued to decrease.

Overall, the Commission's reports provide a useful summary of factual information relating to the operation of the Schengen system, which could be useful to inform public debate about the Schengen system. So far the European Parliament and the Council have not responded directly to these reports. With the adoption of further new legislation on the Schengen system (concerning internal border controls, Schengen evaluation, Eurosur, the entry-exit system, maritime surveillance and visa issues) imminent or likely in the near future, there will be an ever-greater need to develop this reporting system, in particular to link together the various reports that are or will be required under the different measures (i.e. the evaluations of individual Schengen States, the annual report on reimposition of internal border controls, the evaluation of

the operations of Eurosur, the VIS and the SIS) and more general information about the Schengen system (such as the number of interceptions and apprehensions of unauthorised migrants).

4.8 Conclusions

It can be seen that, quite separately from the recently agreed changes to the rules on reimposition of internal border controls, the EU regime concerning the control of external borders is subject to a constant process of reinforcement. In particular, the Schengen Borders Code has been amended and supplemented by rules on maritime surveillance (which are still in force pending their replacement by new legislation); the second-generation Schengen Information System began operations in spring 2013 and will likely soon include biometric data; there are more precise rules on entry bans; the powers of Frontex have recently been enhanced; the Eurosur system will soon be operational; a reinforced process for Schengen governance has been launched; and the creation of an entry-exit system and registered travellers' programme is likely in the medium term.

While the demands for new rules on the re-introduction of introduction of border controls were widely seen as a response to concerns about the effectiveness of the Schengen system during the Arab Spring, these concerns should take into account the robustness of the rules relating to external border controls, and the continual strengthening of those controls. To put the issue into perspective, ten years ago there was no Schengen Borders Code (only a loosely drafted 'Common Manual' and a few clauses in the Schengen Convention), no Frontex and no Returns Directive. The idea of a second-generation Schengen Information System was only on the drawing board. So the ongoing willingness and capacity of the EU to strengthen its external borders, despite the considerable cost to establish new bodies and effort to adopt complex legislation, has been demonstrated in the past and cannot be doubted for the future, as evidenced by the support for the planned entry-exit system and registered travellers' programme in the European Council conclusions of June 2011, and (more immediately) by the formal start of the Eurosur system in December 2013.

5 The Schengen system and other immigration control developments

The Schengen system does not comprise only rules on the abolition of controls at internal borders, and the strengthening of controls at external borders. It also comprises a detailed regime on uniform short-term visas valid throughout the territory of all Schengen States ('Schengen visas'),[393] consisting of common visa lists, a visa code regulating applications for Schengen visas, and a Visa Information System. Furthermore, the Schengen system necessarily includes rules on the freedom to travel between Schengen States, and has been bolstered by rules controlling irregular migration, in particular the Returns Directive. Each of these measures will be considered in turn.

5.1 The Schengen visa regime

A key aspect of the Schengen system is the issue of Schengen visas – uniform short-term visas which are valid for all of the States fully participating in the Schengen system, and which are therefore intrinsically linked to the abolition of internal border checks. While the Schengen visa system was originally established by the Schengen Convention and the measures implementing it,[394] it is now principally set out in three different EU law measures, concerning respectively the common visa list,[395] a visa code regulating applications for Schengen visas and the Visa Information System.[396] Each of these measures is being further developed.

[393] There are also a few harmonised rules on long-stay visas: see Reg. 265/2010 (OJ 2010 L 85/1).

[394] See Arts. 9-17 of the Convention, and particularly the Executive Committee Decision establishing the Common Consular instructions (OJ 2000 L 239).

[395] The common visa list has already bound Romania, Bulgaria, Cyprus and Croatia from the date of their EU membership, whereas the other visa rules will only apply once these States are full participants in the Schengen system.

[396] The other measures on visas still in force are: Reg. 1683/95 on a common format for visas (OJ 1995 L 163/1), amended by Reg. 334/2002 (OJ 2002 L 53/7), Reg. 856/2008 (OJ 2008 L 235/1) and Reg. 610/2013 (OJ 2013 L 182/1); Reg. 333/2002 establishing a uniform form for stickers attached to visas for persons who have travel documents from an entity which is not recognised (OJ 2002 L 53/4); Reg. 693/2003 on facilitated travel documents as regards Kaliningrad (OJ 2003 L 99/8) and Reg. 694/2003 on the format for such documents (OJ 2003 L 99/15); a Recommendation on the issue of short-term visas to researchers (OJ 2005 L 289/23); and a Decision drawing up list of travel documents (OJ 2011 L 287/9). See also the Decisions on new Member States' recognition of travel documents (OJ 2006 L 167/1 and 8, and OJ 2008 L 161/30 and L 162/27), as interpreted by the Court of Justice: Case C-139/08 Kqiku [2009] ECR I-2887.

5.1.1 Common visa lists

The visa list was already partly harmonised for all EU Member States in the 1990s.[397] In parallel, the Schengen States went further (then acting outside the EU legal framework) and almost fully harmonised the lists of third States whose nationals do or do not need a visa to cross the external (Schengen) borders,[398] even before the Treaty of Amsterdam integrated the Schengen *acquis* into the EU legal order.[399]

Following the entry into force of the Treaty of Amsterdam, the EU adopted a Regulation in 2001, fully harmonising the visa lists.[400] The EU has amended this legislation many times since then,[401] most notably moving the Western Balkans States to the whitelist.[402] Furthermore, the EU rules set out uniform treatment regarding visas for persons with special status in relation to the United Kingdom,[403] as well as persons holding a local border traffic permit pursuant to EU legislation and (in some cases) refugees and children travelling on school trips.[404]

There are also common rules on visa reciprocity, which aim to ensure that third States on the Schengen whitelist also abolish visa requirements for all

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[397] Reg. 2317/95 (OJ 1995 L 234/1), which was readopted as Reg. 574/99 (OJ 1999 L 72/2) after the former Reg. was annulled by the Court of Justice (Case C-392/95 *EP v Council* [1997] ECR I-3215).

[398] These lists are usually referred to as the 'blacklist' and the 'whitelist' respectively.

[399] SCH/Com-ex(97) 32 and SCH/Com-ex(97) 32 rev 2, respectively OJ 2000 L 239/186 and 206.

[400] Reg. 539/2001, OJ 2001 L 82/1. The only third State which had not been placed on either the blacklist or the whitelist by the prior Executive Committee Decisions (ibid) was Colombia, which the EU placed on its blacklist.

[401] Reg. 2414/2001, OJ 2001 L 327/1; Reg. 453/2003, OJ 2003 L 69/10; Reg. 851/2005, OJ 2005 L 141/3; Reg. 1932/2006, OJ 2006 L 405/23; Reg. 1244/2009, OJ 2009 L 336/1; Reg. 1091/2010, OJ 2010 L 329/1; Reg. 1211/2010, OJ 2010 L 339/6; and Reg. 610/2013 (OJ 2013 L 182/1). The list has also been amended pursuant to the 2003 and 2005 accession treaties. The Commission has also made two proposals for amendment: COM (2011) 290, 24 May 2011 (the '2011 proposal') and COM (2012) 650, 7 Nov. 2012 (the '2012 proposal'). The 2011 proposal has been agreed in principle by the Council and the European Parliament (for the agreed text, see Council doc. 12910/13, 16 Sep. 2013), and will likely be adopted formally before the end of 2013.

[402] Regs. 1244/2009 and 1091/2010 (ibid). Croatia was always on the whitelist (even before it joined the EU), whereas Kosovo remains on the blacklist. The extent of permissible visa requirements for Turkish nationals is affected to some extent by the EU's association agreement with Turkey, which applies to all Member States but not to Schengen associates. See Case C-228/06 *Soysal* [2009] ECR I-1031 and Case C-221/11 *Demirkan*, judgment of 24 Sep. 2013.

[403] Part 3 of Annex I and Part 3 of Annex II to Reg. 539/2001, as amended by Reg. 1932/2006. The 2012 proposal would transfer all such persons to Part 3 of Annex II (i.e., the whitelist).

[404] Art. 1(1), second sub-paragraph and Art. 1(2), second sub-paragraph, of Reg. 539/2001, as amended by Reg. 1932/2006.

Schengen States.[405] Conversely, the European Parliament and the Council have agreed upon new common rules on the emergency re-imposition of visas, in the event of a large increase in irregular migration from third countries on the visa whitelist.[406]

However, despite the considerable and growing extent of harmonisation in this area, Member States in principle retain some discretion as to whether to waive or insist upon a visa requirement for certain categories of persons: persons with diplomatic, service/official, or special passports; transport staff; emergency or disaster helpers; persons carrying out economic activities; other categories of refugees and schoolchildren not covered by mandatory exceptions; the staff of international organisations; and armed forces travelling on NATO or NATO-related business.[407]

Finally, it should be noted that the EU has entered into a number of visa waiver treaties with third States, in order to ensure that those third States have a legal obligation to extend a visa waiver to the citizens of all Schengen States.[408]

5.1.2 Visa code

The Schengen visa application process is regulated in great detail by the EU's visa code,[409] adopted in 2009, which codified and amended a large number of EU and Schengen measures.[410] First of all, the visa code addresses the subject of airport transit visas (visas necessary to transit through an airport located in a particular State), setting out a common list of third States whose nationals require such visas,[411] common criteria for Member States to apply if they

[405] Arts. 1(4) and (5), Reg. 539/2011, which will be amended when the 2011 proposal is adopted.

[406] See the agreed text of the 2011 proposal, Art. 1a.

[407] Art. 4, Reg. 539/2001, which will be amended by the 2011 proposal.

[408] There are two such treaties with Brazil: OJ 2012 L 255/4 (ordinary visas) and OJ 2011 L 66/1 (diplomatic visas). There are also visa waiver treaties with Mauritius, Antigua/Barbuda, Barbados, Seychelles, St. Kitts and Nevis and Bahamas (OJ 2009 L 169). The 2012 proposal envisages that such treaties will be signed with a further sixteen Caribbean and Pacific island States.

[409] Reg. 810/2009 (OJ 2009 L 243/1), amended by Reg. 154/2012 (OJ 2012 L 58/3), *Reg. 610/2013 (OJ 2013 L 182/1),* and by an implementing measure (Commission Reg. 977/2011, OJ 2011 L 258/9). For judicial interpretation of the code, see Case C-83/12 Vo, judgment of 10 April 2012, not yet reported, and Case C-84/12 Koushkaki (opinion of 11 April 2013), pending.

[410] Art. 56 of the code.

[411] Such visas fall outside the scope of the visa list Regulation: see Case C-170/96 *Commission v Council* [1998] ECR I-2763.

wish to insist upon an airport transit visa requirement for nationals of additional third countries, and common exemptions from such requirements.[412]

Next, there are rules on the authorities that take part in visa applications, including rules determining which Schengen State's consulate an applicant should apply to.[413] Then there are rules on the visa application process,[414] which set out: time limits concerning applications; which data should be submitted with an application, including biometric data (photographs and fingerprints),[415] supporting documents and travel documents; a medical insurance requirement; and standard application fees, including largely uniform exceptions from the relevant rules.[416]

The visa code then regulates the process of examining and taking decisions upon visa applications.[417] This includes: rules on admissibility and stamping of documents, in particular the criteria for admission set out in the Schengen Borders Code: possession of a valid travel document; justification of the purpose and conditions of the visit, and sufficient subsistence; non-listing in the Schengen Information System; and not posing a 'threat to public policy, internal security, public health or the international relations of any of the Member States'.[418] In this context, the code specifies that 'particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.'[419]

Consulates must carry out checks concerning the veracity of documents, the intention of the applicants, means for the subsistence of applicants, a listing in the Schengen Information System, the existence of a 'threat to public policy, public security or public health' as defined in the Schengen Borders Code, and the existence of sufficient insurance.[420] They must also check whether

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[412] Art. 3 and Annex IV of the visa code. For a list of the countries subject to national requirements to hold an airport transit visa, see: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/annex_7b_atv-national_lists.en.pdf#zoom=100>.

[413] Arts. 4-8 of the visa code: Chapter I of Title III.

[414] Arts. 9-17 of the visa code: Chapter II of Title III.

[415] This data is then retained in the Visa Information System: see s. 5.1.3 below.

[416] Art. 13(7) (fingerprints); Art. 14(4) and (6) (supporting documents); Art. 15(6) (insurance); and Art. 16(4) (fees). Art. 16(4) and (5) provides for optional exceptions regarding fees.

[417] Arts. 18-23 of the visa code: Chapter III of Title III.

[418] Art. 21(1) of the visa code, referring to Art. 5 of the Schengen Borders Code; see s. 4.1 above.

[419] See the opinion in *Koushkaki*, n. 409 above.

[420] Art. 21(3) of the visa code.

the applicant has overstayed in the past.[421] Decisions must be made on the basis of the 'authenticity and reliability' of the documents submitted, and the 'veracity and reliability' of the applicant.[422]

A system of prior consultation applies in some cases.[423] This system provides that one Member State may require the authorities of other Member States to inform them of applications by nationals of particular third countries, or certain categories of such nationals. This consultation requirement can be replaced by a less onerous information requirement, which does not provide for the second Member State to comment on the visa application.[424]

Next, there are rules on issuing a visa,[425] which state that visas can be valid for one entry, two entries or multiple entries.[426] Multiple-entry visas 'shall' be issued if there is a proven need to travel frequently and the applicant has proven his or her 'integrity and reliability'.[427] As an exception, Schengen States can issue a visa with limited territorial validity (i.e. valid for only one or some, but not all, Schengen States), if a Schengen State 'considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations', where the criteria for entry set out in the Schengen Borders Code are not satisfied, in the absence of consultation of another Member State or despite the latter's objection in the consultation process.[428]

As for the grounds for refusing entry, an application must be refused if the applicant does not meet the conditions for issuing a visa, or he or she has already stayed on the territory with a visa for three of the last six months, or if there are 'reasonable doubts' whether his or her documents or statements can be believed.[429] The applicant has to be informed of the refusal and the reason for it, by means of a standard form, and has the 'right to appeal' in accordance

[421] Art. 21(4) of the visa code. In future, this information will be generated by the planned entry-exit system: see s. 4.6 above.

[422] Art. 21(7) of the visa code. This assessment is increasingly affected by use of the Visa Information System (see 5.2.3 below), which must be consulted pursuant to Art. 21(2) of the visa code.

[423] Art. 22 of the visa code. For a list of the countries concerned, see: < http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/prior_consultation_en.pdf#zoom=100>.

[424] Art. 31 of the visa code. For a list of the countries concerned, see: <http://ec.europa.eu/dgs/home-affairs/doc_centre/borders/docs/annex_17_ex_post_info_en.pdf#zoom=100>.

[425] Arts. 24-32 of the visa code: Chapter IV of Title III.

[426] Art. 24(1) of the visa code.

[427] Art. 24(2) of the visa code.

[428] Art. 25 of the visa code.

[429] Art. 32(1) of the visa code.

with the national law of the Member State which refused the application.[430]

There are also rules on the organisation and management of visa sections in Member States' consulates,[431] concerning security, resources and the conduct of staff.[432] Member States must cooperate in various ways, for instance in the form of co-location of consulates, Common Application Centres, honorary consuls or the use of private companies.[433] To assist consular staff, the Commission has drawn up a Handbook on the processing of visa applications and the modification of issued visas, and a Handbook for the organisation of visa sections and local Schengen cooperation.[434]

The final substantive provisions of the visa code concern local consular cooperation.[435] Local consulates and the Commission must consider whether to draw up harmonised rules for the local level on certain issues. There must also be common information sheets for local applicants, the exchange of information and statistics and discussions on operational issues.436 The Commission has adopted a number of decisions specifying common rules for supporting documents in various locations.[437]

A Commission review of the visa code is due in 2013.[438] Already the Commission has indicated that it intends at that time (likely to be late 2013) to make proposals on a number of specific issues, in particular with a view to increasing tourism and therefore economic growth in the EU:[439]

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[430] Art. 32(2) and (3) of the visa code.

[431] Arts. 37-47 of the visa code: Title IV.

[432] Arts. 37-39 of the visa code.

[433] Arts. 40-45 of the visa code.

[434] For the texts, see: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/index_en.htm>.

[435] Art. 48 of the visa code: Title V.

[436] For an overview of the practical application of these rules, see the Commission's report on the functioning of local Schengen cooperation during the first two years of operation of the visa code: COM (2012) 648, 7 Nov. 2012.

[437] Art. 48 of the visa code: Title V. There have been six decisions, applying to consulates in sixteen countries: Bosnia-Herzegovina, Chile, China, Egypt, Indonesia, Jordan, Kazakhstan, Kosovo, Nicaragua, Nigeria, Saudi Arabia, Sri Lanka, Turkey, the United Kingdom, the United States of America and Vietnam. For the texts of these decisions, see: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/index_en.htm>.

[438] Art. 57 of the visa code.

[439] See the Commission's communication on 'Implementation and development of the common visa policy to spur growth in the EU' (COM (2012) 649, 7 Nov. 2012).

– streamlining and shortening the procedures (reconsidering all steps of the procedure including lodging of the visa application by intermediaries/travel agencies, and prior consultation),
– clarifying the definition of the competent consulate for processing the visa application,
– simplifying the application form,
– simplifying the supporting documents requirements,
– clarifying the rules on visa fee waivers,
– clarifying the rules on the issuing of multiple entry visas,
– improving consular organisation and cooperation in order to enhance consular coverage, e.g. by redefining the legal framework for Common Application Centres, facilitating the establishment of such centres and their functioning; and
– enhancing Local Schengen Cooperation in order to make it more efficient.

The rules on applying for visas have been clarified and/or simplified in a number of visa facilitation treaties which the EU has signed with third States.[440] In particular, these treaties: simplify the process of supplying supporting documents for a visa application for some categories of persons; provide that multiple-entry visas must be issued to some groups (waiving the usual conditions which apply to applications for such visas); cut or waive the visa application fee; reduce the time limit for making decisions on applications; and waive the visa requirement for persons holding diplomatic visas.

5.1.3. Visa Information System

Another significant recent development as regards the Schengen regime is the creation of a Visa Information System (VIS), which is a database concerning

[440] Such treaties are in force with: Russia (OJ 2007 L 129); Ukraine (OJ 2007 L 332/66); Western Balkans States (OJ 2007 L 334); Moldova (OJ 2007 L 334); and Georgia (OJ 2011 L 52/33). They have also been signed with Armenia (OJ 2013 L 3/1) and Cape Verde (OJ 2012 L 288), and are being negotiated with Azerbaijan and Belarus. Furthermore, amended treaties, which further facilitate the issue of visas, have been agreed with Moldova (OJ 2013 L 168/1) and Ukraine (OJ 2013 L 168/10), and another such treaty is being negotiated with Russia. See also the Commission's communication on visa facilitation agreements: SEC (2009) 1401, 15 Oct. 2009.

all applicants for Schengen visas.[441] Access to the database was extended to Europol (the EU's police agency) and national law enforcement services on 1 September 2013.[442] The Visa Information System is being rolled out region by region, starting from October 2011.[443] It is managed by the EU agency responsible for JHA information systems,[444] and its adoption has entailed amendments to other EU legislation.[445]

The purpose of the Visa Information System is to improve the implementation of the EU's common visa policy, consular cooperation and consultation between Member States' visa authorities, by exchanging information to achieve seven objectives: facilitating the application procedure; avoiding 'visa-shopping' (i.e. applicants choosing which consulate to apply to); facilitating the fight against fraud; facilitating checks at external borders and with-

[441] The detailed rules regarding the operation of the VIS are set out in Reg. 767/2008, OJ 2008 L 218/60, later amended by the Reg. establishing the visa code (n. 409 above). This Reg. has been implemented by a number of Commission measures, namely: a Decision on the consultation mechanism referred to in Art. 16 of the Reg. (OJ 2009 L 117/3; see discussion below); a Decision laying down specifications for the resolution and use of fingerprints for biometric identification and verification in the VIS (OJ 2009 L 270/14); a Decision on data processing (OJ 2010 L 315/30); and a Decision on security (OJ 2010 L 112/25). The initial legal basis to set up the VIS is a Council Decision (OJ 2004 L 213/5), which has been implemented by several Commission Decisions, namely: a Decision laying down technical specifications for biometrics (OJ 2006 L 267/41); a Decision establishing VIS sites during the development phase (OJ 2006 L 305/13); and a Decision on interfaces with national systems (OJ 2008 L 194/3). See also the list of authorities with access to the VIS (OJ 2012 C 79/5).

[442] Council Decision (OJ 2008 L 218/129); a legal challenge to the validity of this Decision was unsuccessful: Case C-482/08 *UK v Council* [2010] ECR I-10413. See also Art. 3 of the VIS Regulation. For the Council Decision to extend law enforcement agencies' access to the VIS, see OJ 2013 L 198/35. For the list of agencies with access, see OJ 2013 C 236.

[443] A Commission decision (OJ 2010 L 23/52) established the first set of three regions where the VIS would be applied, respectively North Africa, the Near East (except Palestine) and the Gulf. The VIS began operations in the first region (North Africa) on 11 Oct. 2011 (Commission decision in OJ 2011 L 249/18), the second region on 10 May 2012 (OJ 2012 L 117/9) and the third region on 2 Oct. 2012 (OJ 2012 L 256/21). Subsequently, the Commission decided on a second set of eight more regions where the VIS would be applied (OJ 2012 L 134/20), namely West Africa, Central Africa, East Africa, Southern Africa, South America, Central Asia, South East Asia and Palestine. The VIS began operations in the fourth and fifth regions (West and Central Africa) on 14 March 2013 (OJ 2013 L 65/35); in the sixth and seventh regions (East and South Africa) on 6 June 2013 (OJ 2013 L 154/8); in the eighth region (South America) on 5 Sep. 2013 (OJ 2013 L 223/15); and in the ninth to eleventh regions (Central Asia, South East Asia, Palestine) from 14 Nov. 2013 (OJ 2013 L 299/52). The Commission has now decided on the third set of twelve remaining regions (OJ 2013 L 268/13). Also, the VIS has been used at external borders since 31 Oct. 2011.

[444] See Reg. 1077/2011, OJ 2011 L 286/1.

[445] In particular, Reg. 856/2008 amending the visa format legislation (OJ 2008 L 235/1); Reg. 81/2009 amending the Schengen Borders Code (OJ 2009 L 35/56); Reg. 390/2009 amending the Common Consular Instructions (OJ 2009 L 131/1, since subsumed into the visa code); Reg. 154/2012 amending the visa code (OJ 2012 L 54/3); and amendments to the Schengen consultation network (OJ 2009 L 353/49).

in the territory; assisting in identifying unauthorised migrants; facilitating application of the 'Dublin' rules on responsibility for asylum applications; and contributing to preventing 'threats to internal security' of any Member State.[446]

The Visa Information System contains: alphanumeric data (e.g., letters and numbers) on the applicant and on visas requested, issued, refused, annulled, revoked or extended; photographs; fingerprints; and links to other visa applications by the applicant or persons who will be travelling with the applicant.[447] This data is kept for five years in the system.[448] Only visa authorities can enter, delete or amend data in the System,[449] but other authorities (as well as visa authorities) can access the data for the purposes provided for in the VIS Regulation (see below).[450]

As for access to the VIS, first of all, the VIS Regulation sets out rules on the use of the Visa Information System by visa authorities,[451] setting out in detail the circumstances when data must be entered (for instance, the lodging or refusal of a visa application, and the issue of a visa). If a visa application is refused, the visa authority must list the reason for that refusal in the VIS. As a consequence, the 'record' of a visa applicant – whether it is 'good' or 'bad' – will be visible to all other Schengen States' authorities when he or she makes further applications for Schengen visas. The Visa Information System does not contain data on whether a person to whom a visa was issued has overstayed on the territory of the Schengen States, but in future the EU's entry-exit system will provide that information.[452]

Next, the VIS Regulation sets out five cases when other authorities can use the Visa Information System. First of all, the VIS can be used by external border authorities, using the visa sticker number and fingerprints, for the purposes of checking the authenticity of the visa, verifying the identity of the visa holder and confirming that the conditions for entry are satisfied.[453] However, fingerprints cannot be used for these purposes for a three-year period after the VIS

[446] Art. 2, VIS Regulation.
[447] Art. 5, VIS Regulation.
[448] Art. 23, VIS Regulation, which contains detailed rules on determining the start of this five-year period.
[449] Art. 6(1), VIS Regulation.
[450] Art. 6(2), VIS Regulation.
[451] Arts. 8-17, VIS Regulation.
[452] See s. 4.6 above.
[453] Art. 18(1), VIS Regulation.

begins operations (so until October 2014).[454] The detailed rules relating to the use of the Visa Information System at external borders were subsequently set out in separate amendments to the Schengen Borders Code.[455]

Second, immigration authorities may have access to VIS data within the territory of a Member State, in order to verify the identity of a person, to check the authenticity of the visa or to confirm that the conditions for entry are satisfied.[456] Third, national immigration authorities or border guards may search the Visa Information System, in order to identify a person who may be an irregular migrant.[457]

Fourth, in order to apply the rules on responsibility for asylum applications, a national asylum authority can search the VIS using fingerprint data.[458] Finally, national asylum authorities can search the Visa Information System using fingerprint data, in order to assist them with examining the merits of an asylum application.[459]

Data from the Visa Information System cannot usually be transferred to third countries or international organisations, but as an exception, some data can be transferred to third countries or international organisations listed in the Annex to the VIS Regulation, if this is 'necessary in individual cases for the purpose of proving the identity of third-country nationals, including for the purpose of return', and if a number of further conditions are satisfied.[460]

As for the application of the Visa Information System in practice, the Commission released annual reports on the development of the VIS from 2005 to 2013.[461] According to the 2011 report, many Schengen States were already using the VIS unilaterally in some parts of the world, even before the VIS was 'rolled out' to the consulates in the third States concerned for all Schen-

[454] Art. 18(2), VIS Regulation. The Commission has the power to reduce that waiting period to one year as regards air borders, but this power is unlikely to be used since Member States do not support it. However, some Member States have exercised the option to check fingerprints at borders in the meantime.

[455] Reg. 81/2009 (OJ 2009 L 35/56).

[456] Art. 19, VIS Regulation.

[457] Art. 20, VIS Regulation.

[458] Art. 21, VIS Regulation.

[459] Art. 22, VIS Regulation.

[460] Art. 31, VIS Regulation. The bodies concerned are UN organisations (such as the UNHCR), the International Organisation for Migration and the International Committee of the Red Cross.

[461] The two most recent reports detail developments since the VIS began operations: COM (2012) 376, 11 July 2012 (the '2011 report') and COM (2013) 232, 25 April 2013 (the '2012 report').

gen states.[462] In the initial three months of operations of the VIS in the first region (North Africa), 468 cases of visa shopping had been detected.

According to the 2012 report, as of 22 November 2012, the VIS had processed nearly 2 million visa applications, and the central system had dealt with almost forty million operations received from consulates around the world and border crossing points. During the final three months of the reporting period in 2012, nearly 5,000 Schengen visas a day were being issued following the use of the Visa Information System. According to the Commission's May 2013 report on the Schengen system, by 6 May 2013, the VIS had processed 2.9 million visa applications, with 2.4 million visas issued and 348 000 visa applications refused. There was still some concern about 'the mid to long-term effect of a non-optimal quality of data (both biometric and alphanumeric) introduced by the consular authorities of Member States into the VIS'.[463]

5.2 Freedom to travel

The basic rules on the freedom of third-country nationals to travel around the European Union are still set out in the Schengen Convention.[464] These rules were amended for the first time by an EU Regulation in 2010,[465] and then again in 2013.[466]

The rules in the Schengen Convention address in turn the movement of persons with a Schengen visa,[467] the movement of non-visa nationals,[468] the movement of persons with a residence permit or long-stay visa issued by a Member State,[469] and the possible obligation to declare entry.[470] Each of the three categories of persons has the freedom to travel between Schengen States, provided that they meet the conditions for initial entry set out in the Schengen Borders Code, except for the requirement to hold a visa (which is either waived or already satisfied). Also, for the holders of a residence permit or a long-stay visa, there is no requirement of a check in the SIS. Instead,

[462] This is permitted: see Art. 48(3), VIS Regulation.
[463] COM (2013) 326, 31 May 2013.
[464] Arts. 19-22 of the Convention (OJ 2000 L 239).
[465] Reg. 265/2010, OJ 2010 L 85/1, applicable from 5 Apr. 2010.
[466] Reg. 610/2013, OJ 2013 L 182/1.
[467] Art. 19 of the Convention.
[468] Art. 20 of the Convention.
[469] Art. 21 of the Convention, as amended by Reg. 265/2010 to add holders of long-stay visas. For the definition of a long-stay visa, see Art. 18 of the Convention, as amended by Reg. 265/2010.
[470] Art. 22 of the Convention, as amended by Reg. 610/2013.

there is a requirement to check the SIS before a residence permit or a long-stay visa is issued in the first place.[471]

As regards non-visa nationals, travel was only permitted for three months within a six month period, but Member States may permit a third-country national to stay for another three months in exceptional circumstances or on the basis of a pre-existing bilateral agreement.[472]

The freedom to travel of this category of persons was addressed by a judgment of the EU's Court of Justice,[473] which concerned a Romanian national (before the accession of Romania to the EU) who had entered France, left again via other Member States and returned within six months. The Schengen Convention provides that a third country national not subject to a visa requirement can move freely within the Schengen territory for three months out of every six, 'following the date of first entry'.[474] The French court asked the Court of Justice to clarify the meaning of the 'first entry' into the Schengen area. The Court held that a 'first entry' referred to both the 'very first entry' and also to any other first entry which takes place after the expiry of any new period of six months following an earlier date of first entry. However, this interpretation has now been overturned by legislative amendment.[475]

As for the freedom to travel of persons with residence permits, in practice it is dependent upon Member States notifying the relevant permits, pursuant to the Schengen Borders Code.[476]

Overall, it can be seen that the freedom to travel rules have been widened progressively, to extend to the holders of long-stay visas.[477] But in conjunc-

[471] Art. 25 of the Convention, as amended by Reg. 265/2010 to require a search in the SIS and to extend the scope of the rule to include long-stay visas.

[472] Art. 20(2) of the Convention. A later Schengen Executive Committee Decision required the Member States to renegotiate such treaties so that nationals of third states could enjoy only a maximum three-month stay (Sch/Com-ex(98) 24, 23 June 1998; OJ 2000 L 239), but this decision was not integrated into the EU legal order with the rest of the Schengen *acquis* (OJ 1999 L 176/1).

[473] Case C-241/05 *Bot* [2006] ECR I-9627.

[474] Art. 20(1) of the Convention.

[475] See Reg. 610/2013, which amended (*inter alia*) Arts. 18, 20 and 21 of the Schengen Convention, in particular amending Art. 20(1) of the Convention to refer to '90 days in any 180-day period' instead of 'three months during the six months following the date of first entry'.

[476] See Art. 34 of the Code. This obligation was affected by the change in the definition of 'residence permit' in the Code, which was a response to issues which arose during the 'Arab Spring' (see s. 4.1 above).

[477] Before 2001, no holders of long-stay visas had the freedom to travel. Between 2001 and 2010, freedom to travel was extended only to a limited category of holders of long-stay visas: see Art. 18 of the Schengen Convention, as amended by Reg. 1091/2001, OJ 2001 L 150/4, which was repealed by the visa code (Reg. 810/2009, OJ 2009 L 243).

tion with this, the EU has required Member States to check in the SIS before issuing residence permits and long-stay visas, and harmonised aspects of the issue of long-stay visas (their format and validity).[478] The recent move away from harmonisation (as regards reporting of entry on arrival) only confirmed the previous *status quo* in practice.[479] More broadly, the EU has been moving towards harmonisation of the persons with freedom to travel indirectly, as the rules on the issue of visas and admission for short stays have become more uniform,[480] and as the EU has adopted more immigration and asylum measures that regulate the substantive grounds for issuing long-stay visas and residence permits.[481] As a result of these developments, over half of the residence permits or long-term visas in the Schengen States now being issued are regulated by EU law.[482] This percentage will increase in future,[483] and so those legal migrants whose status is only regulated by Member States' national law will make up an ever-diminishing minority.

[478] Arts. 18 and 25 of the Schengen Convention, as amended by Reg. 265/2010. These changes largely confirmed the previous *status quo* in practice.

[479] Recent amendment to Art. 22 of the Schengen Convention by Reg. 610/2013.

[480] See s. 4.1 and s. 5.1 above.

[481] See in particular: Directive 2003/86 on family reunion (OJ 2003 L 251/12); Directive 2003/109 on the status of long-term resident third-country nationals (OJ 2004 L 16/44), amended by Directive 2011/51 (OJ 2011 L 132/1); Directive 2004/114 on entry and residence of students, volunteers and others (OJ 2004 L 375/12); Directive 2005/71 on admission of researchers (OJ 2005 L 289/15); Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ('Blue Card Directive') (OJ 2009 L 155/17); Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State ('single permit Directive') (OJ 2011 L 343/1); and Directive 2011/95 on qualification for international protection (OJ 2011 L 337/9).

[482] More precisely, in 2011 30% of first residence permits were issued to family members (covered by Directive 2003/86); 21% were issued to students (covered by Directive 2004/114); and about 3% of permits were issued to persons obtaining international protection (covered by Directive 2011/95 as from Dec. 2013, but covered by the predecessor Directive 2004/83 in 2011). Also, some proportion of the 26% of the permits issued for employment purposes will have been issued to Blue Card holders. See the Commission's 2012 report on immigration (COM (2013) 422, 17 June 2013).

[483] The percentage of employment-related residence permits linked to EU law will increase once Member States apply the single permit Directive (deadline Dec. 2013). Also, the European Parliament and the Council recently reached agreement on legislation concerning seasonal workers (COM (2010) 379, 13 July 2010), and will likely also agree soon on legislation concerning intra-corporate transferees (COM (2010) 378, 13 July 2010). Both these new measures will probably apply from 2016.

5.3 Returns Directive

Finally, the effect on the Schengen system of EU rules on irregular migrants, in particular the Returns Directive,[484] should be considered, since the rules on the removal of irregular migrants aim to prevent the secondary movement of such persons between Schengen States, and so are a key part of that system. These rules build upon the Schengen *acquis* to the extent that they apply to persons 'who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code'.[485]

In principle, the Returns Directive applies to all third-country nationals 'staying illegally' on a Member State's territory.[486] The Court of Justice has confirmed that it does not apply to asylum-seekers.[487] Also, Member States have options not to apply the Directive to two categories of cases:[488] (a) third-country nationals who are subject to a refusal of entry in accordance with the Schengen Borders Code, 'or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained a right to stay in that Member State'; and (b) those who 'are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures'. The Court of Justice has confirmed that the latter exception does not apply where unauthorised stay is itself punishable by criminal sanctions, or where a Member State had not correctly applied the Directive.[489] Moreover, a number of the rules in the Directive still apply to the first category of excluded persons.[490]

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[484] Directive 2008/115 (OJ 2008 L 348/98). The other EU legislative measures in this field which build upon the Schengen acquis are: *D*irective 2001/40 on mutual recognition of expulsion decisions *(OJ 2001 L 149/34);* Directive 2001/51 on carrier sanctions *(OJ 2001 L 187/45);* Directive 2002/90 defining the facilitation of unauthorised entry, movement and residence *(OJ 2002 L 328/17);* Directive 2003/110 on assistance for expulsions via air transit (OJ 2003 L 321/26); Reg. 377/2004 on an immigration liaison officers' network (*OJ 2004 L 64/1*), amended by Reg. 493/2011 (OJ 2011 L 141/13); and a Decision on financing expulsion measures *(*OJ 2004 L 60/55).

[485] See recitals 28-30, Returns Directive.

[486] Art. 2(1), Returns Directive. A 'third-country national' does not include family members of EU citizens (Art. 3(1), Returns Directive; see also Art. 2(3) of the Directive), and an 'illegal stay' refers both to breaches of the entry conditions in the Schengen Borders Code and to those who do not or no longer fulfil 'other conditions for entry, stay or residence in that Member State' (Art. 3(2), Returns Directive).

[487] Case C-357/09 PPU Kadzoev [2009] ECR I-11185; see also Case C-534/11 Arslan, judgment of 30 May 2013.

[488] Art. 2(2), Returns Directive.

[489] See respectively Case C-329/11 Achughbabgian, judgment of 6 Dec. 2011, not yet reported, para. 41, and Case C-297/12 Filev and Osmani, judgment of 19 Sep 2013.

[490] See Art. 4(4), Returns Directive, which applies to this category of persons in the provisions of: Articles 8(4) and (5) (limitations on use of coercive measures); 9(2)(a) (postponement of removal); 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons); and 16 and 17 (detention conditions).

More favourable rules for the persons concerned can be set out in other EU legislation,[491] or by treaties with third countries concluded by the EU and/or the Member States,[492] or by national law.[493]

The key rule in the Directive is an obligation to issue a return decision to any third-country national illegally staying on their territory.[494] However, this rule is subject to a number of exceptions. First of all, if a third-country national is present on the territory of a Member State without authorisation, but has an authorisation offering a right to stay issued by a second Member State, he or she shall be required to go to the territory of that Member State immediately.[495] Secondly, Member States have an option not to issue a return decision when there is a bilateral agreement or arrangement already in force by 13 January 2009, by which a second Member State is required to take back the third-country national concerned. In that case, the latter Member State must issue a return decision.[496]

Thirdly, and most importantly, Member States have an option to regularise a third-country national 'at any moment' by granting that person an autonomous residence permit or other authorisation to stay, 'for compassionate, humanitarian or other reasons'.[497] Finally, Member States 'shall consider' refraining from issuing a return decision when the third-country national is awaiting the outcome of a procedure to renew a residence permit.[498] Member States also have general obligations to take into account the best interest of the child, family life and the state of health of the third-country national concerned, and to respect the principle of non-refoulement.[499]

The Directive specifies that in principle irregular migrants have to be given a period for voluntary departure.[500] But if no such period is granted, or if the person concerned does not leave within this period, then Member States

[491] Art. 4(2), Returns Directive.
[492] Art. 4(1), Returns Directive.
[493] Art. 4(3), Returns Directive. In this case, the national law has to be 'compatible' with the Directive.
[494] Art. 6(1), Returns Directive.
[495] Art. 6(2), first sentence, Returns Directive. The second sentence sets out an exception to this rule.
[496] Art. 6(3), Returns Directive. The Directive implicitly defines a 'return' as going back to a non-EU country: see Art. 3(3) of the Directive.
[497] Art. 6(4), Returns Directive. In that case, Member States must either withdraw or suspend a return decision, or not issue one at all.
[498] Art. 6(5), Returns Directive.
[499] Art. 5, Returns Directive.
[500] Art. 7(1), Returns Directive. Art. 7(4) of the Directive provides for exceptions from this rule.

are obliged in principle to remove him or her from the territory,[501] subject to safeguards relating to the conduct of the removal.[502] However, Member States are obliged to postpone removal if it would violate the principle of non-refoulement, or if suspensory effect has been granted following a legal challenge,[503] and they have an option to postpone removal in 'individual cases'.[504]

The Directive also sets out specific protections relating to the return or removal of unaccompanied minors,[505] as well as procedural safeguards relating to return decisions.[506] During the period of voluntary departure, or if removal has been postponed, irregular migrants are entitled to basic treatment as regards family unity, 'emergency health care and essential treatment of illness', 'access to the basic education system' for minors and the 'special needs of vulnerable persons'.[507] There are detailed rules on the grounds for detention, the time period of detention and detention conditions.[508]

Taken as a whole, the Directive creates an obligation in principle to issue and enforce return decisions to all third-country nationals who are not legally present on the territory, although it does leave some discretion to Member States to invoke exceptions to these rules, and provides for a number of important safeguards for the persons concerned. Its principal contribution to the Schengen system is the *prima facie* requirement to ensure that everyone who enters or remains on the territory of one Schengen State without authorisation must be removed from the Schengen area.

5.4 Conclusions

The rules on border controls established by the Schengen system have been bolstered by rules in a number of other areas, principally visas, freedom to travel and irregular migration. While the rules on freedom to travel have gradually been widened, the extent of uniformity of the Schengen visa system and the degree of EU control over the issue of such visas has been continually

[501] Art. 8(1), Returns Directive.

[502] Art. 8(4) to (6), Returns Directive.

[503] Art. 9(1), Returns Directive.

[504] Art. 9(2), Returns Directive.

[505] Art. 10, Returns Directive.

[506] Arts. 12 and 13, Returns Directive, discussed in s. 4.2 above in the context of entry bans. See *Filev and Osmani* (n. 489 above).

[507] Art. 14, Returns Directive.

[508] Arts. 15-17, Returns Directive. On the interpretation of these rules, see the Court of Justice's judgments in: *Kadzoev* (n. 487 above), *Achughbabian* (n. 489 above); *Arslan* (n. 487 above); Case C-91/11 PPU *El Dridi* [2011] ECR I-3015; Case C-430/11 *Sagor*, judgment of 6 Dec. 2012, not yet reported; and Case C-383/13 PPU *G and R*, judgment of 10 Sep. 2013.

strengthened, with the adoption and development of the common visa list, the creation of a visa code (which was preceded by steps towards greater uniformity by means of amendment of the previous 'Common Consular Instructions') and the gradual roll-out of the Visa Information System since 2011. While the list of States whose nationals need a visa has, on the whole, been liberalised in recent years, the EU will soon respond to the increased migration from some of the countries concerned by adopting a safeguard permitting the quicker reimposition of visa requirements on the nationals of those States. The creation of detailed common rules on removals from the territory, in the form of the Returns Directive, is another significant development for the Schengen system – and that Directive is only the most prominent among the rules which aim to control unauthorised migration into the Schengen area.

6 Human rights challenges for the Schengen system

The adoption of an extensive corpus of rules on border controls, visas and the control of unauthorised migration necessarily raises issues as regards human rights protection, most obviously where the refusal of admission or return of a person might be incompatible with the protection of his or her human rights (due to the conditions in his or her country of origin), but also as regards issues such as detention and (if a boat full of irregular migrants is sinking) the right to life. So the overall development of the Schengen system cannot be appraised without taking human rights considerations into account. This chapter therefore outlines two detailed recent critiques of the Schengen system on human rights grounds – from the United Nations' special rapporteur on migrants, and the EU's Fundamental Rights Agency. It then examines whether the specific rules in EU legislation on the protection of human rights are sufficient in light of these critiques.

6.1 The report of the UN Special Rapporteur

The report on the 'management of the external borders of the European Union and its impact on the human rights of migrants', conducted by François Crépeau, the United Nations' Special Rapporteur on the human rights of migrants, was released in April 2013.[509] This report had the 'objective of assessing the progress made, as well as the obstacles and challenges which remain in protecting and promoting the human rights of migrants, paying particular attention to the human rights of migrants in an irregular situation.'[510]

First of all, the Special Rapporteur regretted that irregular migration (referred to as 'illegal migration' by the EU) was considered to be a security issue, not a human rights issue, by the EU.[511] Secondly, he regretted that there was an absence of implementation of a human rights-based approach on the ground.[512] The focus was instead on immigration control and security,[513] and there was no 'independent oversight mechanism' to ensure compliance with human rights law as regards all aspects of immigration policy.[514] Irregular

[509] For the text of this report, see: <http://www.statewatch.org/news/2013/may/un-eu-borders-migrants-report.pdf>.
[510] Para. 6 of the report.
[511] Paras. 31-35 of the report.
[512] Paras. 36-41 of the report.
[513] Para. 37 of the report.
[514] Para. 38 of the report.

migrants did not have access to effective remedies as regards their human rights in practice.[515]

The securitisation of EU policy was demonstrated by the hugely increased budget of Frontex, even throughout the economic crisis.[516] As regards Eurosur, the special rapporteur was concerned that there were no 'procedures, guidelines, or systems for ensuring that rescue at sea is implemented effectively as a paramount objective', the rescue process was not defined exactly, and there were no proposed procedures on the position of those who were 'rescued'. So in his view, Eurosur might end up as 'just another tool' used to control immigration, rather than to save lives.[517]

Furthermore, while Frontex officers were allowed to screen and interview migrants, the staff of the European Asylum Support Office did not have a parallel or complementary role. The use of mixed teams from the two bodies (with the involvement of the UNHCR) could be further encouraged.[518] Private vessels could also play a greater role in assisting persons in distress.[519]

Next, the report criticised the systematic use of detention within the context of EU border control, without sufficient consideration of alternatives to detention.[520] This includes the construction of a new detention centre in Italy with EU funds, which will have 'almost no possibilities for detainees to enjoy even the minimum human rights guarantees, with very poor living conditions and with maximum periods of detention being regularly applied'. For its part, Greece intended to detain all irregular migrants, in part with the use of EU funds.[521] The EU was also encouraging and/or funding the construction of immigration detention centres in neighbouring countries.[522]

The 'paramount concern' of the Special Rapporteur was 'that the increasing practice of migration detention both within and outside' the EU 'is not automatically accompanied by the assurance of legal guarantees and basic human rights protection for detainees'. Despite the fundamental rights guarantees in the Returns Directive, 'in practice the Special Rapporteur observed a lack of

[515] Para. 39 of the report.
[516] Para. 43 of the report.
[517] Para. 44 of the report.
[518] Para. 45 of the report.
[519] Para. 46 of the report.
[520] Paras. 47-48 of the report.
[521] Para. 49 of the report.
[522] Para. 50 of the report.

adherence to these principles in all of the countries visited.'[523] More precisely, he 'repeatedly witnessed inadequate procedures for detention, including the failure to guarantee proper legal representation, lack of access for detainees to consular services, and interpretation or translation services, lack of appropriate detection procedures for vulnerable individuals and lack of recourse to effective remedies'. Furthermore, detention conditions 'were also precarious, with inadequate health care or psychosocial support, and prison-like conditions', along with 'the detention of children and families, and the lack of a proper system of guardianship for children', 'the detention of persons without prospect of removal', and a nearly complete 'absence of meaningful alternatives to detention mechanisms'.[524]

The report was also very critical of the trend toward externalisation of EU border controls, in the form of assisting third States' interception capabilities and the creation of a network of Immigration Liaison Officers, with the result that 'responsibility for migration control is shifted to countries outside' the EU,525 and 'consequently, the recourse of those migrants to human rights mechanisms within the [EU] becomes legally restricted or practically impossible.' The apparent objective was to put the persons concerned 'within the firm control' of third States, without the EU 'providing commensurate financial and technical support for human rights mechanisms in such countries' or 'appropriate human rights guarantees', so 'thereby allowing the [EU] to wash its hands of its responsibility to guarantee the human rights of those persons attempting to reach its territory.'[526]

Assistance with capacity-building for third States' coastal patrols, et al, might save the lives of more migrants who would otherwise drown at sea, but might 'simply be an attempt to ensure that boats are not permitted ever to leave the territorial waters of that country, and to facilitate quick return of migrants aboard such ships to the territory of the State from which they departed'. This is particularly a problem when the third States concerned do not have the infrastructure to ensure the human rights of migrants, and could have the effect of 'driving further underground' attempts to reach EU territory. In that case, '[s]muggling rings are reinforced, migrants are made more vulnerable, corruption is made more potent, exploitation more rife, human rights viola

[523] Para. 51 of the report.

[524] Para. 52 of the report. On detention of non-removable persons, see further para. 54 of the report.

[525] Paras. 55-57 of the report.

[526] Para. 58-59 of the report.

tions are more prevalent and graver, and ultimately lives may be more at risk than before.'[527]

Next, the report expressed concern about the application of the EU's readmission agreements, which might apply in some cases 'despite the lack of a well-functioning asylum system or the lack of resources or infrastructure to manage large inflows of migrants in a manner that would effectively ensure proper protection of human rights'.[528] The Special Rapporteur suggested that each of these agreements should contain a provision that would permit the 'temporary suspension of readmission agreements in the event of persistent and serious risk of violation of human rights', and that the 'action plans' with 'detailed benchmarks' implementing the EU's visa liberalisation processes (which are applied as a 'reward' for signing readmission agreements) 'should also include explicit provisions for the human rights of migrants, including irregular migrants'.[529]

The report was also critical of the EU's 'mobility partnerships', which are a series of tailor-made political commitments on migration between the EU and its Member States, on the one hand, and various third States, on the other, on the grounds that they provided for the 'externalization of border controls, in exchange for tightly controlled and limited migration opportunities'.[530] The Special Rapporteur was also concerned about the lack of clarity regarding the legal effect of such partnerships, as there were no rules on their enforcement or evaluation, and 'no clear framework' for incorporating human rights.[531]

Finally, the Special Rapporteur was critical of the EU's Dublin rules on responsibility for asylum-seekers,[532] and suggested that the EU's legal migration legislation (and its implementation in practice) should address the 'pull' factors as regards irregular migration.[533]

The Special Rapporteur then made a number of recommendations as regards the development of EU policy in this area.[534] These recommendations included:

[527] Para. 61 of the report.
[528] Para. 63 of the report.
[529] Para. 64 of the report.
[530] Para. 67 of the report.
[531] Para. 68 of the report.
[532] Paras. 69-72 of the report.
[533] Paras. 73-74 of the report.
[534] Paras. 82-108 of the report.

a) the adoption of minimum human rights standards for irregular migrants;
b) ratification of the United Nations Convention on the Rights of all Migrant Workers;
c) more solidarity between EU Member States as regards borders and asylum;
d) the creation of 'a permanent evaluation and independent monitoring mechanism as an integral part of European Union migration control policies and practices';
e) the publication of any migration control agreements, and a commitment not to enter into them with countries 'which are unable to demonstrate that they respect and protect the human rights of migrants';
f) avoiding criminalisation of irregular migration;
g) developing 'procedures and guidelines for ensuring that rescue at sea is implemented effectively', specifically 'rules to motivate private vessels to help boats in distress';
h) making human rights 'the primary consideration' in EU external migration policies, in particular addressing access to justice, support for migrants' NGOs and training on human rights law; and
i) bringing infringement proceedings against Member States which do not correctly apply EU legislation on migrants' rights.

6.2 The report of the EU Fundamental Rights Agency

The report of the EU Fundamental Rights Agency on human rights in the context of controlling southern European sea borders was also released in 2013.[535] First of all, the report documents the numbers of persons attempting to cross the southern maritime borders in recent years, noting a sharp increase during the 'Arab Spring' in 2011 and a sharp drop in numbers the following year.[536]

Next, the report documents the loss of life during Mediterranean crossings, for instance estimating that 1500 lives were lost during 2011, and then sets out in detail the legal framework as regards search and rescue at sea, as set out in international maritime conventions and the United Nations Convention on the Law of the Sea. While these rules are usually applied in practice, in some cases they are not applied, or are strictly interpreted. Fishermen usually report sightings of migrant boats to the authorities, but are sometimes more directly involved in rescues, at significant financial cost. Furthermore,

[535] For the text of this report, see: <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>.

[536] Chapter 1 of the report.

a significant number of military vessels are deployed in the Mediterranean, and there have been many allegations that such vessels failed to rescue migrants.[537]

As for interception and non-refoulement,[538] the report set out the relevant provisions of international law, including the *Hirsi* case, in which the European Court of Human Rights ruled that Italy had exercised jurisdiction over migrants once Italian vessels intercepted the migrants on the high seas and took those migrants on board the Italian ships. The Italian authorities breached the migrants' human rights when they returned those migrants to Libya, without any opportunity to apply for asylum, even though the Italian authorities should have known that there was no opportunity in Libya to obtain any form of protection or to apply for asylum, and a risk that the applicants would be sent from Libya to face torture or other inhuman or degrading treatment in their countries of origin. Third countries have increasingly introduced penalties for irregular exit from their territories, and have stepped up patrols to prevent exit, including joint patrols with EU Member States' authorities. It was arguable that any jurisdiction exercised by EU Member States' authorities in third countries would bring Member States' actions within the scope of the ECHR, but actions by third States' authorities using assets donated by Member States would not.

On occasion, Member States' authorities have engaged in 'push-backs', i.e. actions requiring migrants at sea to return to their countries of destination. Such actions were condemned in the *Hirsi* judgment, and in the Agency's opinion, none of the Mediterranean States in North Africa provide 'effective protection' for asylum-seekers, according to the definitions set out by the UNHCR. There have also been problems resulting from disputes as to where migrants should be disembarked, since most Member States accepted changes to international maritime law which allocate responsibility for determining a 'place of safety' to the State responsible for the search and rescue region in which the migrants were recovered – but Malta did not.

Next, the report examined maritime surveillance systems,[539] describing the development in recent years of aerial and land-based surveillance of the seas. These developments raise questions concerning the protection of personal data, where persons are being photographed. In this context, the report also

[537] Chapter 2 of the report.
[538] Chapter 3 of the report.
[539] Chapter 4 of the report.

examines the planned development of Eurosur,[540] which raises questions both of personal data protection in general and more particularly whether sharing information with third States could expose persons to the risk of (*inter alia*) inhuman treatment.

The report then moves on to examine the treatment of migrants on board government vessels. While migrants were usually provided with water and food, medical assistance was not always available. Only limited information was available to migrants while on board, but the general view was that it was more practical to consider the possible application of the asylum process once migrants had disembarked.[541]

As for the humanitarian response upon arrival,[542] the report notes that there is not always a systematic framework in place for providing humanitarian assistance. NGOs with experience in this field are not always involved, but law enforcement officers do not have the necessary training. Medical screening usually takes place at the pier, but subsequent medical checks were not always satisfactory. In practice, migrants are usually initially detained for some period, but Member States can opt out from applying some of the provisions in the EU's Returns Directive to migrants who have been apprehended at the border.

The report then examines screening and identification procedures,[543] starting with police interviews. Usually no NGO representative or lawyer, or professional interpreter, is present during the interviews. Legal advice is generally 'very limited', and the information provided is hard to understand. There is little guidance from EU legislation on how to deal with separated children at this point. The identification of trafficking victims, or victims of torture or other serious crime such as sexual abuse or exploitation, is also often difficult.

A detailed examination of return and readmission procedures assesses the practice of swift removals, which are usually facilitated by readmission agreements, including arrangements between Member States and third countries which have not been made public.[544]

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[540] See also the report by B. Hayes and M. Vermeulen, 'Borderline: Assessing the Costs and Fundamental Rights Implications of Eurosur and the Smart Borders' proposals, online at: <http://www.statewatch.org/news/2012/jun/borderline.pdf>.

[541] Chapter 5 of the report.

[542] Chapter 6 of the report.

[543] Chapter 7 of the report.

[544] Chapter 8 of the report.

Part Three of the report begins with an examination of fundamental rights training for border guards, including Frontex's common core curriculum for border guards, which was augmented in 2012 with a number of provisions on human rights protection.[545] It continues with an assessment of the human rights challenges facing Frontex, along with those connected to the EU principle of solidarity between Member States.[546] As regards Frontex, a large proportion of its budget for operations is spent on operations at sea, which in some cases has led to accusations that Frontex has violated human rights obligations in practice. While Frontex has improved its practices as regards the integration of fundamental rights into its operational plans, its evaluation reports have still not fully integrated a human rights dimension.

Finally, the report concludes with a number of recommendations by the Agency, which include the following:

a) the EU should do more to 'strengthen the protection space' in nearby countries, in particular as regards 'the establishment of effective asylum systems', prevention of abuse and exploitation and access to justice for migrants who are crime victims;
b) the EU should give priority, in its assistance to third States, to facilitating search and rescue missions;
c) the captains of private ships should not be punished if they take on board or otherwise assist persons in distress at sea; the EU's legislation on 'facilitating' unauthorised entry or residence could be amended to clarify this point;
d) Member States should support the owners of private vessels who suffer economic loss because of assisting persons in distress;
e) the EU rules on maritime operations should apply to Member States' individual actions, not just those coordinated by Frontex;
f) there should be rules determining where to disembark rescued migrants;
g) the EU should train and monitor third countries' use of maritime assets and equipment, and assess the implementation of joint patrols, from a human rights perspective;
h) Schengen evaluations should address human rights issues;
i) Member States should consider involvement of NGOs which offer emergency assistance to persons rescued or intercepted at sea in national and local coordination centres;

[545] Chapter 9 of the report.
[546] Chapter 10 of the report.

j) the impact of Eurosur on fundamental rights should be evaluated and monitored regularly;
k) the legislation establishing Eurosur should make stronger references to rescue at sea, and the future Eurosur handbook should include practical guidance on how to achieve this;
l) migrants taken on board public-sector ships should be provided with clear information, in a language they understand, on what will happen to them and where they will be brought next;
m) there should be provision made for medical assistance upon disembarkation;
n) Member States should apply the safeguards against arbitrary detention for irregular migrants even if they have opted not to apply the Returns Directive to persons intercepted at the border, and the Directive should be revised to ensure that such safeguards always apply to such persons;
o) there should be a review of initial reception facilities, and persons should be kept there for as short a period as possible;
p) there should be effective systems for providing information to and identifying persons with protection needs at the borders;
q) there should be further training on human rights issues for border guards; and
r) there should be a number of further measures to ensure that Frontex actions are fully compatible with human rights.

6.3 Specific provisions in EU legislation

The Schengen borders code contains general provisions allowing for exemption from the rules on authorised border crossings and refusal of entry on human rights grounds, and now also includes an even more general human rights safeguard clause.[547] The Eurosur Regulation also contains a general human rights clause, as well as some references to saving the lives of migrants.[548] The Frontex Regulation contains (from 2011) both a general clause on human rights issues and a number of specific provisions addressing such issues.[549] Finally, the 2010 Decision and 2013 proposal on the issue of maritime surveillance contain detailed provisions on human rights issues, although some Member States have challenged the inclusion of some of the important human rights provisions in the 2013 proposal.[550]

[547] See further s. 4.1 above.
[548] See further s. 4.4 above.
[549] See further s. 4.3 above.
[550] See further s. 4.5 above.

Despite the increasing tendency to provide for express human rights provisions in the legislation establishing the Schengen system, some of the measures concerned are still very general, leaving some legal uncertainty as to the precise legal obligations of the Schengen States and the rights which the persons concerned can invoke. In particular, the relationship between the general human rights rules and the EU's specific asylum legislation is not spelled out – even though it is clear that all of the EU's asylum legislation applies at the border, and it can be argued (as noted above) that the EU's Directive on the qualification of persons for international protection has an even broader scope.[551]

Even the most detailed regime to date for addressing human rights issues in the context of the Schengen system – the relevant provisions of the Frontex Regulation, added to that Regulation in 2011 – has not to date had its intended results. This is evidenced by an own-initiative enquiry by the European Ombudsman into the human rights strategy of Frontex.[552] In the Ombudsman's view, the Action Plan on human rights drawn up by Frontex was not sufficiently detailed, and does not clearly allocate responsibility as regards human rights breaches between Frontex and Member States. While Frontex intended that its general Code of Conduct would be legally binding on all participants in Frontex operations, this was not made clear enough in all the relevant Frontex measures. The Ombudsman also believed that the rules on the use of force needed to be clarified, and observed that the Code of Conduct on returns operations had not yet been adopted.

Next, the Ombudsman examined the mechanisms to ensure protection for fundamental rights in Frontex activities. He believed that the precise circumstances which would require an operation to be terminated on human rights grounds ought to be specified in detail. Frontex also ought to reflect on when it should terminate returns operations on human rights grounds. Furthermore, the Ombudsman doubted whether the Fundamental Rights Officer was sufficiently independent, and criticised the lack of possibility of individual complaints to that Officer.

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[551] It might be argued that a clarification of the relationship between the Schengen rules and the EU asylum legislation is not feasible, since the Schengen rules and the EU asylum legislation have a different territorial scope: Schengen associates are not bound by the latter rules, and some EU Member States are not bound by the former rules. But it would still be possible to clarify the relationship between the two sets of rules for the 21 EU Member States which are bound by both of them.

[552] For the report and background documentation, see: <http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/49794/html.bookmark>.

All of these concerns formed the basis of thirteen recommendations which the Ombudsman made to Frontex in April 2013. In November 2013, the new Ombudsman reported that Frontex had accepted many of the recommendations, except the recommendation to consider direct compliants by migrants. She therefore issued a special report to the European Parliament on this issue.[553]

6.4 Conclusions

There is a continuing tension between human rights protection and the development of a uniform regime of external border control, including its extension to the high seas and third States, along with the adoption of detailed rules on expulsion. The uniform nature of the EU rules, along with the operations coordinated by an EU agency, suggests that the EU must bear a significant share of the responsibility for ensuring the effective protection of human rights in the context of the Schengen system.

To ensure that human rights protection is indeed guaranteed in that context, first of all the substantive rules on this issue need to be streamlined and clarified. It should be expressly confirmed that, at least for those States bound by both the Schengen rules and the EU asylum legislation, the latter rules govern the position of persons at the borders or in the territorial waters of the State concerned, who claim or appear to be in need of international protection.

On the high seas or in the contiguous zone, when Member States are conducting operations with a view to controlling immigration, they are acting to enforce the essential precepts of the Schengen system, whether their operations are coordinated by Frontex or not, so the same rules should apply in either case. A clear set of rules of responsibility for the protection needs of persons found in the contiguous zone or search and rescue zone of a Member State should be established. If this leads to a disproportionate impact upon Member States such as Malta and Greece as regards responsibility for claims for international protection, then the Dublin rules on asylum responsibility should be revised, or alternative forms of the sharing of effort regarding asylum revised, to address this issue.

If Member States intercept or rescue vessels outside such areas, then more precise rules to decide whether particular countries would be ‘safe’ in the event of international protection claims should established. If there are no such countries, or if a potential ‘safe’ third country is not responsible for

[553] See: <http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark>.

the persons concerned pursuant to the international law of the sea, then the Member State carrying out the relevant operation should bear responsibility for international protection claims. In the case of joint operations by several Member States, whether coordinated by Frontex or not, a new rule should be adopted to allocate responsibility between the States concerned. Where Member States and/or the EU cooperate with or assist third States with immigration control, such assistance should be conditional upon status as a 'safe' third State and continued progress towards the EU's asylum standards.

As for the procedural aspects, there should be regular reporting on the application of human rights standards, including the effective enforcement of those standards, in the context of the Schengen system. The most appropriate forum would be the Commission's annual report on Schengen governance (discussed above). A guide in clear language, which should be translated into the main languages used by migrants, should be produced by one or more of the relevant EU agencies or institutions, explaining the basic elements of the Schengen system, the human rights which must be protected and the allocation of the responsibility for ensuring those rights as between the EU and its Member States (and as between Member States). This would assist migrants to determine what their rights are, and how to enforce them.

7 The Schengen system in the broader context

The Schengen system is not the only area where EU integration has run into difficulties in recent years. This chapter of the report briefly compares the Schengen system to two other such areas – the closely related Dublin system for allocation for asylum responsibility, and the problems besetting the EU's economic and monetary union – although of course other examples exist (the EU's carbon trading system, for instance).

7.1 Comparisons with the Dublin system

The EU's Dublin system has close connections with the Schengen system, not just because of the closeness in subject-matter between immigration control and asylum responsibility, but also because of the necessary factual link between the two issues: since the abolition of internal border controls makes it far easier to travel between Schengen States without being stopped and refused entry into one of them, it makes it much easier for asylum-seekers to travel to a Schengen State where they would prefer to apply for asylum. Therefore the preferred destination States in the north and west of the Schengen area made their support for creating the Schengen system conditional upon the development of rules allocating responsibility for asylum claims to only one State – in effect, the State of first entry in most cases.

For that reason, rules on the allocation of responsibility for asylum applications have always been connected to the Schengen system. In particular, such responsibility rules were included in the Schengen Convention from the outset (Articles 28-38 of that Convention), and have been extended to the Schengen associates by means of parallel treaties alongside the extension of the Schengen rules to those States. But the Dublin rules have a wider scope: they also extend to all Member States of the EU, even those which do not yet or will probably never participate in the Schengen system (i.e. the UK, Ireland, Cyprus, Romania, Bulgaria, and Croatia).

The Dublin rules were initially set out in a Convention between the first twelve Member States.[554] They were replaced by an EU Regulation in 2003,[555] and this Regulation was in turn replaced by another Regulation in

[554] OJ 1997 C 254. Due to entry into force of this Convention in 1997, the relevant provisions of the Schengen Convention were not integrated into the EU legal order along with (most of) the rest of the Schengen *acquis* in 1999.

[555] Reg. 343/2003, OJ 2003 L 50/1.

June 2013.[556] The Dublin rules were initially not accompanied by any form of harmonisation of substantive asylum law, beyond the adoption of a few non-binding Resolutions, beginning in 1992, on the assumption that all Member States' ratifications of the European Convention on Human Rights and the 1951 Geneva Convention on Refugee Status were sufficient to ensure that asylum-seekers would at least be covered by common minimum standards in each of those States.

However, following the Treaty of Amsterdam, the EU decided to create a 'Common European Asylum System' which would include the Dublin rules – and the planned 'Eurodac' system for taking asylum-seekers' fingerprints, which would aim to supplement the Dublin rules – but also set out common rules on the qualification for refugee and subsidiary protection status, the reception of asylum-seekers and procedures for asylum applications. A first phase of legislation to this end was adopted between 2003 and 2005,[557] and following the entry into force of the Treaty of Lisbon in 2009,[558] a second phase of such legislation was adopted between 2011 and 2013.[559]

Nevertheless, the adoption of such legislation did not prevent problems arising as regards the operation of the Dublin system, in particular because the effect of that system was to allocate responsibility for asylum to Member States on the EU's eastern and southern borders, which had less capacity, resources and experience in dealing with asylum applications. In the case of Greece (at least), the asylum system was overwhelmed and extensive evidence suggested that it was systematically impossible for asylum-seekers to not receive a fair hearing or minimum standards of treatment there. So the European Court

[556] Reg. 604/2013, OJ 2013 L 180/31, which will apply from 1 Jan. 2014.

[557] See Directive 2004/83 (OJ 2004 L 304/12) on qualification, Directive 2005/85 (OJ 2005 L 326/13) on procedures and Directive 2003/9 (OJ 2003 L 31/18) on reception conditions. The Reg. establishing Eurodac (Reg. 2725/2000, OJ 2000 L 316/1) was adopted earlier. It should be noted that of this legislation, Denmark was only bound by the Eurodac Regulation, while Ireland was not bound by the reception conditions Directive. Otherwise all Member States were bound by all measures.

[558] See Art. 78 TFEU, which sets out revised provisions on the creation of the Common European Asylum System.

[559] Directive 2011/95 (OJ 2011 L 337/9) on qualification; Directive 2013/32 on procedures for international protection (OJ 2013 L 180/60); Directive 2013/33 on reception conditions (OJ 2013 L 180/96); and Reg. 603/2013 on Eurodac (OJ 2013 L 180/1). It should be noted that the UK, Ireland and Denmark are not bound by any of these Directives, although the UK and Ireland opted into the revised Eurodac and Dublin Regulations, and will remain bound by the first-phase legislation which they opted into before (see n. 557 above).

of Human Rights,[560] followed by the EU's Court of Justice,[561] ruled that it would be a breach of Article 3 of the ECHR, and the corresponding Article 4 of the EU's Charter of Fundamental Rights, for asylum-seekers to be sent to Greece pursuant to the Dublin system.

The subsequent legislation amending the Dublin rules now incorporates the key aspects of the case law of these courts, and also includes some new specific rules creating an 'early-warning' system as regards Member States who have difficulties complying with their obligations under the Regulation.[562] However, the underlying rules allocating responsibility to the first Member State of entry have not been amended at all, except for a very limited extension of the special rules for allocation of responsibility for family members.

So in practice, the EU's attempted solution to the problems of the Dublin system is to establish an obligation to suspend that system as regards (a) particular Member State(s), rather than to reform the fundamental nature of that system. This can be compared to the increased possibility to suspend the basic rules of the Schengen system in respect of (a) particular Member State(s), although the attempted solution to the problems with the Dublin regime differs in that it was initially developed by the courts, not the EU legislature, and is obligatory, rather than optional. In both cases, the EU has legislated to establish a process to assist the Member State(s) in question to apply the underlying rules properly.

7.2 Comparisons with economic and monetary union

The EU's economic and monetary union (EMU), centred on the creation of a single currency and its related institutional framework (most significantly, but not only, the European Central Bank), has become one of the EU's most significant achievements, rivalling (if not equalling or surpassing) the EU's internal market in importance. However, the EMU project has run into well-known difficulties in recent years, largely due to the acute sovereign debt problems of some eurozone Member States.

The main response to these problems has been to overhaul the fairly modest 'economic' side of EMU, which was far less developed than the essentially centralised monetary union created by the Treaties. Put another way, mone-

[560] *MSS v Belgium and Greece*, judgment of 21 Jan. 2011, not yet reported.

[561] Joined Cases C-411/10 *NS* and C-493/10 *M.E and others*, judgment of 21 Dec. 2011, not yet reported. See subsequently: Case C-4/11 *Puid*, judgment of 14 Nov. 2013; Case C-528/11 *Halaf*, judgment of 30 May 2013; and Case C-394/12 *Abdullahi*, pending (opinion of 11 July 2013).

[562] See respectively Arts. 3(2) and 33 of Reg 604/2013.

tary union is an exclusive competence of the EU listed in Article 3 TFEU, while the EU aims only to *coordinate* the economic policies of *Member States* (Article 5 TFEU). That coordination was largely linked to the EU's excessive deficit rules, and aimed primarily to eliminate any excessive deficits once they arose (by means of the measures adopted pursuant to Article 126 TFEU) and to prevent such excessive deficits from arising in the first place (by means of the legislation adopted pursuant to Article 121 TFEU). The assumption was that eurozone Member States in particular would comply with the excessive deficit rules, avoiding any question of any 'bail-outs' or risk of default for those States, and obviating any need for further EU involvement in national economic policy or any interventionist actions by the European Central Bank.

When the assumption of compliance with the excessive deficit rules turned out to be misplaced and the sovereign debt crisis exploded, it was necessary to rethink the overall architecture of EMU profoundly. Eurozone Member States have loaned large sums to those eurozone States which could in effect no longer borrow money from financial markets, and pledged to loan further sums to such States if necessary. In return, stringent conditions have been imposed upon the recipients of such loans, enforced by the 'Troika' of the Commission, the European Central Bank and the International Monetary Fund, as further set out in revisions of the EU's economic governance legislation (the so-called 'six-pack' and 'two-pack' Regulations) and a treaty between a large group of Member States (the 'Treaty on Stability, Coordination and Governance'). Also, the European Central Bank has become far more interventionist in support of Member States' economies. Measures towards a 'banking union' for eurozone States are also underway or planned, in particular as regards common supervision of banks by the European Central Bank and the creation of a common system for closing down failing banks.

Compared to the Schengen system, again the underlying rules (the existence of the single currency) have been retained, and in this case there is no attempt to suspend those rules (i.e., reintroduce national currencies in one or more Member States) temporarily. Instead, the EU's involvement in the closely related fields of banking policy and economic policy has intensified significantly, and (in the form of the European Central Bank) the nature of its involvement in an area of its exclusive competence has changed greatly as well.

7.3 Conclusions

When faced with a systemic crisis, the EU does not easily give up on its particular integration projects. Rather it tries to save them, if necessary by a Copernican revolution (i.e. a complete reversal) in the assumptions underlying the project (in the case of EMU), supplemented by further integration, or alternatively by 'patching up' the project by allowing a limited exception to the basic principles of the project (in the case of the Dublin rules), rather than engaging in any more fundamental reform.

While the recent amendments to the Schengen rules may look at first sight like an example of the former type of change – in this case, a fundamental shift towards permitting more reimposition of internal border controls – on closer examination, as discussed in chapter 3, it is really more of the latter type of change – a 'patching up' of the system by providing for a limited further exception to the basic rule of abolition of such controls, supplemented by more integration measures (i.e. stronger external border controls, more measures on visas), along with (as with the amendments to the Dublin system on asylum applications) enhanced rules on evaluation of Member States' compliance with their responsibilities under the relevant rules.

8 General conclusions

As we have seen in this report, the EU's Schengen system is more robust than it appeared at the height of the 'Arab Spring' in 2011. The essential tendencies towards further external border control were simply reinforced, in particular in the form of the creation and further development of the second-generation Schengen Information System and the Visa Information System, further powers and funding for Frontex, the creation of Eurosur, and plans for an entry-exit system and registered travellers' programme. While at least some Member States were keen for a far greater possibility to reimpose internal border controls, such a demand has ultimately been contained, in accordance with the new amendments to the Schengen Borders Code, within the confines of the pre-existing Schengen system, by ensuring that any use of the extra powers to reimpose such controls will be constrained by the EU's institutions and processes, and moreover by placing further limits on Member States' pre-existing powers to reimpose internal border controls.

Within each of the areas examined in detail in this report, the EU's tendency (by means of EU legislation, administrative action of the EU institutions, or case law of the EU courts) has been to increase the level of uniformity within the Schengen system or the degree of harmonisation of the rules linked closely to them (i.e., the Returns Directive). This has been paralleled by further harmonisation in the related areas of legal immigration and asylum law.

What is the likely future of the Schengen system? While it is difficult to predict international and internal political developments which have not taken place yet, at present the EU is focussing particularly upon the development of an entry-exit and registered travellers' system, and it can be expected that such a system will become operational in the foreseeable future. In the shorter term, the EU will also focus on the implementation of the new rules on reimposition of internal border controls, as well as the amendments to the visa list legislation that are about to be adopted. The negotiation and implementation of amendments to the visa code (due to be proposed in late 2013), which will aim at facilitating travel for legitimate visitors in order to enhance economic growth in the EU, is likely to be a major issue as well. Amendments to the EU's Returns Directive, in particular in light of the start of operations of the second-generation Schengen Information System, might also be proposed in the medium term.

In the context of a declining number of irregular migrants (compared to the peak during the Arab Spring year of 2011), it might be easier for the EU to

implement recent reforms, in particular the recent changes to the internal border rules. After all, it was the sharp rise in migration in 2011 that triggered calls for amendment of these rules in the first place.

In place of a significant shift to increase either Member States' power (as some Member States preferred) or the EU institutions' power (as the Commission preferred) over the reintroduction of internal border controls, the new legislation has instead established a compromise hybrid regime, that allows Member States greater power to reintroduce border controls in the case of serious deficiencies in external border control, but only within the framework of an EU process. The important question of where power lies to reimpose border controls if this system fails – whether the Member States can act unilaterally, or only following a Council recommendation (itself following a Commission recommendation) – is not precisely specified by the new rules. This issue is in principle irrelevant as long as the new rules designed to prevent such a complete breakdown of the Schengen system actually work, but in fact it casts a shadow over those new rules. Member States may be less willing to work toward avoiding such a breakdown if they believe that they are free to reintroduce border controls if it happens. On the other hand, if the process of reimposing controls can only be set in motion if triggered by the Commission, that institution has a powerful weapon (i.e., the threat to refuse to trigger the process) that it can use to ensure that Member States have to make a genuine effort to avoid a breakdown of the Schengen system.

In order to secure the transparency and effectiveness of the operation of the Schengen system, with a view to ensuring its public legitimacy, the specific recommendations in this report as regards Schengen governance, including human rights issues, should be implemented.

In particular:

a) the new rules on reimposing border controls should be interpreted to mean that Member States can *only* reimpose border controls on the 'serious deficiencies' ground following a Council recommendation (which must follow a Commission recommendation;
b) the reintroduction of internal border controls will not be justified unless the Council and Commission have clearly demonstrated that there is no significant doubt that the criteria for such reintroduction are satisfied, and that all relevant procedural steps have been taken; a Member State cannot accept such a recommendation unless it has also complied with all relevant national laws;

c) the Commission should adopt and publish guidelines on the reintroduction of internal border controls;
d) divergences between Member States on the reimposition of internal border controls on grounds of 'serious deficiencies', and whether reimposed internal border controls should be subject to the same rules as external border controls, should be avoided;
e) the necessity for and scope of the planned entry-exit system should be re-examined, in particular with a view to limiting it to visa holders only;
f) the EU should adopt in the very near future legislation to govern maritime surveillance operations coordinated by Frontex, including standards on search and rescue and disembarkation of migrants that comply with human rights law;
g) precise rules should be adopted to address the legal status of any persons intercepted or rescued outside Member States' territorial waters, whether Frontex coordinates such operations or not;
h) where Member States and/or the EU cooperate with or assist third States with immigration control, such assistance should be conditional upon status as a 'safe' third State and continued progress towards the EU's asylum standards;
i) if the EU's external borders rules, in conjunction with the application of the Dublin rules on allocation of responsibility for claims for international protection, create a disproportionate impact upon certain Member States, then either the Dublin rules should be revised, or alternative forms of the sharing of effort regarding asylum revised adopted, in order to address this issue;
j) there should be regular reporting on the application of human rights standards, including the effective enforcement of those standards, in the context of the Schengen system, in the Commission's annual report on Schengen governance;
k) Frontex should consider individual complaints about its human rights record addressed by migrants;
l) a guide in clear language, which should be translated into the main languages used by migrants, should be produced by one or more of the relevant EU agencies or institutions, explaining the basic elements of the Schengen system, the human rights which must be protected and the allocation of the responsibility for ensuring those rights as between the EU and its Member States (and as between Member States).

Appendix

Revised text, Schengen borders Code
– rules on internal border controls

[New text in bold/italics; deleted text in strikeout]

TITLE II
EXTERNAL BORDERS
[existing Chapters I-IV unchanged;
new Chapter V as follows:]

CHAPTER IVa
Specific measures in the case of serious deficiencies relating to external border control

Article 19a
Measures at external borders and support by the Agency

1. Where serious deficiencies in the carrying out of external border control are identified in an evaluation report drawn up pursuant to Article 14 of 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 with a view to ensuring compliance with the recommendations referred to in Article 15 of that Regulation, the Commission may recommend, by means of an implementing act, that the evaluated Member State take certain specific measures, which may include one or both of the following:

(a) initiating the deployment of European border guard teams in accordance with the provisions of Regulation (EC) No 2007/2004;

(b) submitting its strategic plans, based on a risk assessment, including information on the deployment of personnel and equipment, to the Agency for its opinion thereon.

That implementing act shall be adopted in accordance with the examination procedure referred to in Article 33a(2).

2. The Commission shall inform the committee established pursuant to Article 33a(1) on a regular basis of the progress in the implementation of the

measures referred to in paragraph 1 of this Article and on its impact on the deficiencies identified.

It shall also inform the European Parliament and the Council.

3. Where an evaluation report as referred to in paragraph 1 has concluded that the evaluated Member State is seriously neglecting its obligations and must therefore report on the implementation of the relevant action plan within three months in accordance with Article 16(4) of Regulation (EU) No 1053/2013, and where, following that three-month period, the Commission finds that the situation persists, it may trigger the application of the procedure provided for in Article 26 of this Regulation where all the conditions for doing so are fulfilled.

TITLE III
INTERNAL BORDERS

CHAPTER I
Abolition of border control at internal borders

Article 20
Crossing internal borders

Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.

Article 21
Checks within the territory

The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

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

(ii) are based on general police information and experience regarding pos-

sible threats to public security and aim, in particular, to combat cross-border crime,

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

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

(b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;

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

(d) the possibility for a Member State to provide by law for an obligation on third-country nationals to report their presence on the territory of any Member State pursuant to the provisions of Article 22 of the Schengen Convention.

Article 22

Removal of obstacles to traffic at road crossing-points at internal borders

Member States shall remove all obstacles to fluid traffic flow at road crossing-points at internal borders, in particular any speed limits not exclusively based on road-safety considerations. At the same time, Member States shall be prepared to provide for facilities for checks in the event that internal border controls are reintroduced.

CHAPTER II

Temporary reintroduction of border control at internal borders

Article 23

***General framework for the* [~~T~~]*t*emporary reintroduction of border control at internal borders**

1. Where, ***in the area without border control,*** there is a serious threat to public policy or internal security ***in a Member State***, [~~a~~] ***that*** Member State may exceptionally reintroduce border control at ***all or specific parts of*** its internal borders for a limited period of up to [~~no more than~~]30 days or for the

foreseeable duration of the serious threat if its duration exceeds [~~the period of~~] 30 days [~~, in accordance with the procedure laid down in Article 24 or, in urgent cases, with that laid down in Article 25~~]. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

2. Border control at internal borders may only be reintroduced as a last resort, and in accordance with Articles 24, 25 and 26. The criteria referred to, respectively, in Articles 23a and 26a shall be taken into account in each case where a decision on the reintroduction of border control at internal borders is considered pursuant, respectively, to Article 24, 25 or 26.

[~~2.~~] ***3.*** If the serious threat to public policy or internal security ***in the Member State concerned*** persists beyond the period provided for in paragraph 1 ***of this Article***, [~~the~~] ***that*** Member State may prolong border control ***at its internal borders, taking account of the criteria referred to in Article 23a and in accordance with Article 24,*** on the same grounds as those referred to in paragraph 1 ***of this Article*** and, taking into account any new elements, for renewable periods of up to 30 days [~~, in accordance with the procedure laid down in Article 26~~.]

4. The total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed six months. Where there are exceptional circumstances as referred to in Article 26, that total period may be extended to a maximum length of two years, in accordance with paragraph 1 of that Article.

Article 23a
Criteria for the temporary reintroduction of border control at internal borders

1. When a Member State decides, as a last resort, on the temporary reintroduction of border control at one or more of its internal borders or at parts thereof, or decides to prolong such reintroduction, in accordance with Article 23 or Article 25(1), it shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security, and shall assess the proportionality of the measure in relation to that threat. In making such an assessment, the Member State shall, in particular, take the following into account:

(a) the likely impact of any threats to its public policy or internal security, including following terrorist incidents or threats and including those posed by organised crime;

(b) the likely impact of such a measure on free movement of persons within the area without internal border control.

Article 24

Procedure for [~~foreseeable events~~] ***the temporary reintroduction of border control at internal borders under Article 23(1)***

1. Where a Member State [~~is planning~~] ***plans*** to reintroduce border control at internal borders under Article 23(1), it shall [~~as soon as possible~~] notify the other Member States and the Commission [~~accordingly~~] ***at the latest four weeks before the planned reintroduction, or within a shorter period where the circumstances giving rise to the need to reintroduce border control at internal borders become known less than four weeks before the planned reintroduction. To that end, the Member State*** shall supply the following information [~~as soon as available~~]:

(a) the reasons for the proposed reintroduction, ***including all relevant data*** detailing the events that constitute a serious threat to ***its*** public policy or internal security;

(b) the scope of the proposed reintroduction, specifying [~~where~~] ***at which part or parts of the internal borders*** border control is to be reintroduced;

(c) the names of the authorised crossing-points;

(d) the date and duration of the [~~proposed~~] ***planned*** reintroduction;

(e) where appropriate, the measures to be taken by the other Member States.

A notification under the first subparagraph may also be submitted jointly by two or more Member States.

If necessary, the Commission may request additional information from the Member State(s) concerned.

2. The information referred to in paragraph 1 shall be submitted to the European Parliament and to the Council at the same time as it is notified

to the other Member States and to the Commission pursuant to that paragraph.

3. Member States making a notification under paragraph 1 may, where necessary and in accordance with national law, decide to classify parts of the information.

Such classification shall not preclude information from being made available by the Commission to the European Parliament. The transmission and handling of information and documents transmitted to the European Parliament under this Article shall comply with rules concerning the forwarding and handling of classified information which are applicable between the European Parliament and the Commission.

~~[2.]~~ ***4.*** Following [~~the~~] notification ***by a*** [~~from the~~] Member State ***under paragraph 1 of this Article*** [~~concerned~~], and with a view to [~~the~~] consultation provided for in paragraph [~~3~~] ***5 of this Article***, the Commission ***or any other Member State*** may, [~~issue an opinion~~] without prejudice to Article [~~64(1)~~] ***72*** of the Treaty ***on the Functioning of the European Union, issue an opinion***.

If, based on the information contained in the notification or any additional information it has received, the Commission has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders, or if it considers that a consultation on some aspect of the notification would be appropriate, it shall issue an opinion to that effect.

~~[3.]~~ ***5.*** The information referred to in paragraph 1[~~,~~] and ***any***[~~the opinion that the~~] Commission ***or Member State opinion under*** **[**~~may provide in accordance with~~] paragraph [~~2,~~] ***4*** shall be the subject of consultation[~~s~~], ***including, where appropriate, joint meetings*** between the Member State planning to reintroduce border control ***at internal borders***, the other Member States, ***especially those directly affected by such measures,*** and the Commission, with a view to organising, where appropriate, mutual cooperation between the Member States and to examining the proportionality of the measures to the events giving rise to the reintroduction of border control and the threat[~~s~~] to public policy or internal security.

~~[4.]~~ ***6.*** The consultation referred to in paragraph [~~3~~] ***4*** shall take place at least [~~fifteen~~] ***ten*** days before the date planned for the reintroduction of border control.

Article 25

***Specific* [~~P~~]*procedure for cases requiring* [~~urgent~~] *immediate* action**

1. Where [~~considerations of~~] ***a serious threat to*** public policy or internal security in a Member State [~~demand~~] ***requires*** [~~urgent~~] ***immediate*** action to be taken, the Member State concerned may***, on an*** exceptional[~~ly~~] ***basis,*** [~~and~~] immediately reintroduce border control at internal borders***, for a limited period of up to ten days***.

2. ***Where a*** [~~The~~] Member State reintroduc[~~ing~~]***es*** border control at internal borders***, it*** shall ***at the same time*** notify the other Member States and the Commission accordingly, [~~without delay,~~] and shall supply the information referred to in Article 24 (1)***, including*** [~~and~~] the reasons that justify the use of [~~this~~] ***the*** procedure ***set out in this Article***. ***The Commission may consult the other Member States immediately upon receipt of the notification.***

3. If the serious threat to public policy or internal security persists beyond the period provided for in paragraph 1, the Member State may decide to prolong the border control at internal borders for renewable periods of up to 20 days. In doing so, the Member State concerned shall take into account the criteria referred to in Article 23a, including an updated assessment of the necessity and the proportionality of the measure, and shall take into account any new elements.

In the event of such a prolongation, the provisions of Article 24(4) and (5) shall apply mutatis mutandis, and the consultation shall take place without delay after the decision to prolong has been notified to the Commission and to the Member States.

4. Without prejudice to Article 23(4), the total period during which border control is reintroduced at internal borders, on the basis of the initial period under paragraph 1 and any prolongations under paragraph 3, shall not exceed two months.

5. The Commission shall inform the European Parliament without delay of notifications made under this Article.

Article 26

~~[Procedure for prolonging border control at internal borders]~~

Specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk

~~[1. Member States may only prolong border control at internal borders under the provisions of Article 23(2) after having notified the other Member States and the Commission.~~

~~2. The Member State planning to prolong border control shall supply the other Member States and the Commission with all relevant information on the reasons for prolonging the border control at internal borders. The provisions of Article 24(2) shall apply.]~~

1. In exceptional circumstances where the overall functioning of the area without internal border controls is put at risk as a result of persistent serious deficiencies relating to external border control as referred to in Article 19a, and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced in accordance with paragraph 2 of this Article for a period of up to six months. This period may be prolonged, no more than three times, by a further period of up to six months if the exceptional circumstances persist.

2. The Council may, as a last resort and as a measure to protect the common interests within the area without internal border control, where all other measures, in particular those referred to in Article 19a(1), are ineffective in mitigating the serious threat identified, recommend that one or more Member States decide to reintroduce border control at all or specific parts of their internal borders. The Council's recommendation shall be based on a proposal from the Commission. The Member States may request the Commission to submit such a proposal to the Council for a recommendation.

In its recommendation, the Council shall at least indicate the elements referred to in points (a) to (e) of Article 24(1).

The Council may recommend a prolongation in accordance with the conditions and procedure set out in this Article.

Before a Member State reintroduces border control at all or specific parts of its internal borders under this paragraph, it shall notify the other Member States, the Commission and the European Parliament accordingly.

3. In the event that the recommendation referred to in paragraph 2 is not implemented by a Member State, that Member State shall without delay

inform the Commission in writing of its reasons.

In such a case, the Commission shall present a report to the European Parliament and the Council assessing the reasons provided by the Member State concerned and the consequences for protecting the common interests of the area without internal border control.

4. On duly justified grounds of urgency relating to situations where the circumstances giving rise to the need to prolong border control at internal borders in accordance with paragraph 2 become known less than 10 days before the end of the preceding reintroduction period, the Commission may adopt any necessary recommendations by means of immediately applicable implementing acts in accordance with the procedure referred to in Article 33a(3). Within 14 days of the adoption of such recommendations, the Commission shall submit to the Council a proposal for a recommendation in accordance with paragraph 2.

5. This Article shall be without prejudice to measures that may be adopted by the Member States in the event of a serious threat to public policy or internal security under Articles 23, 24 and 25.

Article 26a
Criteria for the temporary reintroduction of border control at internal borders where exceptional circumstances put the overall functioning of the area without internal border control at risk

1. Where, as a last resort, the Council recommends in accordance with Article 26(2) the temporary reintroduction of border control at one or more internal borders or parts thereof, it shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security within the area without internal border controls, and shall assess the proportionality of the measure in relation to that threat. That assessment shall be based on the detailed information submitted by the Member State(s) concerned and by the Commission and any other relevant information, including any information obtained pursuant to paragraph 2 of this Article. In making such an assessment, the following considerations shall in particular be taken into account:

(a) the availability of technical or financial support measures which could be or have been resorted to at national or Union level, or both, including assistance by Union bodies, offices or agencies such as the Agency, the European Asylum Support Office, established by Regulation (EU) No 439/2010 of the European Parliament and of the Council or the European Police Office ('Europol'), established by Council Decision 2009/371/JHA, and the extent to which such measures are likely to adequately remedy the threats to public policy or internal security within the area without internal border control;

(b) the current and likely future impact of any serious deficiencies relating to external border control identified in the context of the evaluations carried out pursuant to Regulation (EU) No 1053/2013, and the extent to which such serious deficiencies constitute a serious threat to public policy or internal security within the area without internal border control;

(c) the likely impact of the reintroduction of border control on the free movement of persons within the area without internal border control.

2. Before adopting a proposal for a Council recommendation, in accordance with Article 26(2), the Commission may:

(a) request Member States, the Agency, Europol or other Union bodies, offices or agencies to provide it with further information;

(b) carry out on-site visits, with the support of experts from Member States and of the Agency, Europol or any other relevant Union body, office or agency, in order to obtain or verify information relevant for that recommendation.

Article 27

Informing the European Parliament *and the Council*

The ***Commission and the*** Member State***(s)*** concerned [~~or, where appropriate, the Council~~] shall inform the European Parliament ***and the Council*** as soon as possible of [~~the measures taken under~~] ***any reasons which might trigger the application of*** Articles [~~24, 25 and 26~~] ***19a and 23 to 26a***. [~~As of the third consecutive prolongation pursuant to Article 26, the Member State concerned shall, if requested, report to the European Parliament on the need for border control at internal borders.~~]

Article 28

Provisions to be applied where border control is reintroduce at internal borders

Where border control at internal borders is reintroduced, the relevant provisions of Title II shall apply *mutatis mutandis*.

Article 29

Report on the reintroduction of border control at internal borders

Within four weeks of the lifting of border control at internal borders, [~~T~~]***t***he Member State which has ~~reintroduced~~ ***carried out*** border control at internal borders ~~under Article 23~~ shall ~~confirm the date on which that control is lifted and, at the same time or soon afterwards,~~ present a report to the European Parliament, the Council and the Commission on the reintroduction of border control at internal borders, outlining, in particular, the ***initial assessment and the respect of the criteria referred to in Articles 23a, 25 and 26a, the*** operation of the checks, ***the practical cooperation with neighbouring Member States, the resulting impact on the free movement of persons,*** ~~and~~ the effectiveness of the reintroduction of border control ***at internal borders, including an ex-post assessment of the proportionality of the reintroduction of border control.***

The Commission may issue an opinion on that ex-post assessment of the temporary reintroduction of border control at one or more internal borders or at parts thereof.

The Commission shall present to the European Parliament and to the Council, at least annually, a report on the functioning of the area without internal border control. The report shall include a list of all decisions to reintroduce border control at internal borders taken during the relevant year.

Article 30

Informing the public

The ***Commission and the Member State concerned shall inform the public in a coordinated manner on a*** decision to reintroduce border control at internal borders [~~shall be taken in a transparent manner and the public informed in full thereof,~~] ***and indicate in particular the start and end date of such a measure,*** unless there are overriding security reasons for not doing so.

Article 31
Confidentiality

At the request of the Member State concerned, the other Member States, the European Parliament and the Commission shall respect the confidentiality of information supplied in connection with the reintroduction and prolongation of border control and the report drawn up under Article 29.

TITLE IV
FINAL PROVISIONS

[Title IV unchanged, except for two new Articles as follows:]

Article 33a
Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply. Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

Article 37a
Evaluation mechanism

1. In accordance with the Treaty on the Functioning of the European Union and the Treaty on European Union and without prejudice to their provisions on infringement procedures, the implementation by each Member State of this Regulation shall be evaluated through an evaluation mechanism.

2. The rules on the evaluation mechanism are specified in Regulation (EU) No 1053/2013. In accordance with that evaluation mechanism, the Mem-

ber States and the Commission are, jointly, to conduct regular, objective and impartial evaluations in order to verify the correct application of this Regulation and the Commission is to coordinate the evaluations in close cooperation with the Member States. Under that mechanism, every Member State is evaluated at least every five years by a small team consisting of Commission representatives and of experts designated by the Member States.

Evaluations may consist of announced or unannounced on-site visits at external and internal borders.

In accordance with that evaluation mechanism, the Commission is responsible for adopting the multiannual and annual evaluation programmes and the evaluation reports.

3. In the case of possible deficiencies recommendations for remedial action may be addressed to the Member States concerned.

Where serious deficiencies in the carrying out of external border control are identified in an evaluation report adopted by the Commission in accordance with Article 14 of Regulation (EU) No 1053/2013, Articles 19a and 26 of this Regulation shall apply.

4. The European Parliament and the Council shall be informed at all stages of the evaluation and be transmitted all the relevant documents, in accordance with the rules on classified documents.

5. The European Parliament shall be immediately and fully informed of any proposal to amend or to replace the rules laid down in Regulation (EU) No 1053/2013.

Sammanfattning på svenska

Efter långa och svåra förhandlingar har man inom EU ändrat de regler som gör det möjligt för medlemsländer som ingår i Schengen-området att återinföra inre gränskontroller sinsemellan (och även med vissa associerade länder). Enligt Schengenreglerna ska det annars i princip inte förekomma några kontroller vid inre gränser.

Medan vissa medlemsländer yrkade på dessa ändringar för att öka möjligheten att återinföra gränskontroller, föreslog Europeiska kommissionen i stället nya regler som skulle ge kommissionen rätt att besluta om återinförande av kontroller. Till slut enades medlemsländerna och Europaparlamentet om en kompromiss: det kommer att finnas en ny möjlighet att återinföra kontroller vid de inre gränserna när ett medlemsland uppvisar ”allvarliga brister” vad gäller tillämpningen av reglerna för de yttre gränserna. Den nya möjligheten kommer dock att vara förbunden med stränga villkor.

Villkoren innebär i första hand en skyldighet att försöka stödja ett medlemsland som har problem med att uppfylla sina skyldigheter. Till villkoren hör också att ministerrådet ska avge en rekommendation i frågan, ett ställningstagande som i sin tur baseras på en rekommendation från kommissionen. Det är dock fortfarande möjligt för ett medlemsland att ha en annan åsikt om huruvida man ska följa rådets rekommendation, något som i praktiken skulle kunna leda till kaos.

Utöver ändringarna av reglerna för återinförande av inre gränskontroller, har också Schengen-reglerna för de yttre gränserna nyligen ändrats. Vidare har man också förstärkt Frontex (EU:s gemensamma byrå för gränskontroll); ett andra generationens informationssystem för Schengen togs i drift under våren 2013; ett nytt system för gränsövervakning, Eurosur, kommer att vara på plats före årsskiftet och nya regler för havsövervakning diskuteras. Dessutom har ett förslag till nytt system för in- och utresor lagts fram och kan eventuellt tas i drift på medellång sikt.

Vad gäller andra delar av Schengen-systemet, har informationssystemet för visering inrättats och kommer att utökas. Nya regler som tillåter att man med kort varsel återinför visumtvång för icke-medlemsländer kommer att antas inom kort; EU:s viseringskodex kommer troligtvis snart att reformeras och reglerna vad gäller irreguljära migranter kan komma att ändras inom en snar framtid.

Samtidigt med dessa förändringar finns dock en växande oro över hur frågan om de mänskliga rättigheterna påverkas av EU:s immigrations- och asylpolitik, ett område där Schengen spelar en nyckelroll.

I den här rapporten görs en bedömning av såväl de nya reglerna för återinförande av inre gränskontroller som av utvecklingen i Schengen-systemet i stort. Rapporten innehåller också rekommendationer avsedda att garantera att Schengen-systemet också i fortsättningen är transparent, effektivt, legitimt och i enlighet med de mänskliga rättigheterna.

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