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Border Management and Migration Control in the European Union

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Summary

This report is the first deliverable of Work Package (WP2) Border and Migration Controls of the Horizon 2020 Project *RESPOND -- Multilevel Governance of Mass Migration in Europe and Beyond*. RESPOND explores the multilevel governance of migration in countries of origin, transit and migration, focusing on the Eastern Mediterranean route. WP2 addresses border management and migration control, including European Union (EU) and domestic legal regimes, policy developments since 2011, the implementation of border management and migration control policies by EU member states and third countries, and how refugees and migrants experience and respond to the EU border management regime.

The aim of the report is to provide an overview of the current EU border management and migration control regime in order to contextualise further research on domestic regimes and their implementation. It outlines the key components of the European Union framework on border management and migration controls. It also presents an overview of historical developments, an analysis of discursive aspects of border and migration control on the level of Union institutions between 2011 and 2017, as well as a detailed description of control measures in the different layers of the European Union external border.

We use the term border management to refer to the EU's ensemble of legislation, policies, implementation practices, institutions, and actors that are concerned with defining, conceptualising, and policing of the external border of the member states of the European Union. We use the term migration control to capture modes of control that might fall outside the scope of border management, especially as defined by the 2016 European Border and Coast Guard Directive. We elaborate on these definitional issues in Concepts and Definitions section. We then move on to a detailed analysis of these policies and their legal codification and key legislative and policy developments since 2011. We conclude the report with a discussion of the complexities involved in researching this intersection of various legal frameworks, policy fields and implementation challenges in connection to the larger process of Europeanisation.

1. Introduction

This report is part of WP2 *Border Management and Migration Controls* of the Research Project *RESPOND - Multilevel Governance of Mass Migration in Europe and Beyond*. RESPOND explores the multilevel governance of migration in countries of origin, transit and migration, focusing on the Eastern Mediterranean route.

WP2 addresses border management and migration control, including European Union (EU) and domestic legal regimes, policy developments since 2011, the implementation of border management and migration control policies by EU member states and third countries, and how refugees and migrants experience and respond to the EU border management regime.

It has the following objectives:

- *To gain an overview of the legal and policy frameworks relating to border management and migration controls in the EU and countries of origin, transit and settlement.*
- *To map the institutions and social actors involved in the implementation of border management and control policies in the EU and countries of origin, transit and settlement.*
- *To explore how border management and migration control policies are implemented in countries of origin, transit and settlement.*
- *To scrutinize patterns of cooperation and tensions among actors involved in border regimes in relation to their perception of security.*
- *To explore how non-state actors involved in or affected by border management and security regimes understand and respond to it. This includes both cooperation in implementing control policies and patterns of resistance (i.e. through hosting “illegal” entrants).*
- *To analyze how refugees and migrants understand and respond to the EU border management and security regime, and how their experiences and actions are shaped by it. (RESPOND 2017, Work Package 2)*

The aim of this report is to provide an overview of the current EU border management and migration control regime in order to contextualise further research on domestic regimes and their implementation.

We use the term border management to refer to the EU's ensemble of legislation, policies, implementation practices, institutions, and actors that are concerned with defining, conceptualising, and policing of the external border of the member states of the European Union. We use the term migration control to capture modes of control that might fall outside the scope of border management but relate to the regulation, control or inhibition of migratory movements to and within the territory of the European Union.

We start with outlining the methodology employed for this report, followed by a discussion of definitions and conceptual issues. Even though the primary scope of the report is on the period from 2011 to 2017, we first offer a historical retrospective on the development of Europeanised border and migration policies since the Treaty of Amsterdam, situating the European external border in migration control. It is followed by a section describing the overall structure of the EU legal and policy framework concerning border management and

migration control. In order to further situate the report, we outline key discursive aspects of control as stated in official EU documents.

We then move on to a detailed analysis of these policies and their legal codification. We structure this part into four sections: pre-entry controls, controls at the external border controls applied within the territory -subdivided into the regulation of stay and residence, internal control and apprehension measures, and access to social and welfare rights - and return, detention and readmission measures. All sections reflect the current state of play, but additionally also offer a synopsis of developments since 2011. We conclude the report with a discussion of the complexities involved in researching this intersection of various legal frameworks, policy fields and implementation challenges in connection to the larger process of Europeanisation.

Methodology

We used two different methodological approaches in the writing of this report. First, we conducted a policy analysis, which forms the majority of our findings. Secondly, we carried out a content analysis of selected documents which supplements the analysis of the legal and policy framework.

The analysis of the policy and legal framework was desk based. We located and retrieved key legislative and policy documents in the European Commission's *DG Migration and Home Affairs*, from the *European Agenda on Migration* website, the website of the *European Council*, and of the *Council of the European Union*, specifically the *JHA Council*, as well as the *European Parliament*. We then followed the references, cross-checked with the EUR-LEX database in order to query the current legislative status of proposals and other policy initiatives and thus built a corpus of policy and legislative documents that reflect the current status of the EU framework on migration and borders.

Other secondary sources such as academic literature, European Parliament briefings, research reports and reports by European human rights agencies were used to supplement the analysis of key legal and policy developments.

For the content analysis, we built a corpus of 95 documents published by the *European Commission*, *European Council*, *European Parliament* and *Council of the European Union*. The criteria for selection and the analytical process are described in detail in Appendix A.

Definitions and Conceptual Issues

There are no explicit definitions of neither *border management* nor *migration control* in EU documents. The closest explicit definition of what *European Integrated Border Management* encompasses can be found in Article 4 of the 2016 Regulation establishing the *European Border and Coast Guard*:

‘European integrated border management shall consist of the following components:

- a) *border control, including measures to facilitate legitimate border crossings and, where appropriate, measures related to the prevention and detection of cross-border crime, such as migrant smuggling, trafficking in human beings and terrorism, and measures related to the referral of persons who are in need of, or wish to apply for, international protection;*
- b) *search and rescue operations for persons in distress at sea launched and carried out in accordance with Regulation (EU) No 656/2014 of the European Parliament and the Council [...] and with international law, taking place in situations which may arise during border surveillance operations at sea;*
- c) *analysis of the risks for internal security and analysis of the threats that may affect the functioning or security of the external borders;*
- d) *cooperation between Member States supported and coordinated by the Agency;*
- e) *inter-agency cooperation among the national authorities in each Member State which are responsible for border control or for other tasks carried out at the border and among the relevant Union institutions, bodies, offices and agencies; including the regular exchange of information through existing information exchange tools, such as the European Border Surveillance System (EUROSUR) established by Regulation (EU) No 1052/2013 of the European Parliament and of the Council [...];*
- f) *cooperation with third countries in the areas covered by this Regulation, focusing in particular on neighbouring countries and on those third countries which have been identified through risk analysis as being countries of origin and/or transit for illegal immigration;*
- g) *technical and operational measures within the Schengen area which are related to border control and designed to address illegal immigration and to counter cross-border crime better;*
- h) *return of third-country nationals who are the subject of return decisions issued by a Member State;*
- i) *use of state-of-the-art technology including large-scale information systems;*
- j) *a quality control mechanism, in particular the Schengen evaluation mechanism and possible national mechanisms, to ensure the implementation of Union legislation in the area of border management;*
- k) *solidarity mechanisms, in particular Union funding instruments.’ (Regulation (EU) 2016/1624, Art. 4)*

The above definition lists eleven components that comprise *European Integrated Border Management* from the perspective of the European Union. It does not state a more conceptual definition of *border management*, nor does it give a rationale as to its necessity or objective. These can be found in the recitals of the regulation, however, they have to be situated both in a historical perspective of the specific development of the term *Integrated Border Management* in conjunction with the process of Europeanisation of border and

migration control, as well as in the discursive context how migration and borders are framed and problematised in the EU. We will discuss these two aspects in the respective sections.

There is a similar absence of tangible definitions concerning the terms ‘migration control’ or ‘migration control policies’, even though there is extensive consensus on what types of policy measures constitute migration controls. Boswell (2011, 12) defines policies of migration control as ‘measures adopted to exclude irregular migrations or other unwanted foreign nationals through entry restrictions, border control, detention and deportation’. Vogel defines migration control policies as

all governmental efforts

- *to prevent access to seemingly legal entry, residence or work by foreign nationals who are not eligible by law especially if they try to gain access under false pretences, identities or with fraudulent documents*
- *to prevent illegal entry, residence or work by ineligible foreign nationals (2000, 390–391)*

As Vogel’s definition suggests, migration control policies have a dual focus on *entry* into a territory and lawful *residence/presence* (Anderson 2013; Faist and Kivisto 2010) that corresponds to the classification of controls as external and internal (Frank 2014; Triandafyllidou and Ambrosini 2011; Vogel 2000). External controls regulate the admission and entry of migrants at the border or beyond it; they also include externalised and remote control policies and measures. Internal controls ensure that migrants already in the territory of a state have a legal right to reside and sanction them for breaching regulations related to residence/stay rules (Boswell 2011). Hebling et al. (2017) similarly differentiate between policies that target external populations (i.e. entry controls/visa regimes etc.) and those internally-focused, such as length of stay of residence permits or right to work. Triandafyllidou and Ambrosini (2011) introduce a further distinction between ‘gatekeeping’ and ‘fencing’ strategies, the former preventing legal access to the territory of a state or its institutions and the latter focusing on the removal or expulsion of unauthorised migrants. Exit controls are yet another type of control measure but are less discussed in academic literature. Migration control is also conceptualised as exclusion from social systems, such as healthcare and welfare benefits (Boswell 2011). In Boswell’s conceptualisation, these measures target the systems themselves or actors within those systems (for example through legal exclusion or fines for employers or carriers).

Migration control policies seem to incorporate both legal frameworks as well as implementing and enforcement measures (Anderson 2013; Faist and Kivisto 2010; Castles 2004; Vogel 2000). However, Brochmann and Hammar (1999; cited in Helbling et al., 2017) differentiate between ‘regulations’, which refer to laws and ‘mechanisms of control’, which refer to mechanisms that monitor whether the regulations are adhered to (Helbling et al., 2017). Castles (2004) includes regulatory systems such as Schengen and common EU migration and asylum policies in migration control. Building on the above, there might be scope for differentiating between migration control *regimes* or *systems* (Fahrmeir, Faron, and Weil 2005; Vogel 2000) which incorporates laws, regulation and policies, and measures/mechanisms which refer to specific policies (detention, border checks) and actors (e.g. security agencies, local authorities, bureaucracies) which enforce laws.

One difference in conceptualising migration controls concerns which migration processes

they target – all types of migration or migratory movements that are designated as ‘unwanted’ such as irregular migration or asylum seeking. Some of the literature treats migration controls as concerning the admission and residence of *all* migrants (Bloch, Sigona, and Zetter 2013; Bosworth and Guild 2008; Castles 2004, 2007; Faist and Kivisto 2010; Messina 2007) even though control policies can discursively and practically target mainly unwanted migration. This approach could suggest that *all* contemporary migration policies could be considered control policies, or at least could have a control orientation.

In contrast, other scholars perceive migration control policies as targeting predominantly unwanted migration (Boswell 2011, Vollmer 2011, Vogel 2000). The European Commission website (2016o) reflects this understanding of ‘control’, since the concept is associated with preventing irregular migration, and existing research has demonstrated the centrality of controlling approaches in the governance of irregular migration (Walters 2010, Vollmer 2011). Asylum seekers and refugees would be classified as unwanted (Favell and Hansen 2002; Vollmer 2011).

The emphasis on preventing unwanted migration is consistent with the paradigm of migration management. ‘Migration management’ is a key policy term adopted by international organisations (Kalm 2010), the European Union (Squire 2009; Favell 2014) and governments (Castles 2007; Geddes 2005). Broadly speaking, liberal democratic states allow migration that is seen as economically beneficial while they curtail migration that is seen as undesirable – irregular migration and refugee movements (Favell 2014; Favell and Hansen 2002; Hampshire, 2013; Kalm 2010; Squire 2009). This approach underpins EU policy as well (Favell 2014; Favell and Hansen 2002). In this context migration control policies have a ‘filtering’ function, differentiating between ‘wanted’ and ‘unwanted’ migrants, facilitating the movement of the former and restricting the movement of the latter (Mau et al. 2012; Pickering and Weber 2006). This understanding is for example implicit in Walters (2010, 13) where he refers to remote control policies as ‘often precautionary and preventative in their logic, these practices include the widespread use of visa programmes to code risky nationalities and *filter out* unwanted travellers’. Migration management has been critiqued as a neoliberal paradigm which reflects a preoccupation with legitimating control measures (Castles 2007, Geiger and Pécoud 2010).

While migration control policies still have a significant place in migration management (Kalm 2010) Foucauldian/governmentality approaches situate them within the broader neoliberal management of migration, drawing on biopolitics and the knowledge/discipline nexus (Fassin 2011, Geiger and Pécoud 2010, Kalm 2010, Scheel and Ratfisch 2014). In extension controls are not simple ‘law and order’ measures but utilise techniques of surveillance and knowledge of populations (e.g. databases, registration processes), discipline (e.g. detention, confinement in camps), designate desirable and undesirable behaviours (e.g. information campaigns) and extend controls from the security domain to other spheres (e.g. labour and welfare policies) (Bosworth and Guild 2008, Frank 2014, Geiger and Pécoud 2010, Kalm 2010). In relation to asylum seeker and refugee populations, the surveillance/discipline function has been associated with the management of camps and accommodation centres (Scheel and Ratfisch 2014; Szczepanikova 2013). Such locations are not control measures themselves but facilitate the exercise of controls- e.g. detention. These examples further highlight the linkages between asylum and reception systems and migration controls. In addition, ‘Foucauldian’ approaches are theoretically a better match with literature on borders/bordering and migration governance.

As a last concept necessary for an understanding of the EU's approach to border management, we introduce the *Four-Tier Access Control Model*, as any subsequent effort of defining border management in the EU context makes reference to the model. The model is based on a geographical rationale of concentric layers with the EU territory at its core:

measures in third countries, cooperation with neighbouring countries, border control, control measures within the area of free movement, including return. (Council of the European Union 2006)

The model prescribes different modes, legislation and practices of access control are prescribed by the model for each layer. However, despite frequent references to the model, there seems to exist only one source that describes the model in detail: the first volume of the Schengen Catalogue of February 2002. Chapter A of Part One is titled 'Integrated border security model (a mechanism of different tiers/filters)' (Council of the European Union 2002a) and identifies the four tiers on which a 'set of complementary measures' (Council of the European Union 2002a, 11) to be implemented.

For the first tier, 'Activities in third countries, in countries of origin and transit', the Catalogue prescribes a thorough check of documents in order to detect document forgeries, both in consulates and embassies as well as before the start of air or sea transport. This is to be carried out by liaison officers and document experts. Secondly, consular representations are urged to carry out a 'thorough inspection of [...] application documents' submitted for the issuing of a Schengen visa. Thirdly, carriers are coerced to ensure proper documentation as well as entry authorisation of all travellers through the so-called *carrier sanctions*.

The second tier, 'Bilateral and international border Cooperation', defines international cooperation as either multilateral, bilateral or local and urges the conclusion of agreements with neighbouring countries, including the setting up of information exchange platforms, communication channels, contact points, and emergency procedures (2.2 (a), p.13). Transit countries are urged to 'lend their active assistance' (p.13) through securing their borders and implementation of a 'constant repatriation practice' (p.13).

The third tier, 'Measures at the external border', is described as the 'core area of [a] general border strategy'. It consists of border checks and border surveillance, based on risk analysis. The Catalogue here describes the following necessary measures: coherent legislation, appropriate infrastructure and facilities, and professionalism of and proper training of border police officers. Furthermore, the necessary equipment is to be provided, as well as internal coordination and information exchange between the relevant authorities.

Lastly, the fourth tier, 'Further activities inside the territory of the Schengen States' mandates both internal surveillance and checks, as well as appropriate return policies.

2. Situating the European External Border in Migration Control

More than three decades ago, in 1985, the Schengen Agreement was signed by its initial five signatory countries, outside of the framework of the European Community. Through the agreement, France, West-Germany and the Benelux countries signalled their intent to create an area where internal border checks were abolished. In order to do so, the agreement gave rise to the notion of a common external border, which -- as a compensatory measure to the abolition of internal border controls -- would need to be policed more strongly, and under commonly agreed standards. The Schengen agreement can thus be regarded as the birth of the European external border, however more as a notion than yet an institution. The actual implementation and organisation of the external border would only begin with the Schengen Convention of 1990, in which concrete measures, such as a common visa policy, the creation of databases systems, and rules for asylum applications within the nascent Schengen area, were laid down.

The latter point serves to highlight the intrinsic connection that the Schengen endeavour and the external border had -- from the very beginning -- with the question of migration and asylum in the EC/EU. In fact, the articles that govern asylum applications can be found verbatim in the Dublin Convention, signed about the same time as the Schengen Convention, and giving rise to the central provision of the future Common European Asylum System (CEAS), namely the Dublin Regulation, currently in its third version.

How far this intrinsic link between borders and migration control is a European exceptionality remains to be discussed in a global perspective. However, the further and particular development of this link is highly specific to the larger process of the European project with its supranationalising vector. The external border was the major injection of the Schengen process into the European project and towards the emergence of a Europeanised policy field of Justice and Home Affairs for the EU. Its intergovernmental model has left deep traces in this particular mode of Europeanisation. Conversely, the specific legislative foundations, laws, policies, implementation, practices and actors that are concerned with the European external border, and its role in migration control, are characterised by the absence of a strong and centrally organising rationale, and political authority. In effect, we are confronted with a landscape of different rationales, norms, policies and practices which may be aligned, or not, and that give rise to actors and practices that may be in contradiction, or competition, or not.

Amsterdam Treaty

Border and migration control emerged as an EU policy field with the Treaty of Amsterdam (*Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts* 1997). The treaty moved the competences for legislation in that area from the intergovernmental *Third Pillar* to the European *First Pillar*. At the same time, the Treaty of Amsterdam incorporated the Schengen Agreement of 1985 and Schengen Convention of 1990 into the EU treaties through the *Schengen Protocol*. Consequently, the 2000s saw a plethora of initiatives -- mostly by the Commission and the Council -- to establish not only a legislative and policy framework of

migration and border control, but also the institutions necessary to implement the former.

The Treaty of Amsterdam entered into force on May 1, 1999, and thus marked the begin of the emergence of a completely new field of Europeanised policies in what is commonly referred to as *Justice and Home Affairs* (JHA). For the European Union however, a more ambitious aim was set: the creation of the *Area of Freedom, Security and Justice* (AFSJ). The creation and implementation of policies in the field of asylum, migration and borders were a central part of this endeavour from the beginning. However, developments in the field of migration policy focussed on the creation of the *Common European Asylum System* (CEAS) and its respective legislation and mechanisms, while in terms of legal migration, no such concrete objective was on the table. Consequently, border and migration were not yet as strongly intertwined with each other as a perspective from after 2015 would suggest for the European Union.

In a similar vein, the internalised, externalised, de-territorialised, digitalised and somewhat all-encompassing character that can these days be ascribed to the European external border only slowly emerged over the last two decades, as will be discussed more in detail with reference to *Integrated Border Management*. The first years of the post-Amsterdam supranational approach to border control can be characterised as akin to a national, Westphalian policing of borders, somehow adopted to the *variable geometry* of the different territories the European Union could lay claim to representing. Variable geometry as a generic EU term refers to a method of differentiated European integration. It here means the fact that the United Kingdom, the Republic of Ireland and the Kingdom of Denmark had negotiated an Opt-out for the Schengen Protocol of the Treaty of Amsterdam, thus leading to a mismatch of the Schengen Area, the Area of Freedom, Security and Justice, and the Single Market Area.

This challenge aside, the initial post-Amsterdam perspective on the European external border was structured by Schengen's intergovernmental approach, and thus focused on the national border guard institutions, a certain harmonisation of practices, cooperation and support, as well a general material and technological reinforcement of the European External Border, enabled by European Union financing mechanisms. The transformation of Spain's border with Morocco in the late 1990s into a tightly surveyed and patrolled border through the introduction of the SIVE (System of Integrated Surveillance of the External Border) can be regarded as the blueprint for the material and technological transformation of the EU external border in the early years after the Treaty of Amsterdam. A further specific focus of the early years lay on the implementation of the Schengen standards in the accession candidate countries.

The Tampere Programme

The first EU summit after the entering into force of the Treaty of Amsterdam took place in Tampere, Finland, in December 1999. The creation of the AFSJ was central on its agenda, and a five-year programme was initiated at the summit. The presidency conclusions call for four priority fields, amongst which the first reads as the creation of 'A Common EU Asylum and Migration Policy' (European Council 1999). Only under the fourth subheading of 'Managing Migration Flows' can a reference be found to borders, with the EU Council calling for 'closer co-operation and mutual technical assistance' (European Council 1999, para. 24), as well as the full application of the Schengen acquis by candidate countries.

The conclusions from the EU Summit in Nice in December 2000 are even more brief. Conclusion 49 recalls ‘the need to promote operational cooperation between the competent authorities of the Member States in controlling the Union’s external borders, and in particular its sea borders’ (European Council 2000), and states that the European Council has ‘noted with interest’ a letter by the Spanish and the Italian prime ministers. Notably, it is those two states that in the early 2000s were most confronted with the challenge of securing its portion of the EU’s external sea border, while other member states -- especially those further in the North -- were less forthcoming in forging a European system of migration and border policies.

It would not be until the next EU summit that this blockage would be overcome in principle. The summit took place in Laeken in December 2001 (European Council 2001), a mere three months after the attacks on September 11, 2001 in New York and Washington, USA, which had already created a wholly new agenda of security worldwide.

Hobbing notes:

It was the merit of the Laeken European Council of December 2001 to have sensed these tensions and initiated a discussion on a new topic called “integrated border management”, which would take into account the interests of those both on the border and far away from it. Although the identification of the problem did not lead to immediate solutions, the debate was well received and it has stayed in the headlines ever since. (Hobbing 2005, 1)

The initially most ambitious initiative was the proposed creation of the *European Border Guard Corps*, which the Commission put forward in its 2002 Commission Communication *Towards Integrated Management of the External Border of the Member States of the European Union* (Commission of the European Communities 2002). The Commission intended to transfer the policing of the European external border, as established through the Schengen Agreements to an EU police force that was yet to be created. Ultimately, the proposal was rejected by the EU member states as they judged the implicit transfer of sovereign powers as too far reaching. This particular episode however is instructive as to the general political context of a Europeanised border and migration control system, which from the onset has been characterised by a second inherent tension between supranationalisation and retention of sovereign national rights.

Even though initially rejected, the proposal ushered in the creation of the European border agency Frontex in 2004 (*Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* 2004), which started operating in May 2005 from its headquarters in Warsaw, Poland. Unlike the previously proposed *European Border Guard Corps*, the agency was not initially tasked with policing the European External Border by itself, but with contributing to the operational cooperation at the External border. This was reflected in the long form of its name, i.e. the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*. One clearly notes the intergovernmental spirit of the Schengen Agreements in that it is not the European Union’s external border that is referred to, but the external border of the member states of the European Union.

The tension between national sovereignty and Europeanised border control was addressed through a designation of Frontex' activities as support to the respective member states' national border guard institutions. More broadly speaking, the notion of *Integrated Border Management* (IBM) that the Laeken summit had created allowed the European Union to mobilise a common effort at securing the external border -- at least nominally. For what IBM would actually encompass had not yet been defined. As an ambiguous ensemble of policies, legislation and mostly national actors, it allowed for the integration of different components, elements and scales once a political consensus on narrow, more technical issues emerged.

The Hague Programme, and the Global Approach to Migration

As the first five years of the Tampere programme were about to pass, the European Council adopted a successor five-year programme, named *The Hague Programme* after the city where the EU summit in November 2004 took place. Generally evaluating the first five years of the AFSJ a success, *The Hague Programme* aimed at 'strengthening freedom, security and justice' (European Council 2005) in the European Union. Part of this strengthening was a reinforcement of the link between migration, asylum and borders, which the programme discusses together (see for example III.1.2.). Unlike in the *Tampere Programme*, very specific policy initiatives were called for, covering areas such as the CEAS, legal migration and the 'fight against illegal employment' (1.4.), integration of third-country nationals, partnerships with third countries, countries of origin and of transit, return and re-admission policy, border checks and the 'fight against illegal migration', biometrics and information systems, and visa policy. Many of the key components of today's EU border and migration framework can trace their origin to this programme.

However, just about a year later, the approach of materially and technologically upgrading borders in conjunction with a slowly to be homogenised patrolling practice touched its own limits in 2005. The situation at the Spanish exclaves of Ceuta and Melilla, which in October 2005 culminated in the attempted crossing of the border fences by several hundreds of African migrants demonstrated sharply that a reliance on technical and technological border control at the border was insufficient for a larger project of migration control. Thus emerged the *Global Approach to Migration*, a larger framework for EU migration policy, which was presented by the Commission and adopted by the Council in December 2005 (Commission of the European Communities 2005; European Council 2006).

The *Global Approach* did not discard with the existing system of border and migration control in the EU, but rather augmented it with the *external dimension*. Even though this term was already contained in *The Hague Programme*, the *Global Approach* brought a new focus on this area. This was epitomised in the so-called *routes approach*, an approach that not only mandated a continued tight policing of the EU external borders, but also demanded proactive measures of migration control along the routes of migration before their intersection with the external border. Here, cooperation with third countries, i.e. countries of transit or origin, was designated to be pivotal, suddenly injecting migration control policy into the EU's foreign policy and policy of development cooperation.

A second development within the EU's approach to border control is an increasing focus on what the Commission has initially termed *smart borders*, i.e. the augmentation of controls at

the border with new technological systems, such as the *European Border Surveillance System* (EUROSUR), and a range of newly to be established information systems or databases. The Schengen agreements had already led to the creation of the first supranational, pan-European police database *Schengen Information System* (SIS), while the incorporation of the Dublin Convention (*Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities* 1990) into EU legislation through the so called Dublin II regulation in 2003 (*Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National* 2003) was accompanied by the creation of the European fingerprint database EURODAC (*Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention* 2000). In 2008, the Commission proposed the so-called *border package*, focussing on the establishment of new databases, the enhancement of interoperability, and an extension of the use of database in border checks. In the same year, the creation of EUROSUR was proposed.

The Stockholm Programme and the Crisis of Schengen

Yet another five-year programme, the *Stockholm Programme* was adopted in 2009 (European Council 2010). Again concerned with the establishment of the AFSJ, its focus shifted to more traditional JHA issues of police and judicial cooperation. Border, migration and asylum were relegated to the end of the programme text, not necessarily because the European Council deemed them less necessary, but because it judged that sufficient progress had been made, and the necessary tools, such as Frontex, the CEAS, and the *Global Approach*, had been established. The *Stockholm Programme* also falls into a very different epoch of the European Union. The rather technical Treaty of Lisbon had been adopted amongst a rising eurosceptical trend in the member states after the failed constitutional process. Also, the 2008 global financial crisis that originated in the USA started to affect the European Union as the crisis of sovereign debt, and attention shifted to the stability of the Euro-zone.

With the advent of what has been commonly referred to as the *Arab Spring*, starting in December 2010 in Tunisia, the EU system of migration and border control started to slide into a crisis, which culminated in the refugee migrations of 2015. On the one hand the political and social upheavals voided the cooperation with Third countries in Northern Africa, leading to a collapse of control in the Mediterranean, and to a rise in crossings towards Italy that are to date still ongoing. On the other, two judgments of the European Court of Human Rights in Strasbourg challenged central premises of the EU's migration control strategy. In *M.S.S. v. Belgium and Greece* (2011), the Court found both Belgium and Greece to be in violation of the human rights of an Afghan asylum seeker that had been transferred from Belgium to Greece under the Dublin II regulation. In consequence, Greece effectively dropped out of the Dublin system, thus undermining the strategy of forcing asylum seekers to remain close to the EU external border for the processing of their asylum application and afterwards. More relevantly in the case of *Hirsi Jamaa and Others v. Italy* (2012), the court found that the Italian practice of intercepting refugees and potential asylum seekers in international waters and returning them to Libya constituted a breach of the non-refoulement

principle of the Geneva Convention on Refugees.

However, the consequences of these developments would only properly unfold after 2013, and particular in 2015, and would not be taken into account by the European Union beforehand. In retrospect, the border and migration agenda that arose from the *Stockholm Programme* focussed on a reform of the CEAS. The necessary legislative acts passed around the year 2013 but were largely disconnected from a changing migratory reality in and around Europe. Notably, the imbalance that arose from the Dublin regulation's mechanism of allocating responsibility for the processing of an asylum claim -- the country of first entry rule -- was not changed with the passing of Dublin III, and thus provided an actual disincentive for members states such as Italy and Greece to engage in a comprehensive registration of irregular migrants at its external border. For the purpose of this report, we can conclude that by 2010, the European Council did not see the necessity of a larger reform, or a Europeanising push in the field of European border management and policy. Apparently, what had been developed as *Integrated Border Management* in the EU over the prior decade seemed sufficient. Conflicts over re-established internal border checks that flared up after 2011, or the humanitarian crisis in the Central Mediterranean that became a discursive topic after 2013 did not register as the first signs of an impending collapse (Hess and Kasperek 2017).

Even in May 2015, with the first signs of large refugee migrations towards Europe on the horizon, the Commission still presented its *European Agenda on Migration* (European Commission 2015b) which was largely rooted in existing mechanisms and instruments and did not envisage a fundamental reform of the EU's system of migration and border control. These proposals would only begin to be presented from December 2015 on, while the migrations across the institutionalised and formalised corridor across the Balkan were still happening and would only be brought to a stop through the ad-hoc EU-Turkey Statement of March 18, 2016. Since then, however, the European Commission has presented about 25 legislative proposals (Kasperek 2018), aiming at a fundamental transformation of all aspects of border, migration and asylum policy in the European Union.

The Advent of Integrated Border Management in the European Union

As discussed above, the wider field of European Union border policies did not immediately coalesce around the term of *Integrated Border Management* (IBM) after Amsterdam. Only after the Laeken Council in 2001, and an increasing trend to securitisation that had also taken hold of EU JHA policies was the term introduced. Initially, it was an empty signifier, but a well sounding one. It served to mobilise further efforts at Europeanising the field of border policies, and was useful in this respect not in spite, but because of its initial undefined state. IBM at the same time represents a policy objective and a process towards attaining it, and despite its global proliferation since the 1990s can only be understood properly in its specific context, here: the Europeanisation of migration and border control.

On a fundamental level, *Integrated Border Management* refers to a shift in the notion how a border is to be governed. Hobbing, referring to the heterogeneous contents of various IBM initiatives in the world, concludes that 'there is at least the common understanding that IBM relates to 'lean government' approaches and that border procedures should be governed by

modern economic strategies rather than slow bureaucratic structures’ (Hobbing 2005, 2). This is certainly in reference to the term ‘management’, while the notion of ‘integrated’ refers to a cross-sectional policing of various concerns at the border, such as policing the movements of people, of goods and finances (customs), as well as phytosanitary and veterinary checks at the border. Instead of relegating these concerns, and their implementational tackling, to the hitherto separated state institutions such as border police, customs, centres for disease control etc., the notion of IBM assembles these institutions around the site of the border and aims at their coordination under a larger policy and practice umbrella, precisely the IBM system. This horizontal dimension of coordination and cooperation is complemented by the vertical dimension of progressing Europeanisation which needs to arrange regional, national and supranational authorities and policies within the larger ensemble of IBM. Integration in the sense of IBM therefore is a two-dimensional process.

Owing to the process of Europeanisation and its particular dynamics, often characterised by the reluctance of national EU member states to cede further competences to the EU level, and thus the inability to evolve Justice and Home Affairs in the EU as a political field in its own right, and with its own sets of mechanisms based on a sound legislative footing, the very notion of EU IBM remains elusive and fragmented. Hobbing asserts that

IBM rules cannot easily be located within just one framework; they are spread across a number of legal and administrative instruments. They represent a multi-layered compilation of provisions, with only the basic ones found in formal legal texts such as the Treaty on the European Community or the Schengen instruments of 1985-90, while much of the rest has been adopted through informal arrangements, e.g. the Common Manual on external borders adopted by the Schengen Executive Committee [...] and the Catalogue of Best Practices drawn up by the Working Party on Schengen Evaluation. Further elements that make the IBM mechanism work practically are found in bilateral/multilateral arrangements among individual member states or between them and third countries. (Hobbing 2005, 10)

Without questioning the validity of Hobbing’s assessment, it needs to be situated in its historical context. In 2005, it had only been six years since the original set of Schengen Agreements and their accompanying tools and fora had been incorporated into the EU legal framework through the *Schengen Protocol*. The events of September 11, 2001 had acutely accentuated the perception of borders, national or supranational, as relevant for internal security, although this is not to say that a securitised view of the border had not been already predominant in the Schengen Agreements. Lastly, the EU accession round of 2004 enlarged the EU, and thus its external border, and the ‘bilateral/multilateral arrangements’ Hobbing refers to are often agreements with accession candidates that had to be ‘Schengen ready’ prior to the actual accession.

Even if IBM today appears like an objective in its own right, a unified system to be established, it emerged both as a strategic orientation and set of practices and implementations in response to a multitude of concerns that needed to be addressed by the EU. Foremost under these concerns ranges irregular migration, which is constructed as a security concern:

This [securitisation of migration; bk] has been the case with respect to the

implementation of the integrated border management (IBM) strategy and its relationship to a common EU policy on irregular immigration. The guiding principle seems to be that border management must be 'integrated' and cover all border-related threats that the EU is supposed to be facing. The phenomenon of irregular immigration represents the target against which 'the EU border' and its multi-layered components as framed by the IBM have been conceived. Indeed, one of the more important objectives of EU border management is the building of a common immigration policy that 'manages comprehensively' and 'fights against' the sort of mobility negatively qualified as 'illegal'. (Guild, Carrera, and Balzacq 2008, 3)

Given the ambivalent and disparate notion and definition of IBM, Hobbing adds that

[o]wing to the reticence of the political level to endow justice and home affairs with formal legal tools, practitioners took refuge in 'practical' solutions in order to cope with the day-to-day real world problems they were faced with after the abolition of the internal borders. (Hobbing 2005, 10)

As corollary, we note that the notion of IBM in its initial phase functions as a) a proxy for a securitised EU migration policy directed against irregular migration, b) a vehicle to mobilise a homogenisation of border control policies within the EU and its accession candidates, and c) an umbrella under which a multitude of practices could blossom in order to be then evaluated and synthesised into common policy and best practice recommendations.

If one is to trace the advent of IBM through policy and legislative documents, the provisions of Schengen II (1990) constitute the first elements of an emergent IBM policy (see Hobbing 2005, 3.1 for a detailed discussion). Post-Amsterdam, two sets of documents signal the emergence of an EU IBM strategy. For one, there is the *Schengen Catalogue of recommendations and best practices*. Notably, the Catalogue (Council of the European Union 2002a) does not yet refer to the term IBM, but rather to a) an 'Integrated Border Security Model' (p.9) and b) 'Border Management' (p.10), the latter comprising border checks and border surveillance, in reference to the *Schengen acquis*.

The second relevant string of documents does not rise from the level of practitioners but is situated in the more formal deliberations of the relevant EU bodies. After the entering into force of the Amsterdam Treaty in 1999, the Tampere European Council in 1999 inaugurated the development of the Justice and Home Affairs field as a genuine Europeanised policy field. With reference to external borders, the Council noted the 'need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes' (European Council 1999) and stressed 'the importance of the effective control of the Union's future external borders by specialised trained professionals' (European Council 1999).

Subsequently, the JHA Council endorsed, on December 7, 2001 a *European management concept on border control* (JHA Council 2001) as well as nine more concrete initiatives to be envisaged, such as common training courses, an elaboration of the Common Manual on checks at external borders, research into new techniques and approaches to border controls, the centralisation of technical expertise, improvement of operational cooperation between member states and the development of an early warning system.

The following week, the Laeken European Council concluded in point 42 ('More effective

control of external borders’):

Better management of the Union’s external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created. (European Council 2001)

In May 2002, the Commission published its anticipated communication *Towards Integrated Management of the External Borders of the Member States of the European Union* (Commission of the European Communities 2002). After taking stock of the *status quo*, the Commission proposes five components of a common policy on management of the external borders, which should ultimately lead towards a *European Corps of Border Guards* (ECBG).

- A common corpus of legislation;
- A common co-ordination and operational co-operation mechanism;
- Common integrated risk analysis;
- Staff trained in the European dimension and inter-operational equipment;
- Burden-sharing between Member States in the run-up to a European Corps of Border Guards.

To the Commission, IBM was both a vehicle and a synonym for the establishment of the ECBG, thus interpreting ‘integrated’ in a sense of supranational integration, i.e. the emergence of state institutions at the level of the EU. This concrete development was soundly rebutted by the Council in its *Plan for the Management of the External Borders of the Member States of the European Union* (JHA Council 2002) as adopted by the JHA Council on June 13, 2002. The JHA Council however was in agreement with the five components the Commission had proposed, only rephrasing them to preclude the creation of the ECBG.

This first phase of the crystallisation, what would be the first generation of a EU IBM strategy, concluded with the European Council in Sevilla in June 2002 (European Council 2002), where the European Council welcomed the Commission communication, but ‘applauded’ (p.32) the approval of the JHA Council’s *Plan for the Management of the External Borders of the Member States of the European Union*, since it would ‘help bring greater control of migration flows’ (p.32). The European Council further requested the Commission, Council and Member States to start to implement several measures, such as joint operations at the external borders, pilot projects, the creation of a network of Member States’ immigration liaison officers, preparations for a common risk analysis model, common training standards and a study on burden sharing. These requests echo the set of five components as laid out by both Commission and JHA Council, however any strong reference to the creation to anything akin to the ECBG is notably missing from the Presidency Conclusions. In general, the European Council finds itself firmly on the side of the JHA Council, thus favouring a more gradual establishment of an IBM system based on existing Member State institutions. The European component would be constituted by common legislation, coordination and cooperation, and the development of a new approach to border control based on risk analysis, but the actual policing of the external border would remain with the national institutions of the Member States.

Despite these intense inter-institutional deliberations concerning the nascent EU IBM system, still no rigid definition was to emerge until four years later. In the meantime, the European Border Agency Frontex had been established in 2004. The same year, the European Council had approved the *The Hague Programme*, in which the European Council again stressed the importance of ‘the further gradual establishment of the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union’ (European Council 2005, point 1.7.1.). However, it does not define this system any further.

Only in 2006 was the question ‘What is (Integrated) Border Management in the European Union?’ preliminarily resolved when the JHA Council on December 4/5, 2006 formally adopted a definition (JHA Council 2006) consisting out of five dimensions:

- Border control (checks and surveillance) as defined in the Schengen Borders Code, including relevant risk analysis and crime intelligence
- Detection and investigation of cross border crime in coordination with all competent law enforcement authorities
- The four-tier access control model (measures in third countries, cooperation with neighbouring countries, border control, control measures within the area of free movement, including return)
- Inter-agency cooperation for border management (border guards, customs, police, national security and other relevant authorities) and international cooperation
- Coordination and coherence of the activities of Member States and Institutions and other bodies of the Community and the Union.

From the Council Conclusions it becomes obvious that the previously established agency Frontex was regarded as the main vehicle in order to fulfil the promise and the premise of IBM. With the definitional problem finally out of the way, the EU continued to build and extend its IBM strategy over the next years. In 2009, the further development of IBM even became an official objective in the Lisbon Treaty, where Art. 77 states that ‘[t]he Union shall develop a policy with view to: [...] (c) the gradual introduction of an integrated management system for external borders’ (*Consolidated Version of the Treaty on the Functioning of the European Union* 2007, Art. 77).

Despite the manifold references to IBM and the formal definition in 2006, it has to be noted that there did not exist a *legal* definition of IBM that would force Member States into subscribing to the IBM process and its (national) implementation. Despite EU competences in the field, IBM remained a largely voluntary notion, with the relevant institutions, such as Commission, Council and Frontex appealing to the Member States, offering their support, and referring to the perceived added value of IBM. It was only in December 2015 that through the Commission Communication *A European Border and Coast Guard and effective management of Europe’s external borders* (European Commission 2015g) a new discussion on EU IBM would be initiated, from which a formal and legal definition of the second generation of IBM in the EU would emerge.

3. The EU Framework on Border Management and Migration Control Policies

In this section, we will outline legal frameworks, policies and components of the EU architecture that governs border management and migration control. We begin with the *Schengen Acquis* and its incorporation into Union law, then introduce the European Border Agency Frontex, the use of large-scale information systems in border management, the terms facilitation and external dimension, and end with a brief overview over the central provisions of the Common European Asylum System (CEAS).

The Schengen Acquis and the Schengen Borders Code

A reference to *Schengen* is by now largely synonymous with the abolition of internal border controls in the Schengen Area as well as the creation of the European external border. As discussed in the section above, the Schengen Agreement of 1985 and the Schengen Convention of 1990 were incorporated into the European Union treaties through the *Schengen Protocol* of the Treaty of Amsterdam 1997. From this point on, the two Schengen treaties ceased to exist as separate treaties but became part of the legislative framework of the EU. This means that changes to the Schengen rules can be affected through the normal legislative procedures of the EU, a separate re-ratification of the original signatory parties of the treaties are not necessary.

The Schengen Convention of 1990 as the implementing treaty to the Schengen Agreement of 1985 had established an *Executive Committee*. On April 28, 1999, few days before the entering into force of the Treaty of Amsterdam, the Executive Committee adopted the latest version of the *Common Manual*, and the *Common Consular Instructions*. The *Common Manual* (Schengen Executive Committee 1999b) lays down the rules for border crossings and border checks, while the *Common Consular Instructions* (Schengen Executive Committee 1999a) prescribe uniform rules for the issuing of visas.

While the *Common Consular Instructions* remain valid in amended form until today, the *Common Manual* was superseded and repealed in 2006 through the creation of the *Schengen Borders Code (Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) 2006)*. It mandates how border checks are to be carried out, under which circumstances border checks may be relaxed, how border crossing points are to be architecturally designed, how border surveillance is to be carried out, and under which circumstances entry may be refused. Furthermore, the *Schengen Borders Code* details the abolition of controls at internal borders, as well as the criteria for their resumption or reintroduction. Since 2006 it has been amended many times, which led to a repeal and replacement by a consolidated version of the *Schengen Borders Code* in 2016 (*Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) 2016)*.

The second component of uniform rules on the issuing of visas is regulated by Council Regulation (EC) 539/2001 listing the countries whose nationals need or do not need a visa

to enter the European Union) and Regulation 810/2009 regulating the issuance of short term visas for Schengen countries. We explore the provisions of these regulations and connected elements in a dedicated section on pre-entry measures.

Other relevant, even though non-binding, texts in the framework of the Schengen acquis are the four volumes of the *Schengen Catalogue of Recommendations and Best Practices* (Council of the European Union 2002a, 2002b, 2003a, 2003b), adopted in 2002 and 2003 and updated between 2009 and 2011. Volume 1 discusses External Border Control, Removal and Readmission, Volume 2 concerns the Schengen Information System (SIS) and SIRENE (national contact points for the SIS), Volume 3 outlines recommendations for the issuing of visas, while Volume 4 concerns police co-operation in the Schengen Area. While the *Schengen Catalogue* as a set of non-binding recommendations and best practice examples aims at harmonising the national border management practices, in 2006, the Commission published the *Practical Handbook for Border Guards (Schengen Handbook)* (Commission of the European Communities 2006), describing the practicalities of border checks and border surveillance. The Commission has also published a *Handbook for the processing of visa applications and the modification of issued visas* (European Commission 2011c).

The European Border Agency Frontex

The *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* was created through Council Regulation (EC) No 2007/2004. The headquarters of the agency are located in Warsaw, Poland, and the agency officially started operating in May 2005. Recital 4 clarified the relationship between member states and the agency:

The responsibility for the control and surveillance of external borders lies with the Member States. The Agency should facilitate the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures.
(Council Regulation (EC) No 2007/2004 Rec. 4)

Art. 2 defined the six main tasks of the agency. The first is to 'coordinate operational cooperation between Member States in the field of management of external borders' (Art. 2). In practice, this meant the coordination of so called *Joint Operations* (JO), i.e. operations of border guards from different EU member states following a request of the host member state of the operation. Notable examples are JO Hera (Spain), JO Nautilus (Italy/Malta) and JO Poseidon (Greece).

The second task was to 'assist Member States on training of national border guards, including the establishment of common training standards', the third is to 'carry out risk analyses'. *Risk analysis* refers to a new approach to policing borders. Rather than to react to the daily occurrences at the border, risk analysis mandates a pro-active approach based on gathering data, and forward-projecting this data into reports about possible future dynamics at the border. The fourth task mandates the agency to 'follow up on the development of research relevant for the control and surveillance of external borders', which so far has mostly meant research in *Unmanned Aerial Vehicles* (UAV) for the purpose of border

surveillance and research into biometrics to speed up border checks. Task five is to ‘assist Member States in circumstances requiring increased technical and operational assistance at external borders’, which initially amounted to the agency maintaining a record of loanable equipment from member states, while the last task is to ‘provide Member States with the necessary support in organising joint return operations’.

The mandate in respect to task five was expanded in 2007 through Regulation (EC) No 863/2007 of the European Parliament and of the Council, the so called RABIT regulation (*Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 Establishing a Mechanism for the Creation of Rapid Border Intervention Teams and Amending Council Regulation (EC) No 2007/2004 as Regards That Mechanism and Regulating the Tasks and Powers of Guest Officers* 2007). RABIT is the acronym for *Rapid Border Intervention Teams* and enables the deployment of border guards from different member states in mixed teams, and under the supervision of the host member state.

As will be discussed in detail below, in 2016, the creation of the *European Border and Coast Guard*, and the accompanying agency, created an entirely new mandate for Frontex.

‘Smart Borders’: Large-scale Information Systems and Databases

Large-scale information systems is the more generic term used in the European Union for the different Union-wide databases that have been established over the previous decades. Notably, most of these database systems are connected to border or migration control.

The oldest and most widely known database is the Schengen Information System (SIS), which was created through the Schengen Convention (Schengen II) of 1990, title IV. Article 92 described the SIS as

a joint information system, [...] consisting of a national section in each of the Contracting Parties and a technical support function. The Schengen Information System shall enable the authorities designated by the Contracting Parties, by means of an automated search procedure, to have access to alerts on persons and property for the purposes of border checks and other police and customs checks carried out within the country in accordance with national law and, in the case of the specific category of alerts referred to in Article 96 [refusal of entry; bk], for the purposes of issuing visas, residence permits and the administration of legislation on aliens in the context of the application of the provisions of this Convention relating to the movement of persons. (European Union 2000)

In 2006, *Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II)* was passed. The second generation of the database had become necessary in order to cope with the enlargement of the Schengen area since 1990 (Peers 2016). It also introduced new features to the database, such as the possibility to store biometric information such as fingerprints or photographs, to be able to store more type of objects, and also to store European Arrest Warrants (Rec. 6, 12; Peers 2016). Technically, SIS II was to consist of a central system, national systems, and a

communication infrastructure linking them (*Regulation (EC) No 1987/2006*, Rec. 7, Art. 4). After a prolonged phase of development, SIS II became operational in April 2013, its operation entrusted to the newly founded Union agency eu-LISA (*European Agency for the operational management of large-scale IT Systems in the area of freedom, security and justice*).

The purpose of SIS is to hold alerts used for refusing the entry or stay of third country nationals (Rec. 10, Art. 20). The information contained in these alerts is specified in article 20¹. Alerts are entered by national authorities following a decision 'taken by the competent administrative authorities or courts' when a third country national is deemed a threat to national or public security or public order (Art. 24, para. 2). This arises when they have committed an offence punished with imprisonment of at least one year, or, more vaguely, if 'there are serious grounds for believing that he 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' (Art. 2, para. 2). In addition, an alert 'may' be entered into SIS on the grounds of immigration offences resulting in expulsion, refusal of entry or removal that have not been invalidated (art. 24, para. 3).

The second database relevant to the exercise of border controls is EURODAC (European Dactyloscopy System). It was established by *Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention*. The database became operational in 2003. In 2013, the original regulation was repealed by Regulation (EU) 603/2013 along the introduction of the Dublin III Regulation (Regulation (EU) 604/2013). The purpose of the database is to store fingerprints of asylum seekers and persons apprehend while irregularly crossing the EU external border. The stored data is to facilitate the determination of the member state which is responsible to process an asylum application under the Dublin system (Regulation (EU) 604/2013, Rec. 1; Peers 2016). Unlike the SIS, EURODAC consists merely out of a central system and a communication infrastructure. It is also operated by eu-LISA (Peers 2016). Article 29 guarantees procedural rights regarding information about the purpose of EURODAC and access to data – in general data provisions were strengthened between the two regulations (Peers 2016). Data is stored for 18 months in the case of irregular migrants and 10 years in the case of applicants for international protection (Regulation (EU) 604/2013, Art. 12, 16). The reform of the regulation in 2013 opened the hitherto administrative database to police access.

In 2004, Council decision 2004/512/EC established the Visa Information System (VIS), a database to store the data of all visa applicants for five years, including biometric markers. The system was regionally rolled out for Northern Africa in 2011 and became fully operational in December 2015.

In 2008, the Commission presented its Communication *Preparing the next steps in border management in the European Union* (Commission of the European Communities 2008b). It formed part of the so-called *borders package*, also including an evaluation of Frontex Commission of the European Communities (2008c) and the proposal for the creation of

¹ (a) surname(s) and forename(s), name(s) at birth and previously used names and any aliases, which may be entered separately; (b) any specific, objective, physical characteristics not subject to change; (c) place and date of birth; (d) sex; (e) photographs; (f) fingerprints; (g) nationality(ies); (h) whether the

EUROSUR Commission of the European Communities (2008a). The Commission proposed the creation of three new databases. An Entry/Exit System for registering all movements across the European external border, secondly a Registered Travellers Programme (RTP) to speed up the border crossing for bona fide travellers, and thirdly an Electronic System of Travel Authorisation (ESTA) for pre-authorisation of border crossings.

The *Entry Exit System* was established by Regulation (EU) 2017/2226 (*Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 Establishing an Entry/Exit System (EES) to Register Entry and Exit Data and Refusal of Entry Data of Third-Country Nationals Crossing the External Borders of the Member States and Determining the Conditions for Access to the EES for Law Enforcement Purposes, and Amending the Convention Implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011* 2017). It is an information system interlinked with VIS, whose purpose is

(a) the recording and storage of the date, time and place of entry and exit of third-country nationals crossing the borders of the Member States at which the EES is operated; (b) the calculation of the duration of the authorised stay of such third-country nationals; (c) the generation of alerts to Member States when the authorised stay has expired; and (d) the recording and storage of the date, time and place of refusal of entry of third-country nationals whose entry for a short stay has been refused, as well as the authority of the Member State which refused the entry and the reasons therefore. (Art. 1)

EES comprises a central system (EES central system), a National Uniform interface, a Secure Communication Channel between the EES Central System and the VIS central System, communication infrastructure linking the EES central System and the NUIs, a web service hosted by eu-LISA to allow the online submission of data by third country nationals, and a data depository at central level holding anonymised data (Art. 7, Art. 13, Art. 31 para. 2). EES is to be operated at the external borders of the European Union by border guard authorities replacing manual stamps on passports (Art. 14, Rec. 7). Europol has been granted access (Art. 30--32).

Facilitation

Council Directive 2002/90/EC created a framework whereby member states can introduce sanctions against persons who assist non-nationals to enter, transit or, for financial gain, reside in the territory of member states in breach of national laws (Art. 1 para. a, b). It is also the responsibility of member states to determine 'effective, proportionate and dissuasive sanctions' (Art. 3) through national legislation. Council Framework decision 2002/946/JHA further elaborated on the types of sanction MS could introduce to prevent the facilitation of unauthorised entry, transit and residence, such as extradition (Art. 1, 5), custodial sentences (Art. 3), fines, confiscation of means of transport, prohibition from occupational activities during which offenses were committed, deportation (Art. 2). Legal persons were also designated as liable and could be sanctioned with fines, exclusions from public benefits or aids, temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision or a judicial winding-up order (Art. 3).

The Facilitators package does not refer to the key international instrument defining and regulating smuggling and trafficking, the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (Carrera et al. 2016). Further, it leaves a large degree of discretion to member states since key terms, such as ‘financial gain’ and ‘humanitarian assistance’ are not defined (Carrera et al. 2016). As Carrera et al (2016a) note, the Package aims

to provide criminal sanctions for a broad range of behaviours that cover a continuum from people smuggling at one extreme to assistance at the other, but it does so with a high degree of legislative ambiguity and legal uncertainty. (Carrera et al. 2016, 10; see also European Commission 2017e)

Lastly, in contrast to the UN Smuggling Protocol, the Facilitators package does not provide protection for those entering the EU through the use of smugglers (Carrera et al. 2016a). In contrast, Article 5 of the UN Protocol prohibits the criminalisation of those that have been smuggled (*Protocol Against the Smuggling of Migrants by Land, Sea, Air, Supplementing the United Nations Convention Against Transnational Organized Crime 2000*; Carrera et al. 2016a).

External Dimension

What is generally referred to as the *External Dimension* of migration and border policies in the EU did not emerge until the Tampere Council, even though the 1990s already saw various efforts of including third countries into the control of migration and borders. ‘Stronger External Action’ was actually one of the four priorities that the Tampere Council formulated, even though the concrete aim and connection to migration and borders, were not spelled out yet (European Council 1999).

However, already the *The Hague Programme* (European Council 2005) became much more explicit and defines the external dimension as ‘partnerships’ with third countries (1.6.1), countries and regions of origin (1.6.2.), countries and regions of transit (1.6.3.) as well as return and re-admission policy (1.6.4.). Measures to be undertaken are wide-ranging:

EU policy should aim at assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return. (The Hague Programme, 1.6.1.)

Through the *Global Approach to Migration* (2005), such measures were embedded into a coordinated framework, which was in 2011 extended to the *Global Approach to Migration and Mobility*. The *Valletta Summit on Migration* in November 2015 marked the begin of a new round of initiatives under the *EU Emergency Trust Fund for Africa*. In June 2016, the Commission also announced a new *Migration Partnership Framework* for reinforced cooperation with third countries (European Commission 2016i).

Notably, these outward facing initiatives regularly escape legislative codification, since they are usually carried out under the mandate for external policy that the Treaty of Amsterdam conferred on the Commission.

The Common European Asylum System

Because migration, asylum and border policies co-developed within the EU after Amsterdam, we present a brief overview over the *Common European Asylum System* (CEAS).

At its core, the *Common European Asylum System* consists out of two regulations and three directives. The Dublin II regulation (*Council Regulation (EC) No 343/2003*) was adopted in 2003 and incorporated the Dublin Convention of 1990 into European Union law. The regulation establishes a mechanism to determine the member state responsible for the processing of an asylum application, based on a list of criteria. Since the criteria of country of first entry is in practice the most relevant and the most applied, there exists an intrinsic connection between border checks and surveillance on the one hand and the Dublin regulation on the other: consistent and comprehensive border checks and surveillance and apprehension of persons irregularly crossing the European external border usually designate the respective member state as responsible for the processing the asylum application.

This effect is reinforced through the second regulation of the CEAS, the Eurodac regulation (*Council Regulation (EC) No 2725/2000*). The three directives deal with reception conditions for asylum seekers (*Council Directive 2003/9/EC*), conditions under which a person qualifies for international protection (*Council Directive 2004/83/EC*), and common procedures for asylum processes (*Council Directive 2005/85/EC*). A fourth directive of 2008, the Return directive (*Directive 2008/115/EC*), does not technically deal with asylum, is however relevant both in the context of rejected asylum seekers as well as concerning internal checks and returns in the fourth tier.

The five legislative acts of the CEAS were reformed in 2013, and after 2015, the Commission has proposed yet another reform of the acts, which includes the conversion of some directives to regulations. Additionally, the Commission has proposed to create a Union agency for Asylum (European Commission 2016h), which would become relevant in the hotspot areas and the deployment of migration management support teams.

4. Discursive Aspects of Control in EU Documents

This section focuses on discursive aspects of EU documents on migration policy which address control. We address five themes a) the conceptualisation and types of controls discussed in EU documents b) the actors mentioned c) the objectives of control policies and their legitimisation c) challenges associated with border and migration control and e) how EU institutions propose to increase the effectiveness of controls.

Conceptualisation and types of control instruments

The documents examined do not offer any indications regarding how border or migration controls are conceptualised or understood by EU actors as there are no definitions of border management or migration controls.

Nevertheless, references to different *types* of measures offer some indications about their relative importance for EU border management and migration control policies. By and far, the most frequently mentioned measure (n=63) are controls exercised at the external borders of the Union such as identity and document checks, border surveillance measures and sea border surveillance operations such as the TRITON, Poseidon and EUNAVFOR Med Operation Sophia. The latter are also presented as sea rescue operations with a humanitarian objective, for example European Commission (2015b), European Commission (2017k), European Parliament (2013), European Parliament (2016a). But they are also a component of EIBM (*Regulation (EU) 2016/1624*). Border controls are a constant theme in all years.

The second most frequently mentioned control instrument, with 54 references, is return and readmission. The frequency of references reflects the emphasis placed on as a measure for preventing unauthorized movement, stay and residence both before and after the 2015 'crisis'. Externalised controls – any control measure exercised in or involving the authorities of non-member states -- is the third most frequent category in the documents analysed (n=38).

Likewise, the fourth most frequently type, anti-smuggling and anti-trafficking measures (n=36), is a broad category that includes, for example, boat seizures, employer raids and operations against networks in NMS (European Commission 2015d, 2016i, 2017k).

Both border controls and return are often mentioned in conjunction to control instruments with utilising information and communication technologies (n=30). These include databases such as VIS, SIS and EURODAC and border surveillance systems such as EUROSUR, which are aimed at enhancing the effectiveness of at-the border controls, as well as the management of information that feeds into multiple control functions. Databases, for example, are linked to identity checks at the borders (e.g. European Commission 2016c, 2015b; Council of the European Union 2014c); management of return decisions and entry bans and identification of overstayers (European Commission 2014a, 2015e; European Commission 2017; Council of the European Union 2016c).

While at-the-border and external controls feature prominently, less emphasis is placed on control measures exercised within the territory of the EU and in particular Schengen. Border

controls between Schengen countries (n=19) are referred to as an exceptional measure mainly during the 2011-2014 period corresponding to the Schengen Borders package reform. It is the only control measure that is presented in negative terms since it is at odds with the objective of maintaining free movement within the Schengen area (Council of the European Union 2015h; European Commission 2012b, 2016c).

Similarly, references to control measures exercised at the domestic level –such as residence checks, detention and apprehension measures are also relatedly low (n=19). There are no references to control measures that involve the exclusion of migrants from regimes of rights such as access to healthcare or housing, despite the fact that such measures are identified as migration control in academic literature (Boswell 2011; Frank 2014).

Implementing Actors

The majority of actors referred to in the corpus fall into two categories: states and supranational institutions. Member states are the most frequently mentioned actor (n=81), while the number of references to non-member states (n=53) suggests their significance for the EU externalized policies of control. The European Union, either as a unitary actor or through its institutions, is designated as a significant actor itself (n=74), especially in what concerns relations with NMS and legislative functions, while the number of references to supranational agencies such as FRONTEX (n=64) reflects the increasingly significant role of supranational agencies in border management and migration controls (Scipioni 2017; Niemann and Speyer 2018).

Despite the significant and increasing involvement of both IGOs such as UNHCR and IOM and NGOs in border and migration controls, neither feature very highly in the corpus (n=13 and n=6 respectively). Private actors such as employers and private companies feature in a limited way (n=8).

Objectives of control measures and their legitimization

Most documents include explicit or implicit aims of control policies. The most frequently stated aims is preventing unauthorised migration (n=47) and protecting the external borders of the Union (n=31). Both of these aims are consistent with the overall policy aims of the European Union. Preventing – or ‘tackling’- irregular migration has been a key aim of EU migration policy since its intergovernmental stage while the protection of the external borders of the Union is an essential element to maintaining free movement (Walters 2010; Van Munster 2009). The associated objectives of preserving free movement within Schengen and safeguarding security within the EU are also present albeit to a lesser extent (n=15 and n=19 respectively). Further, narratives of free movement, highlighting its importance for the EU and Schengen (n=23) and narratives of security threats (n=20) contextualise and legitimate these objectives.

A further objective is preventing migrant smuggling and trafficking (n=37), have featured heavily as aims in EU official discourses (Walters 2010). The increased references to smuggling since 2015 reflect both narratives of crisis used to construct post-2015 developments in migration movements and events such as the October 2014 shipwreck close to Lampedusa, Italy, which resulted in extensive loss of lives. References to preventing

smuggling and irregular migration are frequently situated within broader humanitarian narratives (n=29) which act as legitimating devices (Fairclough and Fairclough 2013, Van Leeuwen and Wodak 1999) justifying the targeting of unauthorised forms of migration.

A distinct objective is 'saving lives', in particular at the sea borders of the European Union. This objective is rooted in humanitarian disasters such as the Lampedusa shipwreck, and sea rescue operations implemented by EU agencies and member states. Protecting human life and dignity is a core humanitarian concern (Nyers 2013) and reflects the overlap between control and humanitarian objectives which characterise EU migration policies (Pallister-Wilkins 2015). More significantly, the most common legitimating narrative is one of compliance with human and fundamental rights (n=41). Given that the compatibility of the EU border management and migration controls regime has been extensively and consistently challenged (ECRE 2017, Fassin 2011, Peers 2016, Guild et al. 2014), the strong presence of this narrative alludes to the normative significance of these regimes for the value system of the European Union.

Another stated set of aims, albeit more infrequently mentioned, reflects the relation between migration control and migration management. From this perspective, border and migration controls contribute to managing migration flows (n=16) and are associated with the goals of maintaining legal routes for migration (n=14) and preserving the integrity of asylum system (n=6). It should be noted that the semantic relations between these elements suggest a one-way causality: legal migration, refugee protection and legitimacy are dependent on the existence of border and migration controls.

Challenges to border and migration controls

In contrast to stating the objectives of migration control, the articulation of challenges to the EU border and control regime is less frequent and considerably more implicit. The main challenge associated with the effectiveness of border and migration controls is deficiencies in their implementation by member states (n=20). Lack of coordination among MS agencies and EU bodies is stated on very few occasions (n=4).

A second strand of problematisation concerns factors external to the European Union and member states. The most frequently mentioned is changes in migratory movements (n=9) which present challenges in relation to the responses of MS and EU institutions. However, this form of problematisation is often implicit, rooted in crisis narratives (n=20) that occur in particular post-2015. These apply the term 'crisis' to migration movements but also refer to increases in numbers of arrivals (n=16) and the perceived increasing complexity of migration movements (n=7). A further challenge identified is abuse of asylum and return procedures by migrants (n=15), including with their unwillingness to cooperate with EU policies of control.

It should be noted that the overall usefulness of border and migration controls is not questioned. For example, there is no reference to the possibility that an expansive control regime can result in an increase of unauthorised movements by closing legal routes, migrant deaths or can fail in its stated objectives of preventing unauthorised migration movements (Aas 2013; Van Munster 2009; Weber and Pickering 2011). The only critical narratives towards the EU's control regime occur in resolutions by the European Parliament and consist of questioning compliance with human rights instruments and norms including non-

refoulement, and with provisions concerning access to asylum (n=5) (European Parliament 2013). Even in this case, the legitimacy or desirability of the overall border and migration control regime, and in particular of sea rescue operations is not questioned.

Increasing the effectiveness and scope of border and migration controls

While identifying challenges is mainly implicit, proposals on improving the effectiveness of controls are explicitly stated and wide ranging. The most frequently stated measure is improving the implementation of EU control policies (n=44). This is accompanied by references to harmonizing implementation among member states (n=15) and improving the use of existing EU instruments (n=18). Implementation, both in terms of transposing legislation and implementing policies on the ground has been identified as a key challenge in existing academic literature and research reports (den Heijer, Rijpma, and Spijkerboer 2016; Wunderlich 2013; European Migration Network 2017). An associated ‘solution’ is improving the availability and quality of knowledge and evidence (n=30) in relation to the implementation of EU border management and migration control policies.

The second most frequently stated measure is strengthening external border controls (n=34). This often occurs as a categorical statement which does not specify which type of border control measures should be strengthened or in what manner. By contrast, suggestions regarding intra-Schengen controls are significantly fewer (n=5) reflecting free movement arrangements. Cooperation and coordination of policy actions are also heavily emphasised in terms of border and migration controls. Identifying cooperation as essential for the effectiveness of EU policy involves all actors: cooperation among member states (n=28); cooperation between MS and EU agencies (n=26). References to cooperation are rooted in narratives of solidarity and responsibility, both of which feature prominently (n=33 and n=25 respectively), which highlights their significance as values associated with the European Union. The use of information technologies – such as ‘smart borders’ is identified as a significant factor in improvising cooperation and implementation as well as increasing the effectiveness of border controls (n=29). Lastly, suggestions for increasing the efficiency of migration controls focus very prominently on the external dimension. Strengthening extraterritorial controls such as visa policies and pre-border checks is mentioned in a minority of cases (n=12), but increased cooperation with member states proves a very strong theme (n=50). References to the latter incorporate both notions of acting together but also supporting the capacity of NMS to implement EU migration policies. In a minority of cases (n=8), references to NMS highlight the necessity to enforce or coerce cooperation, a theme that relates to the approach expressed in the 2016 Framework for Partnership with Third Countries.

5. Pre-Entry Controls

While migration and border controls take place at the border and within the territory of the EU, several legislative instruments have introduced measures that are implemented before a third country national enters the territory of a member state. Such measures include visa policies, carrier sanctions, advance passenger information and immigration liaison officers (European Migration Network 2012). These pre-entry measures are explicitly linked to the aim of preventing irregular migration and enhancing border management (European Commission 2012c, 2014c; Peers 2016; Trauner and Kruse 2008). Pre-entry measures involve co-operation with third countries and exemplify the externalisation of migration controls and the EU's border regime (Baird 2017, ECRE 2017, Guild et al. 2015). They also have significant impact on preventing refugees from accessing protection in the EU through safe routes (ECRE 2017, Guild et al. 2015).

Visa policies

Article 62 (2) of the Treaty of European Union and Article 77 of the Treaty of Lisbon establish the Union's legislative capacity for introducing legislation on short-term visas and for lists of countries whose nationals must possess a visa when entering an EU member state (Peers 2016). Article 5 of the Schengen Acquis stipulates that third country nationals, in addition to valid travel documents, must be in possession of a valid travel Visa 'if so required'. Further, it stipulates a common visa policy and the harmonisation of rules for short stay visas (Art. 9, para. 1), a common Visa document (Art. 11) and outlines arrangements for the issuing of visas and examination of visa applications (Art. 12--17). The issuance of long-term visas, in contrast, is to be regulated by national law, although such visas allow travel to other member states who have acceded to the Schengen Agreement (Art. 18).

The arrangements for the issuance of visas are regulated by three legislative acts. Council Regulation 539/2001 established common lists of countries whose nationals must obtain visas when entering EU territory – the 'black list' -- and countries that are exempt from such requirement – the 'white list' (ECRE 2017; Guild et al. 2015; Peers 2016). It has since been amended several times, most recently in 2017 (*Council Regulation (EC) No 539/2001*). The inclusion of countries in this list is done on a case by case basis, based on criteria such as 'illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity' (*Council Regulation (EC) No 539/2001*, Rec. 5; ECRE 2017). Although member states can exempt recognised refugees and stateless persons from its provisions, it is left to their discretion (Rec. 7, Art. 4, para. 2), while 'black lists' include all refugee-producing states. The exemption of a third country from the visa requirement can be suspended by member states when there is 'a substantial and sudden increase' over a six-month period of its nationals being in a member state without authorisation, applying for asylum with low recognition rates, and the third country reject readmission applications for its own nationals (*Council Regulation (EC) No 539/2001*, Art. 1a; ECRE 2017; Peers 2016).

The exemption or not of a third country from visa requirements is also dependent on negotiations between the European union and a non-member state (European Commission 2016). They are subject to third countries adopting measures on a range of issues such as

migration control capacity, preventing irregular migration, combatting organised crime and upholding the rule of law and human rights (European Commission 2016; Trauner and Kruse 2008). Visa facilitation agreements are part of common EU policy and are entered with the aim of facilitating the issuance of visas between EU member states and third countries (European Parliament 2018b; Peers 2016).

The Visa Code established common rules for the issuance of short term visas as well as for airport transit visas (*Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 Establishing a Community Code on Visas (Visa Code) 2009*, Art. 1, para. 1, 3; see also European Commission 2014c). Similarly to Council Regulation 539/2001, it establishes lists of countries whose nationals must obtain airport transit visas before entering EU territory (Art. 1 para. 3). In cases of ‘mass influx of illegal immigrants’, member states can require nationals of member states not on the list to obtain airport transit visas (Rec. 5, Art. 3, para. 2). In what concerns international protection, Article 25 allows member states to issue visas with limited territorial validity, which can be granted for humanitarian reasons or on the grounds of ‘international obligations’ (Art. 25, para. 1; ECRE 2017).

The Regulation designates the national authorities responsible for receiving applications (Art. 4) the member state responsible for examining and application (Art. 5), stipulates rules for lodging applications (Art. 9–12), the biometric identifiers needed for a visa application (Art. 13), documentary and other requirements (Art. 14–15) and fees (116–17). It further sets out rules for examining, issuing, modifying and annulling visa applications (Art. 18–36). A common format for visas issued by member states was established by (*Council Regulation (EC) No 1683/95 of 29 May 1995 Laying down a Uniform Format for Visas 1995*), while a Handbook for the processing of Visa applications was produced through European Commission (2011c).

Regulation (EC) 767/2008 established the use of the Visa Information System (VIS) for the storage and exchange of data on short-term visas issued by member states (*Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 Concerning the Visa Information System (VIS) and the Exchange of Data Between Member States on Short-Stay Visas (VIS Regulation) 2008*). The Regulation determines the data to be stored in VIS when an application is submitted, and a visa is issued, refused, annulled, revoked or extended (Art. 5, 9–14). While national visa authorities are responsible for entering and when necessary amending data (Art. 6), the stored data can be accessed by border control and law enforcement authorities (Art. 18, 19) as well as by other member states. The Regulation designates a number of grounds for accessing and using data, including for facilitating visa applications (Art. 2), detecting irregular migration (Art. 2, 19), investigating criminal and terrorist offences (Art. 3) and for determining responsibility and examining asylum applications (Art. 21, 22). It further stipulates rules for the retention, storage and protection of personal data (Art. 23–25, 29, 32–38). Commission Implementing Decision 2016/281 extended the use of VIS to external border crossings.

Carrier Sanctions

Article 26 1(b) of the Convention implementing the Schengen Agreement stipulates that carriers are obliged ‘to take all the necessary measures to ensure that an alien carried by air

or sea is in possession of the travel documents required for entry into the territories of the Contracting Parties' and to return third country nationals refused entry at external borders (European Union 2000, Art. 26, 1 (a), (b)).² Article 26 (2) stipulates that member states can impose penalties on carriers that failed to ensure that a third country national has the required documents for entering their jurisdiction.

Elaborating on these provisions, Council Directive 2001/51 obliges member states to enforce the responsibility of carriers to return third country nationals in transit to another member state when the state of destination has refused entry or if a carrier has refused the onward transportation to the state of destination (*Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985* 2001, Art. 2; Peers 2016). It further stipulates that carriers have to find alternative means of transportation if entry is refused as well as covering associated costs (Art. 3). The Directive further sets maximum and minimum of penalties imposed for non-compliance (Art. 4) and allows member states to impose further sanctions such as 'immobilisation, seizure and confiscation' of the carriers means of transport (Art. 5).

While the Convention implementing the Schengen Agreement stipulates that carrier sanctions are 'subject to' obligations arising from the Geneva Convention, the Directive 2001/51 included a weaker formulation that penalties apply 'without prejudice' to such obligations. In practice, exemptions from penalties on the grounds of asylum seeking vary across member states (ECRE 2017). Thus, the provisions on carrier sanctions act as a disincentive for the transportation of persons in need of international protection and therefore access to protection in the European Union (Peers 2016; ECRE 2017).

Advance Passenger Information (API) and Passenger Name Record (PNR)

Complementing the Carrier Sanctions Directive, Council Directive 2004/82/EC obliges member states to ensure that carriers provide national authorities with passenger data in advance of travel to an EU member state (*Council Directive 2004/82/EC of 29 April 2004 on the Obligation of Carriers to Communicate Passenger Data* 2004, Art. 3). The Directive lists the data that must be transmitted, which include document number and type, nationality, names, date of birth, point of entry, code of transport, departure and arrival times, number of passengers and departure point (Art. 3). It sets minimum and maximum penalties for carriers that do not transmit or transmit incomplete data (Art. 4). The transmitted data must be deleted by carriers and authorities within 24 hours (Art. 6). However, national authorities can maintain API data if required for 'carrying out checks on persons at external borders' and for the objective of law enforcement (Art. 6; Peers 2016).

Directive 2016/681 on the use of Passenger Name Record (PNR) obliges carriers to provide member states with Passenger Name Record data and authorises member states to collect,

² After the incorporation of the Schengen Agreements into the EU by the Schengen Protocol of the Treaty of Amsterdam, the so called *Schengen Acquis*, i.e. the two agreements/conventions, accession protocols, decision of the Schengen Executive Committee and subordinate bodies was published in 2000 by the European Union. We will use this version in all further references to documents contained in the Schengen Acquis.

use and retain such data³ (*Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the Use of Passenger Name Record (PNR) Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime* 2016, Art. 1). It applies to flight from third countries to the EU (Art. 1) but member states can opt to apply it to intra-EU flights (Art. 2). The transferred data is to be used for assessing if passengers from third countries have been involved in terrorism or serious crime before arrival in EU territories, the purposes of detecting and investigating such offenses, and the identification of persons 'who may be involved in a terrorist offence or serious crime' (Art. 2, para. 2). Member states are obliged to communicate information on those identified through the PNR system to other member states, and request data that has not been depersonalised (Art. 9). Unlike the API Directive, the PNR directive allows for data to be shared with EUROPOL and third countries (Art. 10; 11). Data can be retained for 5 years although they must be depersonalised after six months (Art. 12). However, most member states were yet to transpose the directive in early 2018.

Both Directives have raised concerns over privacy, storage of data and the sharing of data among member states but also between the EU and US (Peers 2016; Vavoula 2016). It is seen as disproportionately affecting the free movement rights of EU citizens (Peers 2016; Vavoula 2016). While the PNR directive is not explicitly linked to migration control, trafficking in human beings and facilitation of entry and residence are included in the list of serious crimes referred to in the directive (*Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the Use of Passenger Name Record (PNR) Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime* 2016, 148).

Immigration Liaison Officers and European Migration Liaison officers

Council Regulation 377/2004 established a network of Immigration Liaison Officers (ILOs) to be posted in non-member states (*Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network* 2004). It was amended by Regulation 493/2011 in view of the introduction of FRONTEX (*Regulation (EU) No 493/2011*

³ Annex 1 of the PNR Directive specifies the data that are transmitted: '1. PNR record locator 2. Date of reservation/issue of ticket 3. Date(s) of intended travel 4. Name(s) 5. Address and contact information (telephone number, e-mail address) 6. All forms of payment information, including billing address 7. Complete travel itinerary for specific PNR 8. Frequent flyer information 9. Travel agency/travel agent 10. Travel status of passenger, including confirmations, check-in status, no-show or go-show information 11. Split/divided PNR information 12. General remarks (including all available information on unaccompanied minors under 18 years, such as name and gender of the minor, age, language(s) spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details of guardian on arrival and relationship to the minor, departure and arrival agent) 13. Ticketing field information, including ticket number, date of ticket issuance and one-way tickets, automated ticket fare quote fields 14. Seat number and other seat information 15. Code share information 16. All baggage information 17. Number and other names of travellers on the PNR 18. Any advance passenger information (API) data collected (including the type, number, country of issuance and expiry date of any identity document, nationality, family name, given name, gender, date of birth, airline, flight number, departure date, arrival date, departure port, arrival port, departure time and arrival time) 19. All historical changes to the PNR listed in numbers 1 to 18'.

of the European Parliament and of the Council of 5 April 2011 Amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network 2011; European Parliament 2018d).

The role ILO officers, deployed by member states, is 'to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration (*Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network 2004*, Art. 1, para. 1). The tasks of ILOs include information gathering on migration movements, routes, smuggling operations and developments that might affect migration movements, as well as on assisting third country authorities on preventing unauthorised migration and facilitating return and readmission (Art. 2, para. 2). The 2011 amendment added the exchange of information on access to protection (*Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 Amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network 2011*, Art. 1). Further, ILOs can assist NMS in identification of migrants under return procedures (Art. 2, para. 3). Baird (2017) reports that ILOs also liaise with carriers on identification and document checks. The 2004 Regulation, however, did not include clauses on obligations created by the international and European refugee protection and human rights frameworks (ECRE 2017) although the 2011 amendment refers to compliance with European human rights instruments (*Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 Amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network 2011*, Rec. 10, Art. 6).

ILOs are to operate locally as networks and participate in information sharing – since 2011 through using ICONnet⁴ – and training activities with ILOs of other member states, while the Commission, FRONTEX and other EU agencies are to participate in such activities (*Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network 2004*, Art. 4, 2011, Art. 1, para. 2(b); European Parliament 2018d). The Regulation also stipulates that member states can consent that ILOs 'shall also look after the interests of one or more other Member States' (Art. 5). Member states, and in particular the presiding member state, also have reporting obligations (*Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network 2004*, Art. 6, 2011, Art. 1, para. 3).

Some of the roles of ILOs were mirrored in the tasks of FRONTEX, and since 2016 in its new disguise as the European Border and Coast Guard Agency (ECRE 2017). Regulation (EU) 1168/2011 stipulates that FRONTEX can 'deploy liaison officers in third countries in cooperation with the competent authorities of those countries' (Rec. 22). It also specifies that its liaison officers should be deployed only in countries 'border management practices comply with minimum human rights standards' and are designated by risk analysis as countries of origin or transit for 'illegal' [sic] migration (Art. 14, para. 3). The tasks of FRONTEX ILOs are 'establishing and maintaining contacts with the competent authorities of the third country to which they are assigned' with the aim of 'contributing to the prevention of

⁴ Information and Coordination Network for Member States' Migration Management Services, established by (*Council Decision of 16 March 2005 Establishing a Secure Web-Based Information and Coordination Network for Member States' Migration Management Services (2005/267/EC) 2005*).

and fight against illegal immigration and the return of illegal migrants' (Art. 14, para. 4). Regulation 2016/1624 establishing the European Border and Coast Guard Agency stipulated that the Agency can deploy liaison officers in third countries (Rec. 46, Art. 55). The criteria for deployment and tasks are the same as in the case of FRONTEX liaison officers (Art. 55, para. 2, 3) (*Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 Amending Council Regulation (EC) No 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* 2015).

Information collected by FRONTEX and EGCBA liaison officers feeds into the 'common pre-frontier intelligence picture' established by the EUROSUR regulation (*Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 Establishing the European Border Surveillance System (Eurosir)* 2013, Art. 11).

Developments since 2011

Until the refugee 'crisis' of 2015, there have been few legislative developments in the field of pre-entry controls. Despite shortcomings in the implementation of the Visa, API, sanctions and ILO legal frameworks (European Migration Network 2012; European Commission 2012c, 2014c; Capdevila 2012), there was little to suggest any widespread agreement for legal reform. The post-2015 environment provided a greater impetus both for legal reform and non-legislative measures, but also for disagreements among EU institutions over proposed reforms (Meloni 2017).

EU documents and studies have highlighted significant transposition and implementation problems in what concerns visa policy (European Migration Network 2012). Several shortcomings were identified in relation to the implementation of the Visa Code, such as variable time limits for appointments and decisions and lack of harmonisation in applying the rules of the Visa Code, for example on lists of documents required by member states and visa waivers (European Commission 2012c, 2014c). References to visa policy highlight the perception that they are abused by third country nationals, in particular in the case of countries whose nationals were given visa-free travel. Security considerations such as preventing identity fraud are also discussed (European Commission 2013, 2014d).

Although some of these issues were to be solved through better implementation (European Commission 2012c, 2014c), the Commission proposed a reform of the Visa Code in 2014 while the 2015 'crisis' increased focus on the reform of Visa provisions, and in particular for humanitarian visas (ECRE 2017, European Parliament 2018b). The proposal suggested a simplified procedure for Schengen Visa applications and lower level of requirements (European Commission 2014b; Peers 2016). Its adoption however failed due to rifts between EU institutions and between the Parliament and the Council of Ministers over the issue of humanitarian visas (European Parliament 2018b, Meloni 2017). In 2017, the visa suspension mechanism was revised to include further grounds for suspension of exemptions from the visa-free list of countries, namely the lack of cooperation in readmitting third country nationals in transit, and an increase in public order and security risks (European Parliament 2018b; European Commission 2017b). The Commission was given power to trigger this mechanism alongside member states (European Commission 2017b). A new proposal for a recast Visa Code is likely to emerge in 2018 (European Parliament 2018b).

Further, visa facilitation became central to efforts to externalise controls to non-member states. It is mentioned as an explicit or implicit positive incentive for NMS, especially those that are deemed important for the EU migration control regime, for expanding and strengthening their control systems (European Council 2015b; ECRE 2017). This position is reiterated in a Commission Communication on 'Adapting the common visa policy to new challenges', as well as in the European Council conclusions of June 2017 (European Commission 2017n, European Council 2017). In the case of Turkey, visa liberalisation was part of the EU Turkey Agreement and entailed, inter alia, restricting access to visa-free travel to Turkey (ECRE 2017). Hence, visa arrangements impact on refugees' access to the EU protection system both directly and indirectly (Guild et al. 2015, ECRE 2017).

The provisions of the Carrier Sanctions directive were subject to considerably fewer developments. This does not mean that its implementation was unproblematic, as there has been significant divergence in the implementation of its provisions by member states (Baird 2017; ECRE 2017; European Migration Network 2012). For instance, some MS do not impose fines when a third country national applies for or is granted protection or when return to a third country would amount to refoulement (ECRE 2017; European Migration Network 2012). A lack of reliable data (Baird 2017; ECRE 2017) has rendered the evaluation of the Directive problematic. In terms of access to protection in Europe, it has been noted that carriers' personnel are not qualified to adjudge matters of refugee protection (Guild et al. 2015). Taking into account these issues, ECRE's assessment of the Carriers' sanction framework is that

its effectiveness, in practice, in preventing irregular arrivals on European soil, may be seriously questioned, illustrated by the unprecedented numbers of irregular entrants in 2015 in the EU... Carrier sanctions may certainly have been successful in preventing migrants, asylum seekers and refugees from accessing regular means of transport, but, apparently, they have not contributed to a substantial reduction of the total volume of irregular migration to the EU and therefore the use of irregular ways of crossing borders. (ECRE 2017, 9)

Similarly, the implementation of the API directives was not entirely harmonised across member states, especially in what concerned data protection, the level of maximum and minimum penalties, the functioning of API systems and the transposition of definitions (European Migration Network 2012; Capdevila 2012). However, it was evaluated as having a positive impact on migration control and controlling irregular migration (Capdevila 2012). Although scope for improvements was identified in relation to implementation by member states, there was little suggestion that legislative reform was needed (Capdevila 2012). The introduction of the PNR directive, on the other hand, was driven mainly by security concerns (Vavoula 2016), even though the JHA Council was supportive of the initiative before (Council of the European Union 2014b). While plans for such legislation had been discussed since 2007, the 2015 terrorist attacks in Paris provided the incentive for its eventual introduction (European Council 2015c, Vavoula 2016).

Both Directives have raised concerns over privacy, storage of data and the sharing of data among member states but also between the EU and US (Peers 2016; Vavoula 2016). It is seen as disproportionately affecting the free movement rights of EU citizens (Peers 2016; Vavoula 2016). While the PNR directive is not explicitly linked to migration control, trafficking in human beings and facilitation of entry and residence are included in the list of serious

crimes referred to in the directive (*Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the Use of Passenger Name Record (PNR) Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime* 2016, 148). The VIS database was equally considered as a potential tool for counter-terrorism actions, both before and after the 2015 ‘crisis’ (Council of the European Union 2014b).

In contrast, the legislative framework on ILOS was subject to more significant developments. GAMM suggested the expansion of ILO networks in ‘partner countries’ as well as expanding the role of European Agencies such as FRONTEX in this area (European Commission 2011f). Other official documents also stress the role of ILOS in actions against irregular migration and smuggling in third countries (Council of the European Union 2014c). The European Agenda on Migration proposed the posting of European migration liaison officers in key third countries to work with ILOS as well as the authorities and third sector of non-member states (European Commission 2015b). The same document suggested the deployment of a FRONTEX liaison officer in Turkey which was implemented (European Commission 2015b; ECRE 2017; European Parliament 2018d). Further, the Commission’s willingness to reform the ILO regulation was expressed in several documents, including the 2015 Action Plan on return and Action plan against Migrant Smuggling (European Commission 2015e, 2015d; European Parliament 2018d). The Parliament, on its part, was largely positive on the potential of EMLOs and ILOs, in particular in relation to preventing smuggling (European Parliament 2016b, 2017b).

Evaluations by the Commission and the parliament highlighted shortcomings in terms of member states’ obligations to inform each other, cooperation with the authorities of third countries and among ILOs of different member states (European Commission 2018; European Parliament 2018d). They also raised questions regarding the effectiveness of ILOs in reducing irregular migration and in relation to task overlap with other liaison networks⁵ (European Commission 2018; European Parliament 2018d). As with the Visa legislation, a proposal for a recast regulation was submitted in May 2018 (European Commission 2018). The key changes proposed concern improved co-ordination, cooperation and information exchange among ILOs of different member states as well as between member states and European institutions and agencies (European Commission 2018).

In addition, arrangements with non-member states may entail measures that are beyond the scope of the pre-entry measures designated in EU law. While efforts to transfer responsibilities for migration control to non-member state countries date back to the 2000, policy developments since 2011 illustrate the significance of NMS in the context of preventing migration movements towards and entry to the EU. The Global Agenda on Migration and Mobility consolidated this approach by designating third countries as ‘partners’ in preventing irregular migration and smuggling (European Commission 2011f, ECRE (2017)). Such policies may come under the scope of ENP policies, Mobility Partnerships and CAMMs. A 2012 JHA Council documents outlining ‘a strategic response’ to migration similarly included the goal of ‘Enhancing the capacity of countries of origin and transit to manage mixed migration flows’ (Council of the European Union 2012b). Although neither

⁵ Specifically Frontex Liaison Officers, European Return Liaison Officers Network (EURLO), European Migration Liaison Officers (EMLO) (European Parliament 2018d).

document proposed concrete actions or measures to be undertaken by NMS, there were references to building capacity for preventing irregular migration (European Commission 2011f; Council of the European Union 2012b). These goals are reiterated in council of Europe and European Council documents (Council of the European Union 2014c). In this context, member states reported various forms of informalised – beyond the scope of EU legal framework – policy measures in cooperation with 3rd countries such as enhancing control capacity, training, and information campaigns (European Migration Network 2012). The responses to the 2015 ‘crisis’ continued in proposing measures involving actions aimed at the prevention of migrant departures that are implemented in third countries (ECRE 2017). ‘Soft’ measures include initiatives such as information campaigns aimed at preventing departure and are often targeted at smuggling and trafficking (Council of the European Union 2015g, 2016a; European Commission 2015d, 2016i).

6. Policing the External Border

Border controls pertaining to the external border are a core part of the Schengen *acquis*, and, as discussed in earlier section, are explicitly referred to in the definition of EIBM included in Regulation 2016/1624. They are also the most frequently mentioned type of measures in the EU documents selected for the content analysis. This section discusses in detail the various elements that are clearly connected to the external border, such as arrangements for entry, border checks and the use of information systems. In addition, it discusses the legal framework and developments in border surveillance and sea rescue operations, as well as hotspots, one of the key post-2015 measures for managing migration at the external borders.

Controls at the External Borders: Schengen Borders Code, SIS, EURODAC and Entry-Exit system

External border controls are regulated by the *Schengen Borders Code* which was adopted in 2006 and replaced previous arrangements regarding external border controls embedded in the Schengen Convention framework (Peers 2016). In March 2016, it was recast as (*Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code)* 2016) in order to incorporate the many amendments that had been passed since 2006.

Entry

The Schengen Borders Code (SBC) is the main Union legislation on rules governing the movement of persons across borders. It differentiates between ‘External Borders’ (Title II) and ‘Internal Borders’ (Title III, discussed in a following section). In the understanding of the four-tier model, it covers the third and the fourth tier, while with respect to the EIBM components, it mostly forms component (a) border control, as well as (d) cooperation between member states (Art. 17). The code applies ‘to any person crossing the internal or external borders of Member States’ (Art. 3). It notes that the application of its provisions are ‘without prejudice’ to ‘the rights of refugees and persons requesting international protection, in particular as regards non-refoulement (Art. 3 (b)).

Third Country nationals entering Schengen for short stays (up to 90 days in a 180 day period) must meet several conditions:

- being in possession of a valid document enabling them to cross a border
- a valid visa according to Council Regulation 539/2001 or a valid residence permit or a valid long-term visa (issued by national authorities)
- a justification for ‘the purpose and conditions’ of their stay and ‘sufficient means of subsistence’ for their stay and return to their country of origin
- not having an alert in SIS for being banned from entry
- not being considered a threat to ‘public policy, internal security, public health or the international relations of any of the Member States’ (Art. 6)

Some categories of TCNs are exempt from some of these provisions -- namely holders of residence permits and long term visas, persons who do not possess a visa but can acquire one at the border and when a member state authorizes entry on humanitarian, national interest and international obligations grounds (Art. 6, para. 5; Peers 2016). There is no further explicit mention to international protection or CEAS framework (Peers 2016).

Further, (*Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence* 2002), which constitutes the main EU legal instrument on smuggling, legislates on the manner of entry insofar it concerns individuals that transport third country nationals across external borders (Bozeat et al. 2016; Peers 2016). The Directive stipulates that member states must impose sanctions on

any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens. (Art. 1, para. 1(a))

While member states are given discretion not to apply such sanctions ‘for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned’, the Directive does not prohibit member states from doing so (Art. 2, para. 2; Bozeat et al. 2016; Peers 2016).

Border Checks

In what concerns controls at the external borders of the Union, SBC states, first, that external border crossing can take place at designated crossing points and at fixed times (Art. 5). The code outlines the procedure for border guards checking persons entering and exiting the Schengen area. Border guards must perform ‘minimum checks’ to establish the identity of any person in relation to the travel document produced, as well as the validity of the travel document against relevant databases (Art. 8, para. 2). The ‘minimum checks’ provision applied for persons that have free movement rights (Art. 8, para. 2). However, Regulation 2016/458 extended these provisions to include checks against the SIS, Interpol’s Stolen and Lost Travel Documents Database (SLTD) and national databases with such information (*Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 Amending Regulation (EU) 2016/399 as Regards the Reinforcement of Checks Against Relevant Databases at External Borders* 2015, Art. 1; European Parliament 2018c). If such measures have a ‘disproportionate impact on the flow of traffic, border authorities can apply them on a ‘targeted basis’ following a risk assessment (Art. 1).

In the case of third country nationals, border guards must perform more thorough checks. These include checking that a third country national has a valid, non-expired travel document when entering Schengen as well as, where applicable, a visa or residence permit; ‘thorough scrutiny’ to determine if the travel document is counterfeit; examining exit and entry stamps to determine if someone has violated the Schengen visa time limits; ascertaining the points of departure and destination; checking that a person complies with the subsistence rule in Article 6; and that a person (along with their ‘means of transport’ and ‘objects’) are not a threat to public order, security, health or ‘international relations of any member state (Art. 8, para. 3; Peers 2016). This information must be checked against the

SIS database (Art. 6, Art. 8) In addition since 2013 the VIS database must be checked to determine if the person entering holds a visa as well as for identification purposes (Art. 8, para. 3(b), (c)). Similar checks are performed upon exit (Art. 8, para. 3 (g)). These checks can be relaxed as a result 'of exceptional and unforeseen circumstances' which lead to increased traffic at border crossing points (Art. 9). The code also dictates that such checks must be performed in a non-discriminatory manner (Art. 7).

Third country nationals can be refused entry if they do not fulfil the conditions set out in Art. 6 or are not included in one of exempt categories in the same article, including those who come under 'special provisions' related to applying for international protection (Art. 14, para. 1). Refusal of entry should be substantiated by decision stating the reasons for it, using a standard form provided in the SBC annex. SBC stipulates that those refused entry must have a right to appeal legislated at national level (Art. 14, para. 3). The appeal however, does not have a suspensive effect on the refusal of entry and border guards must ensure that a person does not enter into member states (Art. 14, para. 3, 4).

The Code further stipulates that the controls outlined are to be implemented by border guards deployed by member states who also provide resources and other staff as necessary (Art. 15, 16).

Use of Information Systems for Entry Controls

The Schengen Borders Code stipulates that border authorities must consult the SIS and VIS databases when performing checks on third country nationals (Art. 8, para. 3). As mentioned earlier, Regulation 2016/399 added Interpol's Stolen and Lost Travel Documents Database (SLTD) and national databases (*Regulation (EU) 2017/458*, Art. 1; European Parliament 2018c).

Border authorities of member states are empowered to check the SIS database for alerts on persons and, 'where necessary, objects included in the SIS and in national data files and the action to be performed, if any, as a result of an alert' (*Regulation (EU) 2016/399* Art. 8, para. 3 (vi), 2006, Art. 27 1(a)). They must also consult the VIS database in the case of third country nationals that hold a visa in order to verify their identity and the authenticity of their visa (Art. 8, para. 3(b)).

The introduction of an Entry-Exit system with Regulation (EU) 2017/2226 expanded the scope of at-the-border use of information systems. The Regulation stipulates that border authorities of member states must record the entry and exit of third country nationals who require a visa to enter the European Union, as well as for those who are visa exempt (Rec. 7, 10, Art. 16, 17). Specifically, border authorities must create a personal file⁶ for each third country national entering EU territory (Art. 16, para. 1) or if such a file already exists, to verify this and update the file (Art. 14). When updating an existing file, border authorities must

⁶ The following data must be included: (a) surname (family name); first name or names (given names); date of birth; nationality or nationalities; sex; (b) the type and number of the travel document or documents and the three letter code of the issuing country of the travel document or documents; (c) the date of expiry of the validity of the travel document or documents; (d) the facial image as referred to in Article 15.

update the existing file by entering data⁷ including the date and time of entry and the border crossing point (Art. 16, para. 2). Date, time and crossing point are also recorded upon exit (Art. 16, para. 3). Border authorities must create files and record data on individuals refused entry (Art. 18) as well as data relevant to the revocation, annulment, and extension of short stays and the grounds for such decisions by national authorities (Art. 19). The entry-exit system was not fully operational at the time of writing, but expected to be so by 2020 (*Regulation (EU) 2017/2226*).

In the case of EURODAC, the role of border authorities is one of data collection rather than consultation. Upon entry, national authorities are obliged to collect the fingerprints of all third country nationals that apply for international protection (Art. 9) and third country nationals that enter EU member states without authorization (Art. 14). While EURODAC is linked to CEAS, the taking of fingerprints upon entry at the borders renders it a control measure as well. Fingerprints taken are transmitted to a central system (Art. 9, 14) and subsequently used to determine responsibility for asylum applications and, in extension, prevent secondary movements (Peers 2016).

Border surveillance and the European Border Surveillance System

Article 13 of the SBC stipulates that stationary and mobile units of border guards of member states conduct border surveillance in order ‘to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally’ (Art. 13, para. 1, 2). It further specifies the manner in which border surveillance must be carried – ‘numbers and methods’ must be aligned with ‘existing or foreseen risks and threats’; variable surveillance periods to maximise detection; and that it can be implemented using ‘technical means, including electronic means (Art. 13, para. 3, 4).

Border surveillance practicalities and modes of cooperation are further regulated by Regulation (EU) 1052/1013 which established the *European Border Surveillance System* (EUROSUR) in October 2013 (*Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 Establishing the European Border Surveillance System (Eurosur)* 2013). In the recitals, it is described as a system for the exchange of information and for operational cooperation Recital 1; Peers (2016)). To this end, Frontex

⁷ The full list of data to be entered upon entry includes: (a) the date and time of the entry; (b) the border crossing point of the entry and the authority that authorised the entry; (c) where applicable, the status of that third-country national indicating that he or she is a third-country national who: (i) is a member of the family of a Union citizen to whom Directive 2004/38/EC applies or of a national of a third country enjoying the right of free movement equivalent to that of Union citizens under an agreement between the Union and its Member States, on the one hand, and a third country, on the other; and (ii) does not hold a residence card pursuant to Directive 2004/38/EC or a residence permit pursuant to Regulation (EC) No 1030/2002; (d) the short-stay visa sticker number, including the three letter code of the issuing Member State, the type of short-stay visa, the end date of the maximum duration of the stay as authorised by the short-stay visa, which shall be updated at each entry, and the date of expiry of the validity of the short-stay visa, where applicable; (e) on the first entry on the basis of a short-stay visa, the number of entries and the duration of stay authorised by the short-stay visa as indicated on the short-stay visa sticker; (f) where applicable, the information indicating that the short-stay visa has been issued with limited territorial validity pursuant to point (b) of Article 25(1) of Regulation (EC) No 810/2009.

occupies a central role (Rec. 8, Art. 6). All member states are called upon to establish a *national coordination centre* (NCC) in order to facilitate information exchange and information gathering on a national level and between the relevant member state institutions (Art. 1). It therefore constitutes a nodal point in national integrated border management strategies and is also called upon to support national border surveillance activities. Through a secure communication network to be operated by Frontex, information is to be exchanged with Frontex, and other member states' NCCs (Art. 6, 7). Through this information gathering and exchange, EUROSUR is to provide so called *situational pictures*, defined as

a graphical interface to present near-real-time data and information received from different authorities, sensors, platforms and other sources, which is shared across communication and information channels with other authorities in order to achieve situational awareness and support the reaction capability along the external borders and the pre-frontier area. (Art. 3)

While the national situational pictures are to be created and maintained by the NCCs (Art. 9), Frontex is tasked with the production of a European situational picture as well as a common pre-frontier intelligence picture, covering the geographical areas beyond the EU external border (Art. 6, 10).

These pictures are to contain three layers, relating to events, operations, and analysis (Art. 8). 'Events' refer to unauthorised border crossings, incidents of cross-border crime, and crisis situations (Art. 9 par 3); 'operations' refers to deployed assets and environmental information, while analysis is composed of key developments and other indicators useful for the assessment of the situation, reports, risk analyses, intelligence reports and further information such as images or maps (Art. 9, para. 5, 7). The European situational picture follows the same structure (Art. 10, para. 3).

All this information is supposed to be communicated in near-real-time (Art. 7, 9), and thus allows for the first time to have a constantly updated representation of the dynamics at play at the EU external border and beyond. Further sources of information, such as sensors, satellites and other tracking systems can be plugged into the system (Art. 12).

Regulation 1168/2011 amending Regulation 2007/2004 set out the operational involvement of FRONTEX in border surveillance operations. It stipulates that FRONTEX 'assist Member States in circumstances requiring increased technical and operational assistance at the external borders' (*Regulation (EU) No 1168/2011*, Art. 1, para. 3(ii)) as well as coordinating 'operational cooperation between Member states in the field of management of external borders (Art. 2, para. 1(a), 2015).

In comparison, Regulation 2016/1624 accords greater capacities in coordinating and monitoring border surveillance operation (Regulation (EU) 2016/1624 Art. 8, 14; European Commission 2016m; Guild et al. 2016). It can issue recommendations to member states to initiate joint operation and rapid interventions (Art. 15, para. 3). Most significantly, it accords FRONTEX the power to intervene at the external border of a member state without the consent of the member state itself (Art. 19; European Commission 2016m; Bozeat et al. 2016; Carrera and den Hertog 2016). In addition, Art. 13 stipulates that FRONTEX can conduct vulnerability assessments on the 'capacity and readiness' of member states to manage the Union's external borders (Art. 13, para. 4).

Border Surveillance at sea and Search and Rescue operations

In addition to border surveillance at external land border, the provisions of the SBC also extend to surveillance operations at sea. Search and Rescue operations are a late addition to the notion of *Integrated Border Management*. Both Regulations 2007/2004 and 1168/2011 stipulated that FRONTEX's involvement in border surveillance operations at sea. However, the former did not refer to sea rescue operations. In contrast, 1168/2011 referred to 'situations may involve humanitarian emergencies and rescue at sea' (*Regulation (EU) No 1168/2011*, Art. 1, para. 3 (ii)). Operations at the external border carried out under the coordination of Frontex are regulated by Regulation (EU) No 656/2014 of the European Parliament and the Council (*Regulation (EU) No 656/2014*). A former Council Decision (2010/252/EU) on the subject matter had been invalidated on procedural grounds by the European Court of Justice in 2012, even though the Decision remained in effect until Regulation (EU) No 656/2014 had been passed (Peers 2016). Regulation 2016/1624 stipulates with greater clarity that FRONTEX can 'provide technical and operational assistance' to member states in search and rescue operations at sea 'taking place in situations which may arise during border surveillance operations at sea' (Rec. 10, Art. 4, para. (b)).

The link between sea border surveillance and search and rescue operations is explicit in the Preamble of Regulation 656/2014, whereby

border surveillance is not limited to the detection of attempts at unauthorised border crossings but equally extends to steps such as intercepting vessels suspected of trying to gain entry to the Union without submitting to border checks, as well as arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea and arrangements intended to bring such an operation to a successful conclusion. (Rec. 1)

More generally, the Regulation allows for the interception of vessels both in territorial waters as well as in international waters in case it is suspected to be involved in the 'smuggling of migrants' (Art. 1, Art. 6, Art. 7).

The Regulation defines situations when vessels can be considered in a state of 'uncertainty, alert or distress' (Art. 9) and provides for rules to be followed in search and rescue operations. In the context of border and migration management, the rules of disembarkation as laid down in Article 10 are relevant. In relation to search and rescue operations taking place in the territorial waters or the contiguous zone of a member state, migrants can be disembarked in that member state (Art. 10, par 1(a)). Persons on a vessel intercepted in high seas may be diverted to third countries (Art. 10, para. 1(b)). However, the regulation mandates that a *place of safety* needs to be identified for the disembarkation of the persons that were rescued from the vessel in distress (Art. 10). 'Place of safety' is defined as

a location where rescue operations are considered to terminate and where the survivors' safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next destination or final destination, taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement. (Art. 2, para. 12)

Further, the Regulation explicitly prohibits the disembarkation of persons rescued at sea in third countries where ‘they are aware or out to be aware’ that there is a serious risk of harm to life, inhuman or degrading treatment or punishment, or *refoulement* and obliges both member states participating in operations and EU agencies to consider the ‘general situation in the third country of potential disembarkation (Art. 4, para. 1, 2).

Both Regulation (EU) 2016/1624 and (EU) 656/2014 stipulate that search and rescue operations must conform to the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, and the International Convention on Maritime Search and Rescue (*Regulation (EU) No 656/2014*, Rec. 8, 2016, Rec. 47). This reference was not included in Regulation (EC) 2007/2004.

Hotspot Areas and Migration Management Support Teams

Another notable addition to the border management regime is the *hotspot areas*. As a term and a concept, they had first been introduced by the Commission in its *European Agenda on Migration* in May 2015. In the framework of the EBCG regulation, the concept finds its first legal codification.

The notion of a hotspot is derived from quantifiers developed in the EUROSUR Regulation (see above) and denotes parts of the EU external border that are subject to increased irregular border crossings. The *Hotspot Approach* addresses this situation of perceived crisis through the deployment of European agencies such as Frontex, EASO, Europol and Eurojust in order to support the affected member state in dealing with the situation.

The EBCG regulation then formally defines a *hotspot area* as

an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders. (Art. 2 (10))

The personnel of the Union agencies deployed there are labelled *migration management support teams*, i.e.

a team of experts which provide technical and operational reinforcement to Member States at hotspot areas and which is composed of experts deployed from Member States by the European Border and Coast Guard Agency and by the European Asylum Support Office, and from the European Border and Coast Guard Agency, Europol or other relevant Union agencies (Art 2 (9))

The exact framework of the *migration management support teams* is laid down in Art. 18. In case of ‘disproportionate migratory challenges’, member states may request the deployment of such a team from all Union agencies involved. However, the creation of such teams also exemplifies the thin line that the newly established notion of *shared responsibility* entails between national sovereignty and Union competences: Art. 19 stipulates that in case control of the external border is rendered ineffective to the point that the functioning of the Schengen Area at large is in jeopardy, and the member state in question refuses to apply for support under Art. 18, the Council has the competence to mandate the deployment of a

migration management support team, and enforce this decision through a unilateral recommendation to reintroduce internal border controls towards the non-compliant member state under Art. 29 of the Schengen Borders Code.

Developments Since 2011

The Schengen regime relating to external border controls, as well as ‘smart borders’ measures was the domain of limited legislative changes between 2011 and 2015. The Schengen Borders Code, for example, was amended to incorporate the use of the VIS database, while the EUROSUR directive was introduced in 2013 (European Commission 2014d). The Commission proposed a ‘smart borders’ package in 2013, including a renewed proposal for an entry-exit system and a Registered Traveller Programme (European Commission 2013). However, these were not adopted due to disagreements among EU institutions and member states (European Parliament 2018c; Peers 2016). Council conclusion in 2013, however, called for a more extensive use of SIS and for improving its use and coordination among member states (Council of the European Union 2011c, 2013, 2014b).

The migrations of 2015 provided the political and security context that facilitated a greater rate of legislative change, as well as a range of informalized measures. The European Agenda on Migration (European Commission 2015b) called for the strengthening of the external borders of the Union expanding the powers of EU border management capacities. This extended to rescue operations at sea, whereby FRONTEX operations such as Triton and Poseidon were presented as a blueprint for future actions both in sea rescue operations and border surveillance. Further, it made specific reference to a new ‘Smart Borders’ package. A further factor that contributed to the legislative and non-legislative expansion in the area of external border controls was the 2015 Schengen ‘crisis’ evolving around what was perceived as the failure of Greece to apply Schengen provisions on external border control, the subsequent reintroduction of internal border controls, and their implication for free movement (Council of the European Union 2015h; European Commission 2016c). These responses intersected with security concerns, in particular following the 2015 Paris attacks (European Commission 2015a; Council of the European Union 2015h; European Council 2015c; European Parliament 2018c).

All these three areas have been characterized by significant legislative and policy changes since 2015. Calls to strengthen the capacities and remit of FRONTEX were repeated in several documents, even after its renewed mandate introduced in 2011, but the introduction of the EBCGB was a crucial development to this end (European Commission 2014d). It was first put forward in the European Agenda on Migration and followed by a communication and proposal for a regulation in December 2015 (European Commission 2015b, 2015g, 2015h). All these documents identified a need for Europeanising the management of the external border of the Union. Not only did it expand the powers on FRONTEX in organizational, capacity and financial terms but signalled a further strengthening of the border management regime over CEAS (Alegre, Jeandesboz, and Vavoula 2017; European Parliament 2018c).

Border controls were also reinforced by changes to the Schengen Borders Code, in particular the increased checks introduced by Regulation 2017/458. The related domain of Smart Borders measures saw significant legislative and non-legislative change in what

concerns external border controls. In 2016, the Commission presented its Communication ‘Stronger and Smarter Information Systems for Borders and Security’ (European Commission 2016e). Part of this proposal concerned improving ‘the operational effectiveness and efficiency of SIS’ (European Commission 2017j) and expanding its content. The inclusion of the Automated Fingerprint and Identification System (AFIS) illustrates that some proposals were non-legislative in nature as, according to the Commission, this did not require legislative change (European Commission 2017j).

The creation of an Entry-Exit System and a European Travel Information and Authorisation System (ETIAS) were also proposed. These systems were the subject of previous proposals but due to various concerns by the Parliament and the Council, were not successful (Alegre, Jeandesboz, and Vavoula 2017; European Parliament 2018c). The Entry Exit system proposal cited aims linked to preventing irregular migration – such as the identification of those violating the length of stay allowed by visas – as well as consideration relating to terrorism and serious crime (European Commission 2016d), thus yet again linking migration with security. The securitization of migration movements and prioritization of the Schengen regime over CEAS is also evident in the proposed EUODAC directive, which proposed the retention of data of irregular migrants, the addition of facial images, the fingerprinting of children over 6 years old and access to the authorities of third countries -- opposed by the LIBE committee -- and law enforcement authorities (ECRE 2016a, European Parliament 2018c, 2017a).

The renewed proposal, on ETIAS, on the other hand, met with greater resistance. The proposal argued that ETIAS would have three key functions: authenticating information submitted online by third country nationals of ‘white list’ countries; cross checking information against other EU information systems when processing applications; and issuing authorisation for travel when no issues were detected (European Parliament 2018c). However, concerns were raised regarding the need for such a system, the lack of evidential basis to support the commission’s proposal, concerns over compatibility with human rights and data protection law, and the risk of profiling (Alegre, Jeandesboz, and Vavoula 2017; European Parliament 2018c). Further legislative proposals not concluded at the time of the writing include a proposal to enter entry bans into SIS and extend access to it to Europol, FRONTEX and ETIAS (European Parliament 2018c).

There was less willingness to reform the Facilitators package during its refit evaluation in 2017. Civil society actors criticized the non-compulsory character of the humanitarian exception and the possibility of criminalizing humanitarian assistance resulting to unauthorized entry, as did the Commission in the 2015 Action Plan against Migrant Smuggling (European Commission 2015d, 2017e; Bozeat et al. 2016). Similarly, a lack of guidance for its practical implementation has been noted (Carrera et al 2016). However, member states were opposed to limiting the definition of unauthorized entry by linking it to financial or material gain, as in the case of facilitation of stay (see the section on stay and residence; European Commission 2017e). Member states declared a preference for maintaining the existing definition and the discretion it leaves to interpretation by domestic legal systems (European Commission 2017e). Similarly, the Action Plan against Migrant Smuggling suggested a preference to non-legislative measures -- such as providing member states with ‘operational and technical support’ to scrap smugglers’ boats and information sharing -- rather than any changes to relevant legal frameworks (European Commission 2015d, 2017e). The 2016 Council Conclusions on Smuggling also focused on non-legislative

measures (Council of the European Union 2016a).

The introduction of the hotspot concept, in contrast, reflects a transition between informal arrangements and legislative measures. When first introduced in measures in the context of the European Agenda on Migration, it was not defined in EU legislation – a fact widely criticised (Neville, Sy, and Rigon 2016). It was thus rooted in ad-hoc responses to the 2015 migration movements rather than the existing legal framework. As noted in the previous section, it eventually became a legally defined term with the introduction of Directive 2016/1624, illustrating those informal measures.

7. Regulating Stay and Residence

Conditions of stay and residence

The regulation of stay and residence is rarely considered a distinct migration control aim in EU documents, contrary to academic conceptualisations of control (Boswell 2011; Castles 2004; Castles, De Haas, and Miller 2013). Unlike other aspects of border management and migration control, there is no specific act of EU law regulating the stay of asylum seekers, refugees and irregular migrants in the European Union. Rather, their stay is regulated through a number of different legislative instruments which impose conditions on migrants depending on their legal status. Controlling the stay of migrant population once within the territory of the EU is not included in the Integrated Border Management Framework, even though it relates to two key components ‘technical and operational measures within the Schengen area [...] to address illegal immigration’ and the return of third country nationals (*Regulation (EU) 2016/1624*). However, any legal provisions on the length and conditions of stay are pertinent to migration control since they create a framework for member states to exercise control over migrant populations — for example through detention, registration, and retention of information. Further, legal stipulations on stay determine when migrants become ‘deportable’ and thus directly relate to the EU’s return regime.

A second dimension concerning conditions of stay pertains to movement and subsequent residence to a member state other than the one where a third country national has applied for international protection, has received international protection or has initially resided irregularly. As with stay, conditions for movement between member states depend on the specific legal status of migrants. The prevention of unauthorised secondary movements is regulated predominantly by the Dublin Regulation in the case of asylum seekers.

Recipients of international protection status

Directive 2011/95/EU obliges member states to issue recipients of international protection with residence permits of at least three-year duration, which can be renewable (*Directive 2011/95/EU*, Art. 24, para. 1). Their family members, however, can be issued with residence permits of less than three years (Art. 24, para. 1). Recipients of subsidiary protection are to receive residence permits of at least one year, and at least two in the case of renewal (Art. 24, para. 2). Recipients of international protection and subsidiary status become eligible for long term residence after five years from being granted protection. The exact duration of international and subsidiary status and attached residence permits is decided by member states, who can apply the provisions of the directive or adopt more favourable ones. As a result, the duration of residence permits varies considerable among member states (AIDA 2016b, 2016a).

Protection status is thus not permanent but renewable (AIDA 2016b) and can cease or be revoked on a number of grounds. Member states can cease to provide refugee status if a refugee has re-availed themselves of the protection of the country of nationality or re-established themselves in it, have acquired a new nationality or re-acquired their original nationality, or the circumstances that led to the granting of refugee protection or to being a stateless person have ceased to exist (*Directive 2011/95/EU* Art. 11). Applicants are

excluded from refugee status if they are under the protection of UN agencies other than the UNHCR, and both refugee status and subsidiary protection if they have committed war crimes, crimes against humanity, serious criminal offences (Art. 12, Art. 17). In addition, an applicant can be excluded from subsidiary protection status if they pose a threat to 'the community or the security of the Member State in which he or she is present' (Art. 17, para. 1(d)) or, more vaguely, if they have 'been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations' (Art. 17, para. 1(c)). Subsidiary protection status ceases 'when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required' (Art. 16, para. 1). Member states have to take due care that the change in circumstances is of permanent nature (Art. 16, para. 2). Further, member states can revoke, end or refuse to renew protection status on several grounds, including that applicants misrepresented facts that led to receiving protection status in the first place; if they have reasonable grounds for regarding him or her as a danger to the security of the Member State or they have been convicted of particularly serious crime and thus constitute 'a danger to the community' of the member state (Art. 14, Art. 19, Art. 24). Therefore, member states have the right to end protection on several grounds but according to the 2016 Proposal for a recast qualification directive very few states systematically carry out status reviews (European Commission 2016I). Procedures for the withdrawal of refugee status are set out in Article 45 of the Asylum procedures directive (*Directive 2013/32/EU*).

Refugees and recipients of subsidiary protection are allowed freedom of movement within the member state where they have been granted protection subject to 'the same conditions and restrictions as those provided for other third country nationals legally resident in their territories' (*Council Directive 2004/83/EC* Art. 32).

Movements to and residence to other member states are more complex. Recipients of international protection have the right to be issued travel documents and travel to the territory of other member states (*Council Directive 2004/83/EC* *Directive 2013/32/EU*). However, recipients of subsidiary protection can only receive travel documents if they are unable to obtain them from their country of origin.

Asylum seekers

Asylum seekers have the right to remain in the territory of the member state where they submit an application for international protection (*Directive 2013/32/EU*). However, MS have the right to extradite asylum seekers who make a subsequent application, have been issued an arrest warrant or face prosecution in international criminal courts (Art. 9, para. 3). If the extradition involves a third country, the authorities must be satisfied that it will not result in direct or indirect refoulement (Art. 3). They can move freely within the territory of a member state, but this freedom might be limited to 'an area assigned to them by the member state' (*Directive 2008/115/EC*).

The Asylum and Reception directives stipulate a range of control measures in relation to asylum applicants. Applicants are required to inform the competent authorities of their place of residence or address and of any changes as soon as possible (*Directive 2013/32/EU* Art. 7.5). Member states can designate the area of residence of applicants, for reasons of public

interest, public order or in order to facilitate the quick processing and monitoring of applications (*Directive 2008/115/EC*). Asylum seekers may have to leave such places only with the permission of MS, unless for appointments with competent authorities and courts (Art. 7.4, 7.5).

Both the Asylum and Reception directives stipulate that member states shall not detain migrants solely for being asylum applicants, and if they do it should be on a case by case basis and only if other ‘less coercive alternative measures’ are not applicable (*Directive 2013/32/EU*; *Directive 2008/115/EC* 2008, Art. 8). However, the RD allows detention on several grounds: to ascertain the applicant’s nationality; to facilitate the examination of an application, especially if the MS deems there’s a risk for absconding, to determine the applicant’s right to enter the territory of the MS; if the applicant is detained because s/he is subject to return procedures; if the application is deemed to have the aim of preventing the enforcement of a return decision; to protect national security or public order; if the applicant is subject to procedures under the Dublin Regulation (Art. 8). The RD similarly allows the detention of unaccompanied minors and vulnerable persons (Art. 11). Provisions on detention, however, need to be balanced against Articles 3 of ECHR and 6 of the European Charter of Fundamental Rights, which guarantee the right to liberty (AIDA 2016a; FRA 2018).

Secondary movements of asylum applicants and stay in member state other than the one of entry is explicitly discouraged by CEAS instruments (*Directive 2011/95/EU*) and are regulated by the Dublin Regulation (*Regulation (EU) No 603/2013*). The Dublin Regulation sets out a hierarchy of criteria which determines which member state has responsibility for the examination of an application for international protection, and in extension which applicants are allowed to move to another member state. Thus, unaccompanied minors with relatives in a member state other than the one of entry can have their application considered in the former (Art. 8). Applicants with family members who are recipients of international protection or applicants in another member state can be transferred there following an application to this effect (Art. 9, 10). Otherwise, the application must be considered in the member state of entry (Art. 13, para. 1)) or if submitted after 12 months from the irregular entry, in the state of residence (Art. 13, para. 2). Under article 17 – the sovereignty clause-, member states can decide to examine an application that is not their responsibility.

Unauthorised and undocumented migrants

Unauthorised migrants do not, in legal principle, have a legal right to reside in a MS. There is no specific EU law on the stay and residence of irregular migrants, although several legislative acts have legal implications. The Returns Directive stipulates conditions for migrants under return procedures, although it allows MS to grant residence permits to illegally staying third country nationals on ‘compassionate, humanitarian or other reasons’ (*Directive 2008/115/EC*, Art. 6, para. 4). EU law does not criminalise – in the sense of imposing custodial sentences or fines -- irregular stay or residence but neither does it prohibit member states from doing so⁸ (FRA 2016; European Commission 2014a). However,

⁸ In fact, only France and Portugal do not criminalise stay. All other member states sanction it with fines, imprisonment or both (FRA 2016; European Commission 2014a).

CJEU has ruled in the *El Dridi* and other cases that member states should not ‘undermine common standards and procedures established by directive 2008/115 and thus to deprive it from its effectiveness’ (Hassen El Dridi, alias Soufi Karim 2011; FRA 2016; European Commission 2014a). CJEU however did not rule out the possibility of imposing fines or custodial sentences if a third country national was not removed after return procedures (FRA 2016).

Further, the EU framework penalises *the facilitation* of irregular stay. Article 27 of the *Convention implementing the Schengen Agreement obliges member states to* ‘impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party’s laws on the entry and residence of aliens’ (European Union 2000). Council Directive 2002/90/EC stipulates that member states can introduce sanctions against persons who assist non-nationals to reside in the territory of member states in breach of national laws, but only for the purpose of financial gain (Art. 1). It is the responsibility of member states to determine ‘effective, proportionate and dissuasive sanctions’ (Art. 3) through national legislation. Council Framework decision 2002/946/JHA (*Council Framework Decision of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence (2002/946/JHA)* 2002) further elaborated on the types of sanction MS could introduce to prevent the facilitation of residence, such as extradition (Art. 1, 5), custodial sentences (Art. 3), fines, confiscation of means of transport, prohibition from occupational activities during which offenses were committed, deportation (Art. 2). Legal persons were also designated as liable and could be sanctioned with fines, exclusions from public benefits or aids, temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision or a judicial winding-up order (Art. 3). Although the Facilitators directive does not penalise the facilitation of irregular stay when it does not involve financial gain, or it is aimed ‘to provide humanitarian assistance (Art. 1, para. 2), it does not explicitly prohibit member states from doing so (FRA 2016; Peers 2016).

Developments since 2011

In what concerns the duration of international and subsidiary protection, there have been few significant changes between the 2004 Directive and the 2011 Recast qualification directive. Provisions regarding residence permits for recipients of international protection remained the same, while renewed permits for recipients of subsidiary protection were specified to be of at least two years – the 2004 directive did not include this stipulation (*Council Directive 2004/83/EC*, Art. 24, para. 2; Peers 2016). Exclusion and cessation clauses did not change (Peers 2016).

The 2016 proposal for a recast qualification directive extends the grounds for exclusion from and non-renewal of refugee status to include terrorism and limits the scope for applying the principle of proportionality (European Commission 2016, Art. 12; ECRE 2016d). In contrast to Directive 2011/95/EU (*Directive 2011/95/EU*), the 2016 proposal stipulates that member states have an obligation to review of refugee status and subsidiary protection both when there are significant changes in the country of origin that have an impact on the need for protection, and when member states renew residence permits issued to recipients of international protection (European Commission 2016l, Art. 15, Art. 21). In order to facilitate

the review process, the proposal for a recast asylum directive allows the storage of data, including personal data, gathered during the registration and lodging of an application and the asylum interview (European Commission 2016k, 10). Although the recast qualification regulation introduces a 30-day limit for issuing residence permits, their length remains variable and out of sync with the length of protection status (ECRE 2016d).

Following the CJEU judgement in the *Alo and Osso* case (*Kreis Warendorf v Ibrahim Alo and Amira Osso v and Region Hannover* 2016), the qualification regulation proposal clarifies that recipient of international protection, in addition to freedom of movement, have the right to choose their place of residence within the member state that has granted protection similarly to other legally resident third country nationals 'in a comparable situation' (European Commission 2016l). However, the 2016 proposals for a qualification regulation and recast Dublin regulation significantly limit the right to move and reside in a member state other than the one that granted protection. The proposed qualification regulation states that recipients of international protection 'shall not have the right to reside in Member states other than the one which granted protection' (European Commission 2016l, Art. 29). Those found to reside irregularly in another MS will be returned under the provisions of the Dublin regulation (European Commission 2016l; ECRE 2016d). Further, a proposed amendment to Article 4 of Directive 2003/109/EU so as to exclude periods of stay in member states other than the ones granted protection from the process of granting long term residence permits (European Commission 2016l; Pro Asyl 2016). It also allows member states to impose residence conditions on recipients of international protection who receive social benefits in order to facilitate integration (European Commission 2016l).

The 2016 Recast Dublin Regulation, on the other hand, creates the responsibility for member states which granted protection to take back recipients of international protection who moved to another member state irregularly (European Commission 2016g, Art 20, para. 1(e)). This has been interpreted as an attempt to prevent secondary movements (Pro Asyl 2016; ECRE 2016d). Conditions of stay of asylum seekers changed to a degree between the first-phase and the recast 2013 directives. The 2013 Reception Directive introduced specific provisions on the detention of asylum seekers which were absent from the 2003 Directive (Peers 2016). The Dublin III regulation expanded the criteria that allow unaccompanied minors to move to a member state other than the one of entry or first application, based both on the presence of a family member and taking into consideration the criterion of vulnerability and best interests of the child (*Regulation (EU) No 604/2013*, Art. 6--8, Art. 10). The clause on responsibility of member states where an irregular crossing took place was also introduced in Dublin III regulation.

The proposed 2016 reforms of CEAS introduce significant changes to conditions of stay for asylum seekers. Article 7 of the proposed recast of the Reception directive (European Commission 2016j) expands the grounds for designating the residence of asylum seekers to applicants who are under Dublin procedures for determining the country responsible for their application and are for preventing applicants from absconding when they have not complied with the recast Dublin regulation provisions on applying in the member state they arrived or transferred under procedures for the allocation of applications (European Commission 2016j, Art. 7, para. 2(c) (d); Pro Asyl 2016). These provisions are reinforced by Article 4(3) of the recast Dublin regulation, which creates express obligations for asylum seekers to comply with transfer procedures (European Commission 2016g; ECRE 2016b). The recast Reception directive also reinforces the reporting obligations of asylum seekers to a member

state's authorities in order to avoid absconding (Art. 7, para. 3; ECRE (2016c)). Further, it expands the grounds for detention to non-compliance with the restrictions on residence and movement in Article 7 and to applicants under border procedures introduced in the 2016 recast procedures directive [Art. 8, para. 3 (c) and (d); ECRE (2016c); Pro Asyl (2016)]. The Recast proposals maintain the possibility for detaining minors and vulnerable applicants – now referred to as 'applicants with special reception needs' (European Commission 2016j, Art. 11; ECRE 2016c).

The trend towards limiting secondary movements is also evident in the recast Dublin Regulation. The member state of first entry is designated as responsible for examining applications by applicants from a safe third country, first country of asylum and safe country of origin, including stateless persons habitually resident in such countries (European Commission 2016g, Art. 3; ECRE 2016b). In addition, it is responsible for applicants that may be a threat to public order and national security (European Commission 2016g, Art. 3, para. 3 (b)(ii)). In essence only applicants falling outside these categories would retain the possibility to move to another member state. In the case of unaccompanied minors, the criterion of the first country of application supersedes the consideration of first interests of the child (European Commission 2016g, Art. 10, para. 5; ECRE 2016b), thus limiting the possibility of transfer to another member state. The changes relating to the criterion of residence documents or visas also engender limitations to cross-state movement. The recast directive designates member states as responsible for the application if the applicant possesses a permit that has expired less than two years from lodging an application or a visa that expired within less than six months (European Commission 2016g, Art. 14, 1--2; ECRE 2016b). Further, it removes clauses limiting the responsibilities of states of first entry when migrants moved on to another member state (European Commission 2016g, Art. 14, 15; ECRE 2016b). The discretionary clauses are weakened by the removal of humanitarian grounds for taking responsibility (Art. 19, para. 2) and the exercise of the sovereignty clause to cases where no member state has been designated as responsible for examining and application (Art. 19, para. 1).

At the same time, the 2016 recast Dublin regulation proposals impose penalties on applicants who move to another member state without authorisation. In addition to the withdrawal of reception conditions mentioned above, Article 5 stipulate that in such cases, the responsible member state is obliged to examine applications with the accelerated procedure, without an automatic right to remain in the member state during an appeal, and exclude when deciding on claims, information received after return under the Dublin procedure (European Commission 2016g, Art. 5, para. 2, 4, Art. 20, para. 3; ECRE 2016b; European Parliament 2017c). In addition, 'any further representations or a new application' are to be considered as subsequent applications (European Commission 2016g, Art 20, para. 4; ECRE 2016b).

On the whole the proposed changes to the Qualifications and Reception directives strengthen the migration control elements embedded in previous versions. All documents cite the prevention of secondary movements as a key objective (European Commission 2016j, 3, 2016g, 2) and restrict for recipients of international protection and asylum seekers the scope for moving legally to a member state other than the one of entry and first application (ECRE 2016b; European Parliament 2017c; Pro Asyl 2016). Further, the proposals on restriction of movement and detention have been criticised as potentially incompatible with the Geneva Convention, ECHR and ECHtR case law (ECRE 2016c).

Similarly to developments in the field of return and readmission, the approach adopted is punitive (ECRE 2016b).

In what concerns the Facilitators package, there have been few legal developments. The 2017 Refit evaluation did not suggest legal reform, despite discrepancies in its implementation by member states and lack of data in several areas of its application (European Commission 2017e). The Commission noted the preference of member states for non-legislative measures in this policy area (European Commission 2017e).

8. Internal Control and Apprehension Measures

Internal controls and apprehension measures within the territories of member states and at internal borders regulated primarily by the Schengen Borders Code. Other legislative instruments such as the Employers directive also designate measure for controlling migration, especially in its unauthorised forms.

Internal Control Measures in the Schengen Borders Code and the Employers Directive

The Schengen Borders Code (*Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) 2016*) stipulates that any person can cross internal borders without border checks, regardless of their nationality (Art. 22). However, member states can introduce temporary internal border controls when there is a 'serious threat to public policy or internal security' for a limited period of up to 30 days, or for as long as a serious threat lasts (Art. 25, para. 1). Internal border controls are to be introduced only as a measure of last resort (Art. 25, para. 2). Member states must assess whether the reintroduction of temporary border controls is an 'adequate remedy' to the threat they purport to address and the 'proportionality of the measure in relation to that threat' (Art. 26). In essence, member states are called to seek a balance between considering threats to internal security and the impact on the reintroduction of border controls on Schengen as an area of free movement (Guild et al. 2016, van der Woude and van Berlo 2015). Further, the code specifically states that migration cannot in itself be considered a threat to public policy and internal security (Rec. 26).

Since the reform of the Schengen Borders Code in 2013, member states can introduce temporary internal border controls through three procedures which carry different time limits and potential for extension.

- for 'foreseeable events', whereby temporary internal border controls can be introduced for 30 days and can be renewed for periods of 30 days for up to 6 months (Art. 25)
- in response to 'urgent cases', where immediate action is required (Art. 28), temporary internal border controls can be introduced initially for 10 days but can be extended for up to two months and
- when 'serious deficiencies' of external border controls endanger the functioning of the Schengen Area (Art. 29); temporary internal border controls can be extended for up to two years after a proposal submitted by the Commission following a request by member states and a recommendation to this effect by the Council (Art. 27--29; Guild et al. 2016).

Under the Schengen Borders Code, internal controls can be exercised within the territory of member states and at internal borders as long as they do not have an 'effect equivalent to border checks' (*Regulation (EU) 2016/399*, Art. 23, para. (a); Peers 2016). Thus the code allows the 'exercise of police powers by member states' including in border areas, insofar they

- (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; (Regulation (EU) 2016/399, Art. 26)*

Such operations can thus take the form of police controls or spot-checks, knowledge-based operations targeted at sites where undocumented migrants are present, or at migrants known to be in non-compliance with return orders (European Commission 2014a). Further, the Schengen Borders Code allows checks at ports and airports under national law within national territory (Art. 23 (b)); MS enforcing national laws on the obligation to carry ID documents (Art. 23 (c)); and for MS to oblige third country nationals to report to national police authorities (Art. 23 (d)). These measures can be applied in border areas as long as they do not constitute external, systematic border controls and are backed up by national legislation (Guild et al. 2016; van der Woude and van Berlo 2015; Peers 2016). In practice, the distinction between external border controls and internal controls as defined by Article 23 of the Schengen Borders Code is often unclear and have been the subject of CJEU rulings (Proceedings against Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10) 2010; Carrera et al. 2018; Guild et al. 2016; Peers 2016; van der Woude and van Berlo 2015). Nevertheless, migration controls within the territory of member-states have expanded while internal controls have been abolished (van der Woude and van Berlo 2015).

Internal control measures feeding into the control of irregular migration can also be applied under Directive 2009/52/EC (*Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals* 2009), hereafter the *Employers Directive*. This obliges states to conduct ‘effective and adequate inspections’ in order to ‘control the employment of illegally staying third country nationals’, based on risk assessment indicating the most likely sectors where such employment takes place (*Directive 2009/52/EC*, Art. 14). In addition, it obliges employers to check if a third country national has a valid residence permit or other forms of leave to be in the member state, to maintain records of residence permits and other documents and to inform the member state’s authorities of the start of the employment of a third country national (Art. 4; European Commission 2014e; Peers 2016). It also obliges member states to implement a range of measures such as financial, administrative and criminal sanctions (Art. 5, 7, 9, 10; European Commission 2014e; Peers 2016).

Information stored in the three key databases established by EU law -- SIS, VIS and EURODAC -- is also a crucial element in internal border controls. Police and immigration authorities of member states have access to SIS, VIS and EURODAC (*Regulation (EC) No 1987/2006*, Art. 5, 6; Guild et al. 2016). In addition, EUROPOL can access EURODAC and VIS in the exercise of law enforcement and anti-crime activities (*Regulation (EC) No 767/2008*, Art. 3, 2013, Art. 7; Guild et al. 2016; European Parliament 2017a). VIS and EURODAC are explicitly linked to the performance of internal controls. The former is ‘to assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, stay or residence on the territory of the Member States’ and in addition to determine responsibility for asylum applications under the Dublin regulation (*Regulation (EC)*

No 767/2008, Art. 2(e), Art. 21). The EURODAC system allows Member States 'to check whether a third-country national or stateless person found illegally staying on its territory has applied for international protection in another Member State' (*Regulation (EU) No 603/2013* Rec. 4, Art. 17).

Developments since 2011

The governance of internal border and migration controls under Schengen has been under reform since 2011. The impetus for legal changes was political rather than rooted in implementation and procedural weaknesses. A 2010 Commission report (European Commission 2010) on the application of internal borders provisions highlighted procedural issues in the application of temporary internal border controls but did not suggest that member states were using these powers extensively or beyond the time limits envisaged in the 2006 Schengen Borders Code. In what concerns migration, only Belgium introduced temporary internal border controls in three interlinked cases citing public policy and internal security reasons related to potential migration movements (Guild et al. 2016, van der Woude and van Berlo (2015)). However, on the one hand unauthorised secondary movements and what was designated in a 2012 JHA Council document 'prevention of abuse by third country national' of free movement rights (Council of the European Union 2012b) have remained priorities for migration control. On the other, European Union institutions were concerned with maintaining free movement within Schengen as a key political project (European Commission 2012b; van der Woude and van Berlo 2015).

In the case of internal temporary border controls, the impetus for reforming Schengen governance lied in member states' responses to migratory movements triggered by the Arab Spring and in particular the so-called 'Franco- Italian incident' (Guild et al. 2016; Peers 2016; van der Woude and van Berlo 2015). Italy issued residence permits to Tunisian nationals who subsequently moved to France, triggering the introduction of temporary internal border controls by the latter (European Commission 2012b). While the Commission opined that neither state broke Schengen rules (van der Woude and van Berlo 2015), the European Council called for a revision of the rules for introducing temporary border controls (European Council 2011). The Commission subsequently proposed a 'Schengen Governance Package' including the establishment an evaluation and monitoring mechanism for Schengen (European Commission 2011d), the reform of rules on the temporary reintroduction of borders (European Commission 2011e) and the amendment of the Schengen Borders Code (European Commission 2011b). The following year the JHA Council called for further political guidance on the implementation of Schengen acquis, including temporary internal border controls (Council of the European Union 2012a, 2011b).

These led to the current form of the Schengen Borders Code in force since 2013, which expanded on the procedures for introducing temporary internal border controls and designated a greater role for the commission, and to the establishment of the Schengen Evaluation Mechanism (*Council Regulation (EU) No 1053/2013*). However, while these developments were a step towards supranationalisation, they did not significantly alter the powers of member states in terms of introducing temporary internal border controls or in the exercise of internal migration controls in their territories (Guild et al. 2016) van der Woude and van Berlo (2015)].

Responses to the increased migration movements in 2015 triggered significant

developments in relation to introducing temporary internal border controls. The prevention of secondary movements became a central issue for member states, both because of pressures on their reception systems and political concerns over migration (Council of the European Union 2015e; European Commission 2016c; Guild et al. 2016). Eight member states⁹ introduced temporary internal border controls in 2015, citing internal security and public policy considerations triggered by increased numbers of undocumented migrants (European Commission 2016c). Two states – Slovenia and Hungary -- lifted the temporary controls introduced under article 25 of the SCB after 30 and ten days respectively. Belgium introduced temporary border controls on the basis of movements caused by the dismantling of the Calais camp in France (Anonymous 2016). The remainder – Germany, Austria, Denmark, Sweden and Norway -- maintained interim for beyond the initial 30 days using the procedures under Articles 25 and 28. These developments caused mixed reactions. The Council of Ministers designated the issue as a matter of debate (Council of the European Union 2015g), noted the lack of ‘sufficient prior consultation with other member states’ and invited the commission to present a proposal for the reintroduction of temporary internal border controls (Council of the European Union 2015i). Both the Council of ministers and the European Council, while expressing some disquiet over the effect of the introduction of temporary controls on maintaining free movement, were supportive of the member states’ choice to do so (European Council 2016a; Council of the European Union 2017b).

The Commission, on its part, opined that the introduction of temporary internal border controls by Germany and Austria was proportionate and necessary (European Commission 2015f). In parallel, it carried out an evaluation of external border management in Greece using the Schengen Evaluation mechanism and identified serious shortcomings (European Commission 2016b). On this basis, although seemingly, reluctant to approve the reintroduction of temporary internal border controls beyond the eight months allowed by the procedures under articles 25 and 28 – citing the costs for maintaining an area of free movement – it invited the Council to recommend their prolongation (European Commission 2016b). At the same time, it presented a plan – Back to Schengen - aiming at lifting temporary internal border controls by 2017 (European Commission 2016c).

In May 2016, the Commission proposed a Council Implementing decision for the prolongation of temporary internal border controls using Article 29 of SBC which was adopted by the Council on 12 May 2016 (European Commission 2016f; *Council Implementing Decision 2016/894*). The reasons given for these decisions cited persistent deficiencies of external borders, the perception that the decline of entries following the EU-Turkey statement may be unsustainable, and the risk of secondary movements (European Commission 2016f; *Council Implementing Decision 2016/894*). In October 2016, the Commission and the Council approved a further continuation under Article 20 of SBC, citing a high number of 60,000 irregular migrants in Greece -- albeit with no reference of the source of this number¹⁰ --, persisting arrivals in Greece, a backlog of asylum applications in

⁹ Belgium, Denmark, Germany, Hungary, Austria, Slovenia, Sweden and Norway.

¹⁰ The number given does not seem to correspond with any available statistics issues by the Hellenic Police, the Asylum Service, FRONTEX or EMN. It seems to reflect the migrant population in hotspots and camps around the country recorded by international organisations and the Greek Coordination body consisting of the Ministries of Interior and Defence and the Hellenic Army. This population, however, consisted of refugees and asylum seekers, including those under relocation procedures <http://mindigital.gr/index.php/προσφυγικό-ζήτημα-refugee-crisis/423-summary-statement-of-refugee->

member states, a 'residue of pressure' concerning secondary movements from Greece, and that the recently established EBCGA was not yet operational (European Commission 2016n; *Council Implementing Decision (EU) 2016/1989*). In May 2017, the Commission and the Council assessed the 'situation' as 'fragile', citing again the number of 60,000¹¹ irregular migrants in Greece, overcrowding in the hotspots that could lead to secondary movements and delays in the operation of EBCGA, and a 'risk of irregular secondary movements' (European Commission 2017a; *Council Implementing Decision (EU) 2017/ 818*, para. 5). Based on these implementing decisions, Germany, Austria, Sweden, Denmark and Norway prolonged temporary internal border controls at specific parts on their borders three times (*Council Implementing Decision 2016/894*; Carrera et al. 2018).

The May 2017 renewal was the last one allowed under article 29 of SBC. This was reiterated in a Q & A document issued in parallel (European Commission 2017m), although a communication issued in parallel does not preclude the possibility that member states start the re-introduction process under Article 25 (European Commission 2017i; Carrera et al. 2018). The Communication explicitly cites for the first time terrorist threats, in conjunction with the prolongation of border controls (European Commission 2017j). This justification was used by member states in their decisions (Carrera et al. 2018) but not in previous Commission proposals. A recommendation issued at the same time reiterated the rules for the further prolongation of temporary border controls under SBC and although it did not preclude this possibility, encouraged member states to consider internal police measures. The five above mentioned member states re-started of process of introduction under Art. 25 of SCB in November 2017 (Carrera et al. 2018).

More significantly, the Commission issued a proposal, apparently at the request of the five countries maintaining temporary border controls, for amending the provisions of the SBC regarding their re-introduction under Article 25. In the revised articles, member states will be able to introduce border controls under Article 25 for one year, which could be extended under exceptional circumstances cited in the revised article 27a to two years (European Commission 2017l; Carrera et al. 2018). It further introduces on obligatory risk assessment to be performed by member states wishing to introduce temporary border controls, which should also address how the previous reintroduction dealt with identified security threats (European Commission 2017l; Carrera et al. 2018). The risk assessment should include a detailed account of coordination between the requesting and neighbouring member states, and a full consideration of proportionality between threats and impact on free movement (European Commission 2017l; Carrera et al. 2018). Member states are expected to introduce temporary border controls as a measure of last resort, and the Commission will additionally check their risk assessment against relevant information by the EBCGA (European Commission 2017l; Carrera et al. 2018). The European Council, while declaring commitment to Schengen and supportive of the Commission's plans, have been more insistent in taking 'proportionate security interests of member states fully into account' (Council of the European Union 2017b), thus suggesting a prioritisation of securitised perceptions of the 'crisis'.

flows-14-10-2016

¹¹ Again this seems to correspond with the data by the Greek Coordination Body <http://mindigital.gr/index.php/προσφυγικό-ζήτημα-refugee-crisis/1168-summary-statement-of-refugee-flows-to-eastern-aegean-islands-12-04-2017>

The developments around internal border controls have been the focus of heavy criticism. The Commission was criticised for failing to consider the compatibility of the justifications of member states against both the provisions of SBC for introducing and prolonging internal border controls and against objective evidence of the threats – such as terrorism – invoked by member states (Carrera et al. 2018; Guild et al. 2016). Further, several of the reasons invoked in the commission proposals and council implementing decisions – persistent irregular entries in Greece, sustainability of the reduction of entries, risk of secondary movements- are not fully supported by evidence (Guild et al. 2016; Carrera et al. 2018). From this perspective, policy developments until 2017 concerned more the application of existing provisions rather than changes in the legal framework or its implementation. The 2017 proposal, on the other hand, suggests a significant legal development, albeit one that still relies heavily on the perceptions of risk of member states rather than supranational capacities such the Schengen Evaluation Mechanism (Carrera et al. 2018).

In the context of these debates, internal police control measures under Art. 23 of SCB have also been the focus of developments. Prior to the introduction of temporary internal border controls references to such measures are scant. A 2012 Council document refers to internal control measures such as residence permits checks and the introduction of biometric ones, but it is not clear whether these measures concern recipients of international protection or asylum seekers (Council of the European Union 2012b). More pertinently, the Commission issued guidelines in the same year on the use of internal police checks. In the 2012 Biannual report on the functioning of the Schengen area, the Commission issued guidelines for the implementation of police checks, aiming to bring ‘the use of national competences in line with the Schengen spirit’ (European Commission 2012a). These reiterated the provisions of Art. 23 of SBC, and further stressed that police checks should be ‘targeted and based on updated and concrete police information and experience as regards threats to public security’ and that the frequency and specific objectives are to be defined by national legislation, following CJEU judgments (European Commission 2012a, 16). The Communication suggested that in the case that more systematic controls are needed to address threats to internal security and public order, member states should opt for the introduction of temporary border controls (European Commission 2012a, 16). The 2014 Communication on EU return policy (European Commission 2014a) refers apprehension measures -- such as police and immigration enforcement operations to locate irregularly staying migrants and persons who have not complied with return decisions -- in the context of increasing returns, although no reference is made to Art. 23 of SBC. The European Agenda on Migration (European Commission 2015b) does not refer to internal police controls. However, in a document regarding the integrity of the Schengen area, the Presidency of the Council called for member states to strengthen internal migration controls, stating that ‘irregular migrants who have entered the Schengen area and have not been registered at their arrival should not be able to stay in that area undetected for long periods of time’ (Council of the European Union 2015h).

In the context of the reintroduction of temporary internal border controls, the Commission revised the 2012 guidelines. The 2017 Recommendation on proportionate police checks and police cooperation in the Schengen Area urged states to prioritise police checks over the introduction of temporary border controls, a position reiterated in the later 2017 Communication (European Commission 2017f, 2017i). Member states were urged to implement such checks throughout their territories rather than only in border zones. While it

acknowledged that police checks should be ‘necessary, justified by and proportionate’ to security threats, it emphasised the member states’ entitlement to maintain internal security and public order (European Commission 2017f; Carrera et al. 2018). Further, as in the case of temporary border controls, it associated the exercise of police checks to the prevention of secondary movements and irregular migration (European Commission 2017f; Carrera et al. 2018). Similarly, the 2017 Recommendations on return equally urge member states ‘to put in place measures to effectively locate and apprehend third country nationals staying illegally’ (European Commission 2017d, 6).

There is less emphasis on measures linked to the Employers Sanctions Directive (*Directive 2009/52/EC*). The 2014 Commission communication on the application of Employers Directive identified shortcomings in the implementation of risk assessments, the number of labour inspections carried out in some member states, and lack of harmonisation in what concerns sanctions and penalties (European Commission 2014e). The Communication did not suggest the legal amendment of the Directive but discussions with MS regarding its better transposition and implementation. The European Agenda on Migration (European Commission 2015b) and Action Plan Against Migrant Smuggling (European Commission 2015d) refer to increasing labour inspections in conjunction to efforts to combat smuggling and trafficking, identify sectors where labour inspections should intensify and working with member states to set targets for the yearly number of labour inspections. However, no concrete measures have been proposed. In the 2017 Communication on the Delivery of the European Agenda on Migration (European Commission 2017k), member states are urged to increase labour inspections but again no other specific measures are set out, other than the possibility of the Commission launching infringement procedures.

Policy developments concerning the use of information systems have been largely non-legislative until 2016. Member states were, for example, encouraged to use existing information systems to enable the detection and identification of unauthorised migrants and facilitate return or readmission (European Commission 2014a). In post-2015 developments, the significance of the use of databases for internal controls was emphasised in the European Agenda on migration as well as in several other official documents (European Commission 2015b, 2015e). Initiatives in this period focus on introducing return decisions into SIS II and using databases to apprehend migrants with a view to return (European Council 2015a; European Commission 2016e, 2015e; Council of the European Union 2015d). Further, the Commission Communication on *Stronger and Smarter Information Systems* emphasised the lack of interoperability between the existing information systems (European Commission 2016e; Council of the European Union 2017a).

Two key legislative developments in the area of information systems touch on the exercise of internal controls. The proposal for an Entry-Exit system is aimed at enabling member states to identify TCNs who remain in member states beyond the authorised time limits (Council of the European Union 2017c; European Commission 2016d). The proposal concerning the use of SIS for return, which entails the entry of all return decisions into SIS II is aimed at monitoring the presence of migrants who have not complied with return decisions (European Commission 2016q). As with the existing databases, law enforcement and immigration authorities will have access to the revised SIS and Entry-Exit databases (European Commission 2016d, 2016q). The use and enhancement of databases is associated with preserving internal security (European Commission 2017k; European Council 2017).

9. Control as ‘Gatekeeping’ – Access to Social/Welfare Rights

Access to welfare and social assistance systems for asylum seekers, refugees and undocumented migrants is provided for at the level of EU law, but legislated more extensively at the level of member states, and implemented predominantly at the level of MS, or in certain setting, sub-national levels within MS. As such, measures pertaining to social welfare are considered part of internal migration controls.

Recipients of International protection

The Qualifications Directive (*Directive 2011/95/EU*) obliges member states to guarantee recipients of international protection access to employment and self-employment, as well as to employment related training (Art. 26). It stipulates that recipients of international protection who are minors are entitled to full access to education under the same conditions as nationals. Adult recipients of international protection are guaranteed access to the education system, training or retraining, and to their qualifications being recognised (Art. 27).

Recipients of international protection have access to social assistance and healthcare on the same grounds as nationals of member states. However, member states can limit access to social assistance for recipients of subsidiary protection status (Art. 29, 30).

Refugees are entitled to accommodation under ‘equivalent’ conditions as MS nationals (Art. 32). The use of the word equivalent is of interest, since it is weaker than the word ‘same’ used in relation to other forms of welfare. Further, the directive permits MS to disperse refugees within their territory.

Asylum seekers

Asylum seekers are permitted to work, but member states can prevent access to employment for up to nine months (*Directive 2008/115/*, Art. 15). Member states can also prioritise the employment access of EU and national citizens, as well as of legally resident third country nationals (Art. 15 par 2).

Asylum seekers who are minor are guaranteed access to education under ‘similar conditions’ to nationals unless an expulsion order is being enforced against them or their parents. Access to schooling must be provided at the latest within three months from the submission of an application for international protection, and states must provide preparatory classes (*Directive 2013/32/EU*, Art. 14). Adult asylum seekers have the right to vocational training (Art. 16) but are excluded from access to formal education systems.

The RD stipulates that member states must provide applicants with ‘material conditions of reception’ which provide an ‘adequate standard of living’ and which ensure ‘their subsistence and protects their physical and mental health’ (Art. 17, para 2). Member states can however limit the provision of material conditions of reception to those applicants that ‘do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence’ and request applicant to contribute to reception costs (Art. 17, para. 4, 5).

Healthcare includes at a minimum emergency care and essential treatment of serious illnesses (Art. 19). Member states can impose medical screenings (Art. 12). Accommodation can be provided in kind, in accommodation centres and other premises specifically used for asylum applicants, or in private houses, flats, hotels or other types of housing (Art. 18, para. 1-3)

The Reception Directive allows member states to make provision in the form of social assistance benefits or vouchers, and further allows states to set these forms of welfare at a standard lower than for nationals (Art. 17, para. 5). Material conditions of reception can be reduced or withdrawn on a number of grounds:

- When an applicant leaves their designated place of residence without permission; (Art. 20, para. 1(a))
- When they do not conform with reporting obligation or obligations related to the asylum process ‘during a reasonable period laid down in national law’ (Art. 20, para. 1(b))
- When they have lodged a subsequent application (Art. 20, para. 1(c))
- In case of hiding financial resources
- In cases of violent behaviour in reception centres
- If they did not lodge an application as soon as possible after entry.

Unauthorised migrants

The employment of unauthorised migrants is regulated at EU level by the *Employers Directive* (Directive 2009/52/EC) and implemented at MS level. The rationale for this directive was that obtaining work is a ‘key pull factor for illegal immigration into the EU’ and it explicitly prohibits the employment of illegally staying third country nationals with the ‘fight’ against ‘illegal immigration’ (Art. 1). The directive does not impose penalties on irregular migrants employed illegally (Peers 2016). On the contrary, it introduces mechanisms to regulate payments and access to complaints (Art. 6–7), although these have not been fully implemented by member states (European Commission 2014e, Peers 2016).

The *Return Directive* (Directive 2008/115/EC) does not stipulate whether migrants under return procedures should have access to social welfare; it merely stipulates that their situation ‘should be addressed’ and that ‘their basic conditions of subsistence should be defined according to national legislation’ (Rec. 12). Thus, any rights to social welfare and assistance emanate from international and European human rights legal instruments (Heegaard Bausager, Köpfli Møller, and Ardittis 2013) rather than EU migration and asylum law. The Return Directive only ensures access to education for minors, provision for the need of vulnerable persons and access to emergency healthcare (Art. 14), the latter two of which are extended to third country nationals excluded from the remit of the directive (Art. 4).

Developments since 2011

The second phase CEAS directives strengthened to an extent access to social rights for recipients of international protection and asylum seekers. The recast Qualifications Directive removed an article allowing member states to reduce the benefits of recipients of subsidiary

protection status and of recipients of refugee protection who ‘has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee’ (*Council Directive 2004/83/EC*, Art. 20, para. 6, 7, 2011, Art. 20; Peers 2016). It also accorded recipients of subsidiary protection equal access to employment and healthcare to recipients of refugee protection. In the 2004 Directive, member states could limit the access of subsidiary protection recipients to the labour market based on labour market considerations (*Council Directive 2004/83/EC*, Art. 26, para. 3). The Reception Directive reduced the time for asylum seekers to access employment from one year to nine months and removed a provision barring minors from education for a year. It further provided for preparatory classes and alternative access to education (*Directive 2013/33/EU*; Peers 2016). However, level of social assistance remained lower than for nationals and the recast directive maintained the absence of a clear definition of material conditions (Peers 2016; ECRE 2016d).

Access to social rights is not explicitly designated as a form of migration controls in EU documents, although there are occasional links to this effect. The ‘Back to Schengen’ communication, for example, states that member states should take ‘preventive measures in the field of access to social benefits’ in order to prevent secondary movements (European Commission 2016c). Although some provisions in the recast CEAS instruments strengthen access to social rights – for example the time frame for excluding asylum seekers from employment is reduced to three months (Pro Asyl 2016; ECRE 2016c), elsewhere the control function is evident. In relation to asylum seekers, the proposed Dublin Regulation allows for barring asylum seekers who moved to a member state other than the one of first arrival in the EU, are from or have passed through a safe third country from access to education, vocational training, housing, material conditions of reception and healthcare -- other than emergency -- as set out in articles 14--19 in the 2013 Reception Directive (*Regulation (EU) No 603/2013*, Art. 5; European Parliament 2017c). In addition to the above categories, the proposed Reception Directive (European Commission 2016j) further expands the scope for excluding asylum seekers from material conditions of reception to ‘attend compulsory integration measures’ (European Commission 2016j, Pro Asyl 2016, ECRE 2016c).

10. Return, Detention and Deportation of Unauthorised Migrants

The return of migrants without the legal right to be in the European Union has been a key element of EU asylum and migration policy, and in particular of efforts to control unwanted and unauthorised migration, for over a decade. It has been reiterated in a number of key policy documents such as the *Global Approach to Migration and Mobility* (European Commission 2011f), *The EU Action Plan against Migration Smuggling* (European Commission 2015d) and the *European Agenda on Migration* (European Commission 2015b). Equally, the significance of return policies has been endorsed in numerous JHA Council and European Council conclusions (European Council 2014; Council of the European Union 2014a).

The legal regime of return

The return regime is predominantly regulated by the *Return Directive* (Directive 2008/115/EC). Member states can issue return decisions –defined as an ‘administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return’ (Art. 3, p.4) to any illegally staying third country national (TCN) in their territory. European Union Readmission Agreements (EURAs) and bilateral readmission agreements provide the basis for returning TCN to their country of origin or a country of transit (European Commission 2011a), while (Council Directive 2001/40/EC) ensures that return decisions are mutually recognised by MS (European Commission 2014a). Member states may refrain for issuing return decisions if a TCN can be returned via bilateral readmission agreements, has been granted residence for humanitarian, compassionate or other grounds by the member state, or is in the process of renewing their residence permits (Art. 6, par. 3--5). The Directive permits the return of unaccompanied minors subject to considering the best interests of the child (Art. 10, p.1).

After issuing a return decision, the directive stipulates that member states must allow a period of between seven and 30 days, to be defined in national legislation, for voluntary departure subject to an application made by third-country nationals (Art. 7, para. 1). This period can be extended depending on individual circumstances (Art. 2). Voluntary return should be preferred over forced return (Rec. 10). The RTD point to a range of surveillance measures to facilitate the implementation of return decisions. Third country nationals who applied for voluntary return may have to regularly report to the authorities, submit financial guarantees, surrender their documents or be obliged to reside at a specific location (Art. 3).

Along with the return decision, MS must issue entry bans, with the exception of victims of trafficking, if the TCN has not complied with the obligation to return and a period for voluntary departure has not be granted. Entry bans have a maximum length of five years and can be withdrawn or suspended for humanitarian and other reasons (Art. 11). Although the preamble of the directive states that ‘member States should have rapid access to information on entry bans issued by other Member States’ (para. 18) through SIS II, there is no explicit legal requirement for national authorities to enter entry bans into SIS (European Parliament 2018a; Peers 2016).

Both return decisions and entry bans must be issued in writing, be fully justified (unless national law allows for restrictions on the basis of national and public security, defence, related to criminal offences) and include information on legal remedies. Other safeguards for TCNs include the availability of oral or written translation if requested, generalised information sheets (Art. 12, p.3), and availability of legal advice, representation and interpretation free of charge (Art 13, p.3). MS must also provide effective legal remedies against decisions related to return by an independent judicial or administrative authority, which can review and temporarily suspend return decisions (Art. 13)

The directive stipulates that MS can detain third country nationals subject to return procedures unless other less coercive measures can be used in order to carry out return and removal decisions, in particular when an individual is likely to abscond or obstructs the return or removal process (Art. 15, p.1). In addition, the European Border and Coast Guard can help MS with ‘advice and assistance’ in preventing TCNs to be returned from absconding (*Regulation (EU) 2016/1624*, Art. 27). Detention must be ordered by administrative or judicial authorities of member states, for the shortest period of time possible (Rec. 16, Art. 15, para. 1, 2) as long as removal arrangements are in progress and executed with due diligence (Art. 15, 1, 2) and it must be fully justified in writing (Art. 15, 1, 2). Judicial review periods, however, can be longer in cases of ‘exceptionally large numbers of TCNs to be returned’ (Art. 18). If issued by administrative authorities, MS must provide for judicial review and or allow the TCN the right to challenge the lawfulness of detention via judicial review. Detention decisions must be regularly reviewed, by a judicial authority if prolonged (Art. 15, p.3), and detainees must be released if there is no ‘reasonable prospect for removal’ (p.4). The Directive allows for the detention of unaccompanied and accompanied minors (Art. 17). The maximum time for detention is 18 months – maximum six months in the original decision, which can nevertheless be extended for a further 12 months if the removal cannot be effected because of the lack of cooperation by 3rd countries or delays in obtaining documentation (Art. 15, para. 5--6).

The removal of third country nationals — defined as ‘the enforcement of the obligation to return, namely the physical transportation out of the Member State of third country nationals’ (Art. 3, para. 5) is generally the responsibility of member states. The directive stipulates that MS may introduce a separate administrative or judicial order in order to enforce it (Art. 8, para. 3) and introduces a number of safeguards, such as compliance with fundamental rights, respect for the dignity and physical integrity of the individuals, and the use of coercive measures as a ‘last resort’ (Art. 8, para. 4). Removals can be postponed if it is thought they violate the principle of non-refoulement, if a TCN has submitted an appeal that has suspensive effect, if the physical or mental state is not conducive to removal or for technical reasons such as the lack of transport capacity or of identification (Art. 9).

Operational aspects of forced and voluntary return have been regulated through the return Directive as well as by other legislative and policy instruments. Member states are broadly responsible for organising return operations, informing and obtaining authorisations from third countries, and ensuring returnees have valid travel documents, selecting air carriers (*Council Decision of 29 April 2004*, Art. 4, 5). Regulation (EU) 2016/1624 established a European travel document for TCNs under return procedures, issued by member states, in order to facilitate admission of returnees by member states. (*Council Directive 2003/110/EC*) regulated returns that require transit through another MS. Further, MS’s capacity for return is facilitated by financial support mechanisms such as the Return Fund (2008-2013) and the

Asylum, Migration and Integration Fund (AMIF – 2014–2020) (European Parliament 2015);

At the same time, supranational agencies also have had responsibility over return operations. FRONTEX has had increasing involvement in return operations. *Council Regulation (EC) No 2007/2004* stipulated that FRONTEX was to ‘assist’ member states to organise joined return flights and provide information on best practices on removals and obtaining travel documents (Rec. 11, Art. 4, 9), as well as training national authority personnel on return matters (Art. 5). These responsibilities were strengthened in Directive 2014, in that it was tasked with coordinating and organising joint return flights, albeit at the request of MS in addition to financing operations and developing a Code of Conduct for joint return operations, including their monitoring (Rec. 20; Article 1, 3(v); (15)). With the introduction of *Regulation (EU) 2016/1624*, responsibilities in assisting states and organising return operations were transferred to the newly established European Border and Coast Guard (EBCG) and expanded in scope in relation to the roles previously assigned to FRONTEX. The EBCG can provide technical and operational assistance to member states ‘including through the coordination or organisation of return operations,’¹² (Art. 8, Art. 18, Art. 27).

Similarly to FRONTEX, the EBCGA can assist member states in identifying TCNs and obtaining travel documents, providing practical information on third countries where TCNs are returned, chartering aircraft for return operations, providing interpretation services, organising pools of return escorts and specialists nominated by MS, and coordinate the use of IT systems (Art. 27–31). In addition, EBCG was given responsibilities over the training of national return experts, risk assessment and information exchange on return, including best practices (Art. 8, Art. 27). Departing from previous legislation, the EBCG can set up and deploy European return intervention teams during return interventions¹³ at the request of member states, when they are ‘facing specific and disproportionate challenges when implementing its obligation to return third-country nationals’ (Art. 8, Art. 19, Art. 27, Art. 33, p.2). In a further departure from previous legislation, EBCG can organise ‘collecting return operations’, organised by third states (Art. 28). Regulation (EU) 2016/1624 also includes provisions on the use of personal data processed during return operations (Art. 48).

Assisted Voluntary Return programmes are not regulated by the Return Directive, but have been operated by national authorities in cooperation with NGOs, in particular IOM (European Commission 2014a; Koch 2016). Under Regulation (EU) 2016/1624, the European Border and Coast Guard can coordinate, organise and support voluntary returns (Art. 27).

MS also had the obligation to establish ‘effective’ forced return monitoring systems (Art. 8, 6) by appointing independent monitors — often an independent human rights authority or NGO — for JROs (European Commission 2014a). Under Regulation (EU) 2016/1624, the EBCGA is responsible for creating a pool of forced return monitors nominated by MS (Art. 29). While

¹² Defined as ‘an operation that is coordinated by the European Border and Coast Guard Agency and involves technical and operational reinforcement being provided by one or more Member States under which returnees from one or more Member States are returned either on a forced or voluntary basis’ (Art. 2 (14)).

¹³ ‘Return intervention’ means an activity of the European Border and Coast Guard Agency providing Member States with enhanced technical and operational assistance consisting of the deployment of European return intervention teams to Member States and the organisation of return operations (Art. 2 (15)).

the returns directive did not specify stages of removal operations where monitors should be present, Regulation (EU) 2016/1624 returns should be monitored from ‘the pre-departure stage until the hand-over of the returnees in the 3rd country of return’ (Art. 28, p.6). Under Regulation (EU) 2016/1624, third countries can provide ‘means of transport and forced-return escorts’ in collecting return operations (Art. 28, 3).

Developments since 2011

As with other aspects of EU control regime, return presented problems in what concerns policy harmonisation. The Returns Directive leaves significant discretion to MS in what concerns the implementation and interpretation of its provisions. MS can opt not to apply the provisions of the Returns Directive on individuals apprehended in border regions under Article 13 of the Schengen Borders Code (*Directive 2008/115/EC*, Art. 2; European Commission 2011a). Bilateral readmission agreements can thus allow return of migrants apprehended at borders within very short deadlines (European Commission 2011a). Although the directive stipulates that detention of illegally staying third country nationals for the purpose of removal should be kept at a minimum (Rec. 16), the exact length of pre-return detention allowed is determined by member states, and the directive does not specify rules for extending detention to 18 months (European Parliament 2015). The directive equally does not specify the requirements for detention facilities in terms of room size, sanitation or access to outside space and nutrition, although policy documents stress these must be compatible with Article 4 of the Charter for Fundamental rights (European Commission 2014a). Similarly, member states determine what constitutes ‘reasonable intervals’ for the review of detention decisions, whether appeals against detention decisions should have a suspensive effect, or when return decisions should be issued (European Commission 2014a).

The ‘grey areas’ in the directive and the discretion left to member states in several areas of the directive engendered considerable discrepancies in terms of its implementation by member states, evidenced in several studies (European Commission 2016a, 2014a; FRA 2011). Pre-return detention length varied considerable among member states (European Commission 2014a). MS detained potential returnees even when the grounds for detention were not fulfilled and beyond the maximum 18 months (European Commission 2014a; FRA 2011). CJEU ruled that both these practices are contrary to the provisions of the Return Directive (Said Shamilovich Kadzoev (Huchbarov). 2009). Contrary to the provisions of the directive, detainees were held with ordinary prisoners in several MS (European Parliament 2015; Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik 2014, 2014). Differing practices were also observed in relation to the detention of unaccompanied minors and families, the implementation of alternatives to detention, and the review of detention decisions (European Commission 2014a; European Parliament 2015). Grounds for issuing entry bans have varied among member states as did their length and procedures for entering entry bans into the SIS II system (European Migration Network 2014, 2015). Monitoring practices have also varied significantly among member states (European Commission 2014a).

In response to the lack of harmonisation in national practices and low rate of returns, the 2014 Communication made a number of policy recommendations, including improving the implementation of the directive and cooperation among member states, a more extensive

use of databases such as VIS and SIS, strengthening the role of FRONTEX and issuing a Returns Handbook to enhance the implementation of return policies among Member states (European Commission 2014a). These policy proposals were endorsed by the June 2014 conclusions on return policy, which however explicitly stated a preference for non-legislative measures in the field of return (Council of the European Union 2014a). They were, to an extent, superseded by developments in the context of managing the 2015 refugee 'crisis'.

In this context, return was identified as policy priority in managing migration and forced displacement. In a special meeting in April 2016 the European Council proposed 'creating a new return programme for the rapid return of 'illegal immigrants' [sic] from frontline member states, coordinated by FRONTEX' (Council of the European Union 2015a). While not focusing on frontline states specifically, the European Agenda on Migration (European Commission 2015b) designated return as one of the key 'pillars' in the management of the 'migration crisis' (p.6), and identified cooperation with third states, better implementation of the Returns Directive, and better operational cooperation with a greater role for FRONTEX. The perceived low rate of returns was identified as problem affecting policy in a range of EU documents, including a letter for commissioner Avramopoulos (Council of the European Union 2015b; Slominski and Trauner 2018; European Commission 2015b). In short, the 2015 developments increased the political pressure to increase the rate of returns as a way to manage the 'migration crisis' (DeBono 2016) and create a 'more swift return system' (European Commission 2015b, 10). Further, returns were explicitly linked to managing refugee movements and maintaining public support for the EU's refugee protection system (Council of the European Union 2015a, 2015b). Further, return policy in particular is increasingly associated with 'abuses of the asylum procedures' which member states are called to address (Council of the European Union 2016c, European Commission 2017, European Commission 2017d, Rec. 9a).

Initial responses following the EAM resulted in an Action Plan (European Commission 2015e) and Return Handbook (European Commission 2017h), and a set of *Council conclusions on the future of return policy* (Council of the European Union 2015f), adopted in October 2015, which set the direction for legislative and non-legislative developments in the field of return. However, the perceived low rate of return and political imperatives among member states to increase returns led to further policy developments. The 2016 JHA conclusions (Council of the European Union 2016c) proposed a set of measures that made for a considerably more restrictive interpretation of the provisions of the Returns Directive, which were incorporated in the renewed Action Plan (European Commission 2017) and ensuing 2017 *Recommendations on making returns more effective when implementing the Directive 2008/115/EC* (European Commission 2017d). Increasing the rate of returns remains a priority at present and the foreseeable future (Council of the European Union 2016c). Policy strategies to address the perceived weaknesses of return policy included strengthening operational and financial support for member states, enhancing cooperation among member states and European agencies, addressing discrepancies in the implementation of the Returns directive, and increasing cooperation with third countries. Both legislative – in contrast to the Council's earlier reluctance – and non-legislative, informalised measures were adopted to this end (Slominski and Trauner 2018).

Measures strengthening operational and financial support for member states present the most activity in terms of legislative change. European institutions and member states agreed with strengthening the role of FRONTEX in supporting member states with return operations,

joint return flights and cooperation with third countries (European Commission 2015e, Council of the European Union 2015f) and endorsed legislative amendments in relation to FRONTEX. These developments led to the introduction of Regulation (EU) 2016/1624 establishing the European Border and Coast Guard Agency, which was given an expanded role in EU return policy, covering both forced and voluntary returns (Slominski and Trauner 2018). Member states were urged to use ‘collective return operation’ organised by third countries under the EBCG regulation (European Commission 2017, 11). In terms of financial support, a budget of 806 million Euro was approved to support return activities via AMIF (Council of the European Union 2015f, European Commission 2017, European Commission 2017d, Slominski and Trauner 2018).

In what concerns improving cooperation and coordination among member states, apart from the introduction of a uniform travel document in order to facilitate return (*Regulation (EU) 2016/1953*), other policy measures evolved around using existing legal and operational systems. The June 2015 JHA council conclusions, for example, linked strengthening the ‘safe country of origin concept’ with increasing returns (European Council 2015a). Both the Commission and the JHA Council advocated the use of EU information systems -- SIS, VIS and Eurodac – to facilitate MS cooperation on return (European Commission 2015e; Council of the European Union 2015f, 2016c). In particular, proposals focused on entering return decisions and entry bans into the SIS II database (Council of the European Union 2015f, 2016c). In June 2015, the European council decided that all return decisions by MS would be introduced into the SIS (European Council 2015a). The 2017 Recommendations equally urged member states to systematically enter entry ban alerts into SIS (European Commission 2017, 24). The Integrated Border Management Application system was highlighted as a mechanism to improve cooperation on return among member states (European Commission 2015e; ECRE 2017). The recording and sharing of information among member states through IRMA is referred to in the 2017 Action plan as a solution to lack of statistical information (European Commission 2017, 5).

Voluntary returns and in particular assisted voluntary return programmes constituted a further area of focus. The 2015 Action Plan (European Commission 2015e) expressed a preference for voluntary return as a more cost effective option than forced return. At the same time, it suggested that AVRr could be a ‘pull factor’ and that discrepancies in the levels of benefits offered by AVRr could lead to ‘return-shopping’ – although the document suggests that evidence for these claims had not been obtained. The same assumption was repeated in the 2016 return conclusions (Council of the European Union 2016c) and 2017 Action Plan (European Commission 2017) and Recommendations (European Commission 2017d), which urged member states to comply with the Council’s Non-Binding common standards for Assisted Voluntary Return (and Reintegration) Programmes implemented by member states (Council of the European Union 2016b).

A further set of policy measures concerned the interpretation and implementation of the directive by member states (European Commission 2015e; Council of the European Union 2015e; Slominski and Trauner 2018). Several areas of the returns policy implementation have been identified as requiring improvement and harmonisation so as to strengthen the return regime. For example, member states were called to improve practices on issuing return decisions by issuing them systematically (European Commission 2015e; Council of the European Union 2015f). The 2017 Recommendation (European Commission 2017d) includes more extensive guidance on issuing return decisions than previous documents. It

advises MS to issue return decisions even when the third country national does not have valid ID or travel documents, immediately following the rejection of an asylum application or application for residence permit, and that return decisions should have unlimited duration (European Commission 2017, Rec. 11, (5), (6)). Further, it recommends that MS use the clause on the exclusion of border areas (Art. 2 (2)), in particular ‘when facing significant migratory pressure (European Commission 2017, 7).

The implementation of provisions on detention constitutes a particular area of focus. In the 2015 Action Plan and 2015 Council conclusions, MS were urged to use detention ‘as a legitimate measure of last resort’ (European Commission 2015e, 4) to prevent absconding and secondary movements, but recommended that MS explored alternatives to detention and less coercive measures (Council of the European Union 2015f; European Commission 2015e). The Action plan also encouraged states to use the emergency clause of Art. 18 of the Returns Directive in order to implement ‘simplified and swift’ return procedures on migrants apprehended at borders as stipulated in national laws. By contrast, the 2016 Council Conclusions (Council of the European Union 2016c) invited member states to use detention to avoid absconding and prevent secondary movements to other MS. In parallel, the EU-Turkey statement (European Council 2016b) allowed for the systematic and extended detention of asylum seekers and irregular migrants under the hotspot regime (Neville, Sy, and Rigon 2016). This call for a more extensive use of detention is followed through in the 2017 Action Plan and Recommendations (European Commission 2017; European Commission 2017d). Member states were urged to use the full length of detention limits – up to 18 months – allowed by the Return Directive (Preamble, 16; (10)); to allow the return and detention of minors (Rec. 22, 24 (13)) where prohibited in national legislation; to use more grounds for determining whether a third country national presents a risk of absconding so as to facilitate detention (Rec. 15, 16). The use of detention under the Returns directive was proposed in order to facilitate the fingerprinting of asylum seekers under the EURODAC directive if asylum applicants refuse to comply (European Commission 2015c; Council of the European Union 2015c).

A further development in return policy concerned the procedural and legal safeguards of the Return directive. The 2016 Council conclusions proposed

To effectively address hurdles encountered during the return process, while in all cases safeguarding effective legal protection, by reducing administrative burdens and aligning and simplifying rules and regulations to overcome procedural challenges, especially in relation to the application of detention, the suspensive effect of legal remedies, and unfounded multiple and last-minute asylum applications and appeals with the sole purpose of frustrating return (Council of the European Union 2016c, 5)

These suggestions are reflected in the 2017 Action Plan and Recommendations, which urge member states to reduce administrative hearings related to return and detention; shorten time limits for lodging appeals against return decisions as well as the suspensive effect of appeals and have fewer procedures for examining the risk of *refoulement* (European Commission 2017d, Rec. 21 (12); ECRE 2017). As with the 2015 Action Plan, the Recommendations suggest that MS use the derogation for emergency situations stipulated in Art. 18 of the Return directive.

Overall, the 2017 Recommendations, Action Plan and Handbook signal a departure towards

a more ‘punitive’ approach, which proposes the expansion of detention, lowering safeguards and standards, and expanding the use of coercive policy measures (Amnesty International 2017; ECRE 2017). In addition to the above provisions, MS are encouraged to use ‘effective, proportionate and dissuasive’ sanctions in accordance to national laws against those intentionally obstructing return procedures (p.11), although the nature of such sanctions is not specified. This stipulation seems at odds with judgment C 61/11 PPU (Hassen El Dridi, alias Soufi Karim 2011), which ruled that the Returns Directive precludes national legislation allowing the imprisonment of a TCN for refusing to leave the country. Claims of health problems and requests for health examinations are seen as efforts to derail the implementation of return decisions, which require member states to take measures to address (European Commission 2017d, Rec. 14, (3)a, (9)c; ECRE 2017). Member states are urged to allow access to voluntary departure only after a request by a TCN (p.17), shorten time limits for voluntary departure (p.20) to limit access to AVR and reintegration programmes if a TCN attempts to hinder return (ECRE 2017). Member states are urged to ensure that entry bans have maximum length by issuing them on the day of the deportation of a TCN; monitor compliance with voluntary departure so as to issue entry bans if TCNs do not comply. The 2017 Action Plan (European Commission 2017) also urges member states to make use of information on criminal convictions to end legal stay and initiate return procedures (p.6).

Readmission

Readmission agreements are closely linked to return policy and the aim of controlling irregular migration by facilitating ‘the swift return of irregular migrants’ (European Commission 2011a, 2; Council of the European Union 2011a, 2014a). They stipulate mutual obligations for the European Union member states and signatory non-member states to readmit their own nationals, third country nationals and stateless individuals who have been found to be irregularly staying in their territory (European Commission 2011a; European Parliament 2015). Authority to enter readmission agreements was established with the Treaty of Amsterdam (1999) while the Treaty of Lisbon (2005) accorded to the European Parliament the power to approve readmission agreements before their conclusion (European Parliament 2015). The European Commission conducts negotiations with third countries following authorisation by the Council of Ministers (European Parliament 2015).

To date, the European Union has entered readmission agreement with 17 countries (European Commission 2016p, table 1). At the time of writing, negotiations were ongoing with a further five countries -- Morocco, Algeria, Nigeria, Jordan and Tunisia (Council of the European Union 2015b; European Commission 2017c). In addition to these, Member states can enter bilateral readmission agreements with third states, as well as other agreements such as Memoranda of Understanding.

All EURAs currently in force contain standard clauses on:

- *The readmission of nationals of the signatory member state who were found to have entered or reside in a MS without authorisation*
- *The readmission of third country nationals and stateless persons who entered without authorisation a European Union member state from the territory of the signatory NMS, or held a valid visa or residence permit from the signatory NMS when they entered a*

EU member state at the time of the readmission application

- *The readmission of nationals of a MS member state who were found to have entered or reside in the signatory MS without authorisation*
- *The readmission of third country nationals and stateless persons who entered without authorisation the territory of the signatory NMS, or held a valid visa or residence permit from the signatory NMS when they entered a EU member state at the time of the readmission application. All EURAs in force outline these provisions separately for EU member states and signatory NMS, with the exception of the EURAs with Ukraine and Pakistan. These outline obligations as mutual between requested and requesting states*
- *Readmission that happened in error*
- *The procedure of readmission, including provision on applications, evidence for establishing the identity of nationals, TCNs and stateless persons, time limits and arrangements regarding transportation*
- *Provisions on transit operations towards a destination state, grounds for a requested state to refuse transit, and transit operations*
- *Arrangements regarding costs*
- *Data protection arrangements*
- *Non-affection clauses stipulating compliance with human rights instruments and allowing for informal readmission arrangements*
- *Provisions for the implementation of readmission agreements, including implementation protocols (European Commission 2016p)*

Joint Readmission Committees, comprised of representatives of member states and non-member states oversee the implementation of EURAs (European Commission 2011a; European Parliament 2015).

Developments in Readmission policy since 2011

The significance of migration agreements as a control tool is a recurrent theme in key EU policy documents such as the Stockholm Programme (European Council 2010), Global Approach for Migration and Mobility (European Commission 2011f), the European Agenda on Migration (European Commission 2015b) and the Partnership Framework (European Commission 2016i). Further, readmission agreements are an example of the externalisation of control policies, in that they transfer responsibilities for aspects of EU policies to third countries (Wunderlich 2013).

The 2011 evaluation of readmission agreements and national studies commissioned by the EMN highlighted the shortcomings of EURAs, including inconsistent use by MS and not taking advantage of clauses in the directives that could facilitate returns (European Commission 2011a). Member states were likely to prioritise return via bilateral agreements with third countries, citing the absence of implementing protocols for EURAs (Council of the European Union 2011a; European Commission 2011a). Third countries, on their part, faced limitations in their operational and administrative capacities to implement readmissions, especially within the time limits proscribed by the detention clauses of the Return Directive (*Directive 2008/115/EC*; European Commission 2011a, 2016a; European Parliament 2015). Reported practical impediments also included delays in the responses of third countries,

non-issuance of travel documents, and insufficient cooperation over the return of third country nationals (European Commission 2016a; European Parliament 2015). In short, the existence of EURA does not necessarily lead to its full implementation (Cassarino and Giuffr  2017).

Further, negotiations for entering EURAs with third states can be a slow and laborious process (European Parliament 2015). Negotiations with Morocco, for example have been ongoing since 2000 (Wunderlich 2013). While perceived to be of great benefit to the EU and its member states, non-member states have been resistant to them because of high economic and operational costs and in particular because of the obligation to readmit third country nationals (European Commission 2011a, European Parliament 2015, Wunderlich 2013). Third countries have been reluctant to accept non-nationals without substantial incentives -- financial support for implementing EURAS and providing for the reception of TCNs, visa liberalisation, but also trade and development aid (European Commission 2011a, European Parliament 2015). The necessity to provide such incentives is clearly acknowledged by the Commission and the Council and such incentives are customarily offered during negotiations (Council of the European Union 2011a, 2014a, European Commission 2011a, Lagrand 2016, Wunderlich 2013). While the Commission suggested entering agreements with both countries of origin and transit, the Council was in favour of prioritising countries of origin and returning migrants to their country of origin rather than transit (Council of the European Union 2011a, European Commission 2011a, European Parliament 2015). In the 2014 Conclusions on Return, however, the council acknowledged to a greater extent the significance of transit countries in the context of readmission (Council of the European Union 2014a).

The Commission Evaluation proposed that Readmission agreements are embedded in other foreign policy tools, such as framework partnership agreements with third countries and other foreign policy tools (Council of the European Union 2011a, 2014a; European Commission 2011a). Article 13 of the Cotonou Agreement, which creates an obligation for African countries to readmit their own nationals without the need for separate readmission agreements and 'further formalities' (*The Cotonou Agreement and Multiannual Financial Framework 2014-20 2010*) exemplifies this approach, which became increasingly pertinent in the following years.

As with return, the readmission of TCN increased in importance under the European Agenda on Migration which referred to 'the need to *ensure* [author's highlight] that third countries fulfil their international obligation to take back their own nationals residing irregularly in Europe' and use 'all leverage and incentives in its disposal' (European Commission 2015b, 9–10). The latter statement points to the increasing emphasis placed on using a wide range of non-migration instruments – such as high-level dialogues and development aid – in order to increase readmission rates (Council of the European Union 2015e, 2015a, 2016c). Readmission is designated as a priority, where a 'clear political message [...] about the *necessity* to cooperate on readmission' needs to be conveyed by individual member states (Council of the European Union 2015b, 6). It is unclear in this document why cooperating with the EU on readmission is considered a *necessity* for third countries as opposed to the EU. However, it is consistent with the approach adopted in the Commission's communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration the increasing emphasis on conditionality (European Commission 2016i). The Commission also shifted its position towards prioritising readmission agreements

with countries of origin rather than transit (European Commission 2015b, 9–10, 2016i). The June 2015 letter from Avramopoulos refers specifically to negotiating readmission with sub-Saharan African countries with a view to implementing Article 13 of the Cotonou agreement¹⁴ so as to lessen the reluctance of North African countries to sign readmission agreements forcing them to accept third country nationals (Council of the European Union 2015b). ‘Leverage’ instruments are also to be used to accept the European travel document for TCNs, which third states have been reluctant to accept.

In this context, two key policy developments can be observed in the area of readmission since 2015: a greater insistence on using negative – as well as positive -- incentives and a wider use of non-migration instruments and informal measures to enforce readmission (European Commission 2016i; Council of the European Union 2016c, 2). Positive incentives, such as ‘strengthening third countries’ capacity to ensure functioning civil registries and fingerprint or biometrics digitalisation’ development aid and preferential treatment in trade (European Commission 2016i, 7) remain key measures in order to ensure cooperation on readmission. Projects ‘enabling third countries to fulfil their obligations to readmit their nationals’ are presented as a condition for support under ‘existing financial instruments’ such as the Trust Fund in Response to the Syrian Crisis, the Emergency Trust Fund for Africa, the European Neighbourhood Policy Instrument and development aid (European Commission 2016i, 9). As with other migration control measures, economic support to third states is made conditional on them showing cooperation on readmission (European Commission 2016i; European Parliament 2017d). Negative incentives, while not a novel measure¹⁵, are accorded a far greater role than in previous policy documents which focused on primarily positive incentives (e.g. European Council 2015a). In the Commission’s words, ‘there must be consequences for those [third countries] who do not cooperate on readmission and return’ (European Commission 2016i, 9). While the ‘consequences’ are not spelt out, it can be surmised that non-cooperation on readmission is to result in the EU withholding development aid and preferential trade deals. It remains to be seen how effective such an approach will be in the future, as increased pressure on third countries can be counterproductive and undermine cooperation and trust (Cassarino and Giuffré 2017). According to the commission’s own evaluations, both formal and informal negotiations on readmission appear slow (European Commission 2017g).

Post 2015 developments also see an emphasis on non-legislative — invariably characterised as ‘informal’ and ‘practical’ -- measures to facilitate readmission (European Commission 2017, 1; European Commission 2017o). In order to implement the goal of increasing returns, member states are urged to use a range of non-legally binding measures, such as memoranda of understanding and exchanges of letters (European Commission 2016i; Council of the European Union 2016c) and ‘not necessarily formal readmission agreements’ (European Commission 2016i, 7). Thus, readmission arrangements have been pursued through a range of instruments high-level dialogues on migration, Common agendas on migration and mobility (CAMMS), joint migration Declarations (JMDs), Joint Ways Forward,

¹⁴ As noted by Koeb and Hohmeister (2010) there is some lack of clarity as to whether Article 13 is self-implementing or requires further negotiations for self-standing readmission agreements.

¹⁵ In the 2011 Conclusions on Readmission, the Council did refer to the proportionality and conditionality of incentives as well as their withdrawal in case of non-cooperation (Council of the European Union 2011a).

and Standard Operating Procedures (SOPs), concerning mainly the identification of third country nationals under return procedures (Cassarino and Giuffré 2017; European Commission 2017c, 2017o; European Parliament 2017b).

The reasons for turning to ‘informal’, ‘flexible’ and ‘practical’ readmission arrangements are manifold. One justification used by the European commission is that third countries do not wish to enter negotiations because of domestic political considerations (European Commission 2017o). However, as Cassarino and Giuffré (2017) argue, informal readmission arrangements would not necessarily address this issue, or the lack of mutual trust that the Commission also identifies as a reason for the reluctance of third countries (European Commission 2017o). It is evident, however, that the European Union wished to avoid the protracted negotiations that characterise formal EURAs (Cassarino and Giuffré 2017). Avoiding the parliamentary scrutiny of formal readmission negotiations, especially in light of the Parliament’s opposition to making development aid conditional to cooperation by third countries (European Parliament 2016b, 2017d), appears to be another consideration in preferring informal approaches (Cassarino and Giuffré 2017). As stated by the Commission itself, informal arrangements are outside the scope of international, EU and national law (European Commission 2017o; International Federation for Human Rights 2016) and are therefore beyond the scrutiny of courts (Gkliati 2017, Order of the General Court (First Chamber, Extended Composition) of 28 February 2017 NF v European Council 2017).

The changing dynamics of the post-2015 readmission landscape have also brought into focus one of the shortcomings of readmission agreements. On the one hand, entering informal readmission arrangements with the aim of increasing returns, despite stated commitments to comply with international and European laws, entail significant risks to the rights of migrants (European Parliament 2016b, 2017d). The European Parliament as well as human rights organisation and NGOs have been critical of negotiations with countries such as Eritrea and Nigeria, where respect for the rights of both nationals and TCNs is not assured (European Parliament 2016b, 2017d). The Joint Way Forward with Afghanistan, in particular, attracted widespread criticisms for the lack of transparency of its negotiation and the risks it entails for Afghan citizens in need of international protection, as it allows for unlimited forced returns (European Parliament 2017b; International Federation for Human Rights 2016). On the other, while EU official documents represent readmission agreements as a matter of mutual benefit for the EU and third countries, they are inherently unequal in terms of power (Cassarino and Giuffré 2017). Economic and political disparities mean that the EU is in a considerably stronger negotiating position (Lagrand 2016). The recent shift towards conditionality illustrates that the European Union is not only aware of its economic and political power but also not averse to exercising it in order to pursue objectives such as return and readmission, in a manner often contrary to the interests of third countries (Fassi and Lucarelli 2017).

The most prominent example of informalised readmission arrangements in the context of managing the 2015 ‘crisis’, and the effects of such arrangements in terms of legal scrutiny is the EU-Turkey Statement. The Statement dictated the return of third country nationals entering Greece in an irregular manner to Turkey, unless they applied for international protection, in exchange for financial support for Turkey and resumed talks on visa liberalisation (European Council 2016b). Returns to Turkey under the Agreement were judged beyond the scope of European Courts. A CJEU order in 2017 on a case brought by three third country nationals under return procedures established that Court had no

jurisdiction over the Agreements since it was entered by member states rather than EU institutions (Gkliati 2017, Order of the General Court (First Chamber, Extended Composition) of 28 February 2017 NF v European Council 2017). Given the shortcomings of the Statement such as the designation of Turkey as a safe third country and lack of human rights guarantees, the European Parliament opined that it should not be replicated as a blueprint for readmission arrangements with other countries (Council of Europe 2016).

11. Conclusion

The analysis of legal and policy framework on border and migration control in the EU that we have presented is characterised by a high degree of complexity. We need to account for the high number of legal frameworks, instruments, measures and actors involved. For the case of legal frameworks, we first of all have to differentiate between those that were originally rooted in intergovernmental agreements that predate their incorporation into the framework of the EU treaties, such as the Schengen Acquis and the Dublin Convention, as well as their later re-codification in terms of European Union regulations and directives. While the latter have properly superseded the former, the origins and inherent rationales can still be traced to date. This is also reflected in the various particular instruments that were introduced since the Amsterdam Treaty. There is no overarching legal or policy framework which regulates border management and migration control. ‘Agreements’ such as the EU-Turkey Statement demonstrate the intergovernmental mechanism continue to be an option in the EU policy process, by-passing the legal scrutiny of formal EU institutions.

The EU legal framework still leaves a lot of discretion to member states. For one, this concerns how EU legislation is transposed and interpreted in domestic law, for the other, it concerns the lack of enforcement competences of EU institutions despite the Europeanisation of the two policy fields. This mismatch between European policy and national implementation and practice will be explored by the subsequent country reports of WP 2. Further, regulations and directives are accompanied by further both legally binding and non-legally binding recommendations, handbooks, best practice guides, and implementing decisions that point to a EU harmonisation process at the level of implementational practices that calls for a different research methodology. On a level above policy and legal frameworks, we observe the existence of document types such as agendas, non-papers, European Council and Council of the European Union conclusions which also play an important role in shaping the further development of policy and law. These add to the complexity of legal and policy systems.

Secondly, there is a notable absence of clear and formal definitions, both in relation to border management as well as migration control. Policy seems to be driven by self-stated objectives such as the ‘fight against illegal immigration’, ‘combatting smuggling’, ‘preventing secondary movements’ or ‘saving lives at sea’. These objectives can usually be found in the recitals of the relevant legislative acts, and, as the content analysis has shown, in most official policy documents issued by EU institutions. However, these objectives themselves are highly flexible terms, which appear to be used to mobilise support for certain policy developments.

Thirdly, the expansive character of the border both in terms of geography as well as levels of governance. Initially conceptualised akin to national borders as a line of demarcation or as a boundary, the European external border over the last decades has expanded beyond as well as into the territory of the European Union, as evidenced by the four-tier access control model and the various policy instruments connected to the different layers described in the model. For the latter, the notably quick introduction of the *European Border and Coast Guard* and the concept of ‘shared responsibility’ for the European external border underscore the perceived deficiencies of a management model for the external border that has relied on many levels and actors of governance. This of course is intrinsically connected to the

process of Europeanisation as the moulding of a supranational entity of governance, and thus not restricted to the field of border management and migration control.

Lastly, there is a complex relation between the objective of securing borders as an inherent objective of border management, and the obligations that arise from international legal regimes such as the Geneva Refugee Convention, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union as regard the protection of refugees. While these obligations are frequently invoked in policy documents, the actual policies and their formalisation in law point to the dominance of control and security objectives, and for which the invocation of international obligations act as a mere qualifier that is supposed to convey their compliance with the above mentioned legal regimes.

Appendix A: Methodology (Content Analysis)

For the qualitative content analysis, we built a corpus of documents issued by the four EU institutions involved in the policy making process: The European Commission, the Council of Ministers, the European Council and the European Parliament. We used three criteria to select appropriate documents:

- relevance – that the documents address key areas pertaining to border management and migration control or are significant in shaping the direction of EU migration policy, (such as state of the Union speeches or the European Agenda on Migration)
- representation of institution: we selected at least two documents per institution per year
- representation of years: we ensured documents were fairly evenly spread across the time period for this report (2011-2017).

Therefore most of the documents belong to one of these categories:

- Commission policy documents
- Commission legislative proposals
- State of the Union speeches
- Council of Ministers conclusions related to migration control and border management issues; ordinary conclusions if there was low availability in a year
- European Council conclusions related to migration control and border management issues; ordinary conclusions if there was low availability in a year
- Parliament resolutions on migration control and border management issues

A list of the selected documents is provided in **Appendix B**.

We created a coding framework based on aspects of interest for this report and with the broader objectives of the research aims of WP2 in mind. We also considered the role of the report as providing an overview of EU migration control policy for project partners authoring the country reports. Therefore, the key categories selected were:

- Types of migration control/border management measures
- Actors involved
- Document topics
- Narratives
- Problematisation (what problems EU institutions associate with the implementation of migration controls)
- Solutions – how EU institutions propose to improve migration controls.

More specific themes were attached to each of these analytical categories. The full list is provided in **Appendix C**.

The selected documents were uploaded onto NVivo qualitative analysis software and coded. Thematic categories were applied once to each document in order to facilitate reporting and analysis and due to time limitations. During this process new themes emerging from the documents were inductively added to the initial coding frame. After the initial coding, we used NVivo reporting functions to eliminate errors and enhance the consistency of data analysis.

Appendix B: List of Sources (Content Analysis)

European Commission

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- . 2012a. '3rd Annual Report on Immigration and Asylum (2011).' COM(2012) 250 final. Brussels.
- . 2012b. 'Implementation and Development of the Common Visa Policy to Spur Growth in the EU.' COM(2012) 649 final. Brussels.
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- . 2013b. 'State of the Union Address 2013.' Strasbourg.
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- . 2014c. 'Communication on the Application of Directive 2009/52/EC of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third Country Nationals.' COM(2014) 286 final. Brussels.
- . 2015a. 'A European Agenda on Migration.' Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2015) 240 final. Brussels.
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- . 2015c. 'EU Action Plan on Return.' COM(2015) 453 final. Brussels.
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- . 2017b. 'Progress Report on the European Agenda on Migration.' COM(2017) 669 final. Brussels.
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- . 2016. 'State of the Union 2016.'
- . 2017. 'State of the Union 2017.'

Council of the European Union

- Council of the European Union. 2011a. 'Council Conclusions on EU-Turkey Readmission Agreement and Related Issues.'
- . 2011b. 'Council Conclusions Defining the EU Strategy on Readmission.'
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Appendix C: Coding Framework (Content Analysis)

Document topic

- Border management or controls
- External migration policy
- Internal controls
- Internal security
- Migration policy - general
- Other
- Return - readmission

Actors

- European Union Agency
- European Union
- International Governmental organisation
- Member states
- NATO
- NGO
- Non-member state
- Private actors
- Subnational Actors

Types of controls

- Anti-smuggling
- Border management - control
- Databases - smart borders
- Externalised controls
- Hotspots
- Internal controls - domestic
- Internal controls – within EU territory
- Return – readmission

Narratives

- Abuse of procedures
- Complexity of flows
- Crisis
- Endangering access to rights - protection
- Smuggling
- Free movement
- Humanitarian
- Irregular migration
- Managing migration
- Numbers
- Refugee protection
- Respect for human and protection rights
- Responsibility
- Security threat

Solidarity

Control Objectives

- Enabling legal migration
- Internal free movement - preserving Schengen
- Maintaining legitimacy of policy
- Manage migration movements
- Prevent secondary movement
- Preventing irregular migration
- Preventing smuggling
- Protecting asylum system
- Protecting borders
- Protecting internal security
- Safeguard migrants' rights
- Saving lives
- Surveillance of migrant populations

Problematisation

- Changes in migration movements
- Lack of capacity - resources
- Lack of cooperation from NMS
- Lack of cooperation among actors - MS
- Lack of information and evidence
- Problems with implementation
- Unilateral actions

Solutions

- Cooperation among MS
- Cooperation between MS - EU agencies
- Cooperation with - supporting NMS
- Enforcing compliance from NMS
- Harmonising implementation
- Improving implementation
- Improving knowledge - evidence
- Improving use of EU instruments - resources
- Increasing capabilities of supranational agencies
- Increasing rate of return
- Informalisation
- Information campaigns
- Strengthen external border controls
- Strengthen extraterritorial controls
- Strengthen internal controls
- Strengthen anti-smuggling measures
- Supporting member states
- Use of databases - technology

Appendix D: Results (Content Analysis)

Theme	Year	2011	2012	2013	2014	2015	2016	2017	Total
Document topic									
Border control		1	0	4	0	1	2	3	11
External migration policy		6	3	0	1	1	2	1	14
Internal controls		1	0	0	1	0	0	0	2
Internal security		0	0	1	1	3	1	2	8
Migration policy - general		2	6	3	4	7	5	7	34
Other		0	0	1	1	1	1	1	5
Return - readmission		2	0	0	2	3	2	2	11
Schengen		4	1	2	2	2	1	0	12
Actors									
European Union Agency		11	6	5	7	15	10	10	64
EU		10	9	8	8	13	14	11	73
IGO		0	0	1	2	3	1	5	12
Member states		10	8	7	9	17	15	14	80
NATO		0	0	0	0	0	2	0	2
NGO		0	0	0	2	0	2	1	5
Non-member states		5	5	3	7	11	9	12	52
Private Actors		1	0	0	2	2	2	1	8
Types of control measures									
Anti-smuggling		1	2	4	5	9	6	9	36
Border management - control		9	7	9	7	11	10	10	63
Databases - smart borders		3	4	6	6	4	3	4	30
Externalised controls		3	7	1	6	9	3	8	37
Hotspots		0	0	0	0	8	3	2	13
Internal controls - domestic		4	2	2	3	5	1	2	19
Internal controls - intra Schengen		4	5	2	3	1	3	1	19
Return - readmission		5	5	4	5	13	9	12	53
Narratives									

Abuse of procedures	1	2	1	3	5	1	2	15
Complexity of flows	1	0	0	0	3	1	2	7
Crisis	3	1	1	2	7	4	2	20
Endangering access to rights - protection	0	2	1	0	1	0	1	5
Smuggling	3	0	2	2	4	4	4	19
Free movement	6	5	2	3	3	3	1	23
Humanitarian	1	1	4	4	7	6	6	29
Irregular migration	5	3	1	5	3	3	2	22
Managing migration	4	2	0	3	4	0	1	14
Numbers	1	1	2	1	5	3	3	16
Refugee protection	1	1	3	0	3	2	0	10
Respect for human and protection rights	5	4	5	6	8	9	3	40
Responsibility	3	3	3	3	8	3	2	25
Security threat	5	1	0	1	4	5	4	20
Solidarity	4	3	5	5	8	4	4	33
Control Objectives	0	0	0	0	0	0	0	0
Enabling legal migration	2	4	2	2	2	1	1	14
Internal free movement - preserving Schengen	3	1	0	1	3	5	2	15
Maintaining legitimacy of policy	1	1	0	0	1	1	0	4
Manage migration movements	2	1	1	0	4	4	3	15
Preventing secondary movements	0	0	0	0	1	4	0	5
Preventing irregular migration	5	8	3	6	10	6	8	46
Preventing smuggling	3	1	3	6	10	7	7	37
Protecting asylum system	0	3	0	0	2	0	1	6
Protecting borders	3	5	1	2	6	7	7	31
Protecting internal security	3	2	1	2	3	3	5	19
Safeguard migrants' rights	2	0	0	1	0	0	2	5
Saving lives	0	2	4	3	6	1	4	20
Surveillance of migrant populations	1	1	2	4	9	3	3	23

Problematisation

Changes in migration movements intensity	1	2	0	1	2	3	0	9
Lack of capacity - resources	0	0	0	1	0	0	0	1
Lack of cooperation from NMS	0	1	0	1	1	1	1	5
Lack of coordination	0	0	0	1	3	0	0	4

among actors - MS

Lack of information - knowledge	0	1	0	0	0	0	0	1
Problems with implementation	3	2	1	4	4	3	2	19
Unilateral actions	1	2	0	0	1	1	0	5

Solutions

Cooperation among MS	4	1	2	4	7	4	6	28
Cooperation between MS - EU agencies	2	3	4	1	5	5	6	26
Cooperation with - supporting NMS	8	5	4	7	9	7	9	49
Enforcing compliance from NMS	1	1	0	1	2	2	1	8
Harmonising implementation	3	2	1	3	3	1	1	14
Improving implementation	8	5	4	6	9	5	6	43
Improving knowledge - evidence	2	2	2	6	7	5	6	30
Improving use of EU instruments - resources	1	0	2	1	6	3	5	18
Increase capabilities of supranational agencies	5	2	2	4	7	5	4	29
Increase rate of return	0	1	0	1	5	5	7	19
Informalisation	0	0	0	0	1	2	3	6
Information campaigns	0	1	1	1	2	1	4	10
Strengthening external border controls	3	2	1	4	10	8	6	34
Strengthening extraterritorial controls	0	1	0	3	3	1	4	12
Strengthening internal controls	0	1	0	1	2	0	2	6
Strengthening anti-smuggling measures	0	2	1	1	9	3	6	22
Supporting MS	6	3	1	4	6	7	3	30
Use of databases - technology	4	3	5	3	7	3	4	29

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