

# MIGRATION: FUNDAMENTAL RIGHTS ISSUES AT LAND BORDERS

REPORT

|    |   |
|----|---|
| 3  | Introduction  |
| 7  | EU law governing controls at external land borders  |
| 9  | Duty to protect the state border  |
| 11 | Preventing irregular border crossings   |
| 16 | Border surveillance and apprehensions   |
| 31 | Border checks   |
| 35 | Concluding observations   |
| 37 | Endnotes  |
| 44 | Annex – Practical Guidance: Border controls and fundamental rights at external land borders |



The EU Agency for Fundamental Rights has been regularly collecting data on migration since November 2015. This report covers fundamental rights challenges at the EU's external land borders. It has been produced at the request of the European Parliament. The report reflects the situation as of 31 October 2020, unless indicated otherwise.

© European Union Agency for Fundamental Rights, 2020

Reproduction is authorised provided the source is acknowledged.

For any use or reproduction of photos or other material that is not under the European Union Agency for Fundamental Rights copyright, permission must be sought directly from the copyright holders.

Neither the European Union Agency for Fundamental Rights nor any person acting on behalf of the Agency is responsible for the use that might be made of the following information.

Luxembourg: Publications Office of the European Union, 2020

|       |                        |                   |                   |
|-------|------------------------|-------------------|-------------------|
| Print | ISBN 978-92-9461-029-4 | doi:10.2811/77893 | TK-02-20-857-EN-C |
| PDF   | ISBN 978-92-9461-030-0 | doi:10.2811/8432  | TK-02-20-857-EN-N |

## KEY POINTS

To respect and protect fundamental rights in border management and ensure full implementation of fundamental rights safeguards in the EU border management *acquis*, the EU Agency for Fundamental Rights considers necessary a combination of different actions. These include:

- ★ enhancing the fundamental rights component of existing oversight mechanisms, in particular the Schengen evaluation and monitoring mechanism;
- ★ supporting border guards in their daily work through practical guidance, tools and training;
- ★ fully embracing a victim-focused approach, and mainstreaming child and gender aspects, when combating organised crime at external land borders;
- ★ increasing the transparency and effectiveness of investigations into push-backs and ill-treatment allegations at external land borders; and
- ★ establishing independent and effective fundamental rights monitoring mechanisms at borders.

## Introduction

This report looks at fundamental rights compliance at the European Union (EU)'s external land borders, including rivers and lakes.

### European Parliament request

On 30 January 2020, the European Parliament requested the EU Agency for Fundamental Rights (FRA) to prepare a report on these borders. It noted that the report should focus on the correct application of the safeguards in the European asylum *acquis* and the provisions of the Schengen Borders Code (Regulation (EU) 2016/399). The European Parliament also requested FRA to give specific attention to push-backs and to fundamental rights violations in connection with these practices. It noted that the report should cover compliance with procedural safeguards, respect for the dignity of the person, attention to the specific needs of vulnerable persons, access to the asylum procedure, respect for children's rights in border checks, fundamental rights concerns linked to detention, as well as the capacity of EU Member States to deal with large-scale arrivals.

## Note on sources

FRA drafted this report based on desk research, including data collected through its regular migration bulletins as well as through written correspondence and phone interviews with diverse actors.

Due to public health-related restrictions triggered by the COVID-19 pandemic, FRA could not travel to border areas to the degree initially envisaged.

## In numbers

Schengen area land border:

**some 9,000 km**

EU external land border:

**some 12,000 KM**

Land-border crossing points:

**around 450**

## Note on terminology Push-backs

This report uses the non-legal term 'push-back' when a person is apprehended after an irregular border crossing and summarily returned to a neighbouring country without assessing their individual circumstances on a case-by-case basis.

See also FRA and Council of Europe (2020), *Handbook on European law relating to asylum, borders and immigration*. 2020 Edition, Luxembourg, Publications Office [forthcoming], Section 1.9.

### Focus on Schengen and external EU borders

The report does not cover internal EU borders, except where these are also external borders of the Schengen area. This is the case for Slovenia's and Hungary's borders with Croatia, Hungary's border with Romania, and the Greek-Bulgarian land border. The report does not cover the borders with Andorra, Monaco, the Holy See and the Republic of San Marino,<sup>1</sup> the land border between the Republic of Cyprus and the British Sovereign Base Areas of Akrotiri and Dhekelia,<sup>2</sup> nor the land borders of overseas territories that are part of the EU.<sup>3</sup> The Channel Tunnel connecting France with the United Kingdom is treated as a land border.

The Schengen area is the area within which persons may cross state borders without being subject to border controls, unless temporarily reinstated.<sup>4</sup> As of November 2020, the Schengen area encompasses all EU Member States, except Bulgaria, Croatia, Cyprus, Ireland and Romania. The Schengen area also includes Iceland, Liechtenstein, Norway, and Switzerland (see [map](#)). The land border of the Schengen area is some 9,000 km long.<sup>5</sup> As the European Border and Coast Guard Agency (Frontex) reported, the EU's external land border is some 12,000 km long and has some 450 border crossing points.<sup>6</sup>

### What this report covers

**Section 1** describes the applicable EU law. **Section 2** clarifies how fundamental rights affect Member States' duty to protect the borders.

The report then reviews three specific aspects of border management: activities preventing entry (**Section 3**); border surveillance (**Section 4**); and checks at border-crossing points (**Section 5**).

For each of these aspects, it illustrates current fundamental rights challenges. These range from people dying at borders to allegations of push-backs, sometimes combined with other alleged fundamental rights violations, such as excessive use of force, ill-treatment, arbitrary detention or destruction of personal belongings. The report also refers to risks of arbitrary detention, sub-standard reception conditions and lack of respect for procedural safeguards.

The report ends with concluding observations and points for future action.

The fundamental rights challenges addressed here are not new, as past FRA publications as well as documents by EU institutions and other bodies quoted in this report illustrate. In spite of increased attention by many actors, challenges persist. In some cases, the situation further deteriorated after large numbers of people arrived in 2015 and 2016, as the allegations of serious forms of ill-treatment at borders show.

## Member State action – common EU interest

In principle, the responsibility for controlling the external borders lies with EU Member States which, in performing this function, also act in the common interest of all Member States and the Union.<sup>7</sup> The European Border and Coast Guard Agency (Frontex) also plays a key role in supporting Member States.

In the framework of Frontex activities – which this report does not focus on – the European Border and Coast Guard Regulation (EU) 2019/1896 contains various tools to protect fundamental rights. One important safeguard is Article 110 of the regulation, according to which fundamental rights monitors will assess the fundamental rights compliance of Frontex operational activities.

## EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights (the ‘Charter’) applies to EU Member States when they implement EU law (Article 51 (1) of the Charter). This is the case with border management.

The Charter spells out rights and principles relevant for border controls. These include, in particular, human dignity (Article 1), the right to life (Article 2), the right to integrity of the person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the prohibition of trafficking in human beings (Article 5), the right to liberty and security (Article 6), the right to asylum and protection in the event of removal, expulsion or extradition (Articles 18 and 19), non-discrimination (Article 21), the rights of the child (Article 24), the right to good administration (Article 41), as well as the right to an effective remedy (Article 47).

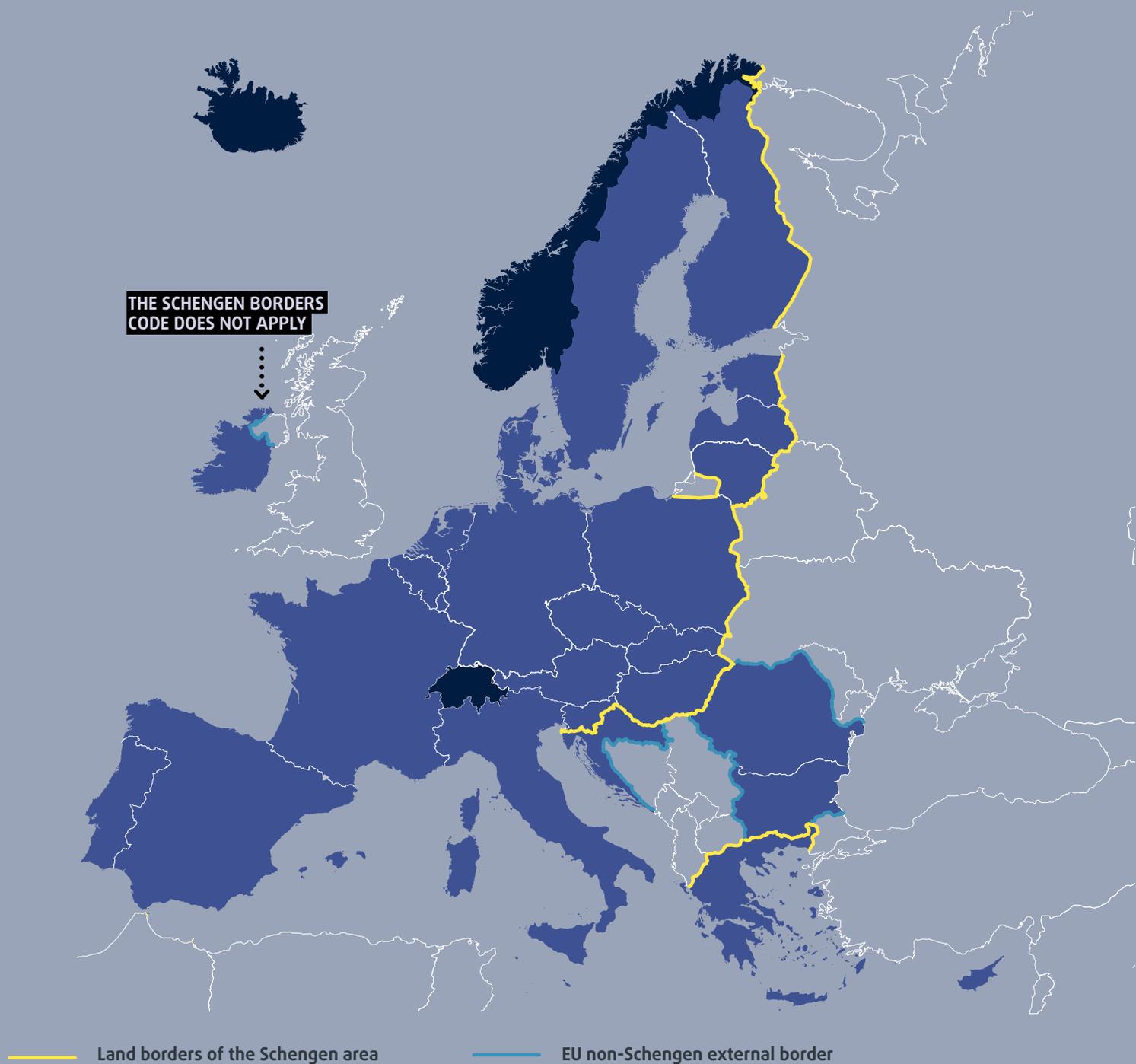
## FRA activity

### Eye on borders – early warnings

In the focus section of its Fundamental Rights Report 2016, FRA already reported that the increased number of people coming to the EU triggered the building of more fences at land borders, the criminalisation of people helping migrants and refugees, and an increase in push-backs at borders. FRA highlighted that the absolute nature of the prohibition of refoulement needs to be respected both in legislative and policy measures and in their implementation.

See FRA (2016), *Focus – Asylum and migration into the European Union in 2015*, Luxembourg, Publications Office.

# THE EU, THE SCHENGEN AREA AND LAND BORDERS



For information on the legal status of borders with micro-states and small territories that cannot be shown on the map, see the report introduction.

# 1. EU law governing controls at external land borders

The main EU law instrument applicable to external borders is the Schengen Borders Code (Regulation (EU) 2016/399). It regulates border controls at the borders of the Schengen area and at other external borders of the EU. 'Border controls' include borders checks at designated border-crossing points and border surveillance, primarily at land and at sea. The code does not apply to the land border between Ireland and the United Kingdom, which is subject to the different arrangements of the Common Travel Area between the two countries.<sup>8</sup>

Table 1 shows how relevant EU law applies to border controls. Leaving aside the land border on the Irish island, most EU law provisions apply equally to the external EU as well as the Schengen borders.

Notes:

The text under the heading 'subject matter' is not comprehensive. It includes selected issues as relevant for this report. The table does not include information on the applicability of these instruments to Dutch and French overseas territories.

**TABLE 1: EU LAW INSTRUMENTS RELEVANT FOR CONTROLS AT EXTERNAL BORDERS**

| EU law instrument   | Subject matter (selected)  | NOT applicable to (EUMS)  |
|---|--|---|
| <b>Schengen Borders Code</b> (EU) 2016/399  | Regulates conduct of border checks and border surveillance (border control)                                  | Ireland, Cyprus (border with British bases)   |
| <b>European Border and Coast Guard Regulation</b> (EU) 2019/1896                                | Regulates the framework for information exchange between Member States and with Frontex                      | Ireland   |
| <b>Convention Implementing the Schengen Agreement</b> (CISA), 22 September 2000                 | Regulates measures to take to enable free movement (text largely amended by subsequent EU law instruments)   | Ireland   |
| <b>Asylum Procedures Directive 2013/32/EU</b>   | Duty to identify and refer asylum claims, Art. 6 and Art. 8  | Ireland   |
| <b>Anti-Trafficking Directive 2011/36/EU</b>  | Duty to identify suspected victims of trafficking in human beings, Art. 11                                   | Ireland   |
| <b>Return Directive 2008/115/EC</b>   | Duty to issue a return decision to third-country nationals without a permission to stay                      | Ireland   |
| <b>Facilitation Directive 2002/90/EC and related Framework Decision (2002/946/JHA)</b>          | Duty to impose sanctions on migrant smugglers  | Ireland   |
| <b>Eurodac Regulation (EU) No. 603/2013</b>   | Duty to process data, including biometric data of asylum applicants and irregular migrants                   | -   |
| <b>Entry/Exit System Regulation (EU) 2017/2226</b>  | As of 2022, electronic recording of entry and exit of all third-country nationals coming for short-term stay | Croatia, Cyprus and Ireland; Partial use in Bulgaria and Romania (e.g. no processing of biometric data).    |
| Schengen Information System (SIS) Regulations (EU) 2018/1862, (EU) 2018/1861 and (EU) 2018/1860 | Verifying if there are any alerts against a third-country national and entering alerts in certain cases.     | Croatia, Cyprus and Ireland; Bulgaria and Romania can consult SIS but do not issue own alerts in the system |
| <b>Visa Information System (EC) No. 767/2008</b>  | Checking visa-holders upon entry and, if necessary, exit   | Croatia, Cyprus and Ireland   |

Source: FRA, 2020

The applicability of the Return Directive (2008/115/EC) at external borders is subject to an exception. The directive regulates the procedure to follow when an EU Member State apprehends a migrant in an irregular situation who does not apply for asylum. Article 2 (2) (a) allows Member States not to apply several of its provisions to persons apprehended or intercepted by the competent authorities in connection with their irregular border crossing at the external borders.<sup>9</sup> Most Member States that have an external EU land border have made use of this option, as Table 2 shows. They remain, however, bound by certain provisions and safeguards of the directive under its Article 4 (4), including the prohibition of *refoulement*.

**TABLE 2: USE OF THE RETURN DIRECTIVE'S OPT-OUT CLAUSE IN EXTERNAL BORDER CASES**

|   |  |
|---|--|
| <b>EUMS with external land borders that make use of the opt-out clause in Art. 2 (2) (a) of the RD</b>          | Bulgaria, France, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia, Spain |
| <b>EUMS with external land borders that have not made use of the opt-out clause in Art. 2 (2) (a) of the RD</b> | Croatia, Estonia, Finland, Slovakia  |

Source: FRA, 2020 [based on information provided by FRA's National Liaison Officers]

Seven EU and Schengen Member States<sup>10</sup> have local border-traffic agreements with neighbouring third countries. These are governed by the Local Border Traffic Regulation (EC) [No. 1931/2006](#) as amended for the Kaliningrad Region (Russian Federation) by Regulation (EU) [No. 1342/2011](#). These bilateral agreements allow for simplified crossing of the external borders for persons who reside in the border area.

## Legal corner

Bilateral, local border-traffic agreements with neighbouring third countries (showing month and year of entry into force):

- ★ Hungary-Ukraine (January 2008)
- ★ Slovakia-Ukraine (September 2008)
- ★ Poland-Ukraine (July 2009)
- ★ Romania-Moldova (October 2010)
- ★ Latvia-Belarus (December 2011)
- ★ Norway-Russian Federation (May 2012)
- ★ Poland-Russian Federation (July 2012)
- ★ Latvia-Russian Federation (June 2013)
- ★ Croatia-Bosnia and Herzegovina (July 2013)
- ★ Romania-Ukraine (May 2015)

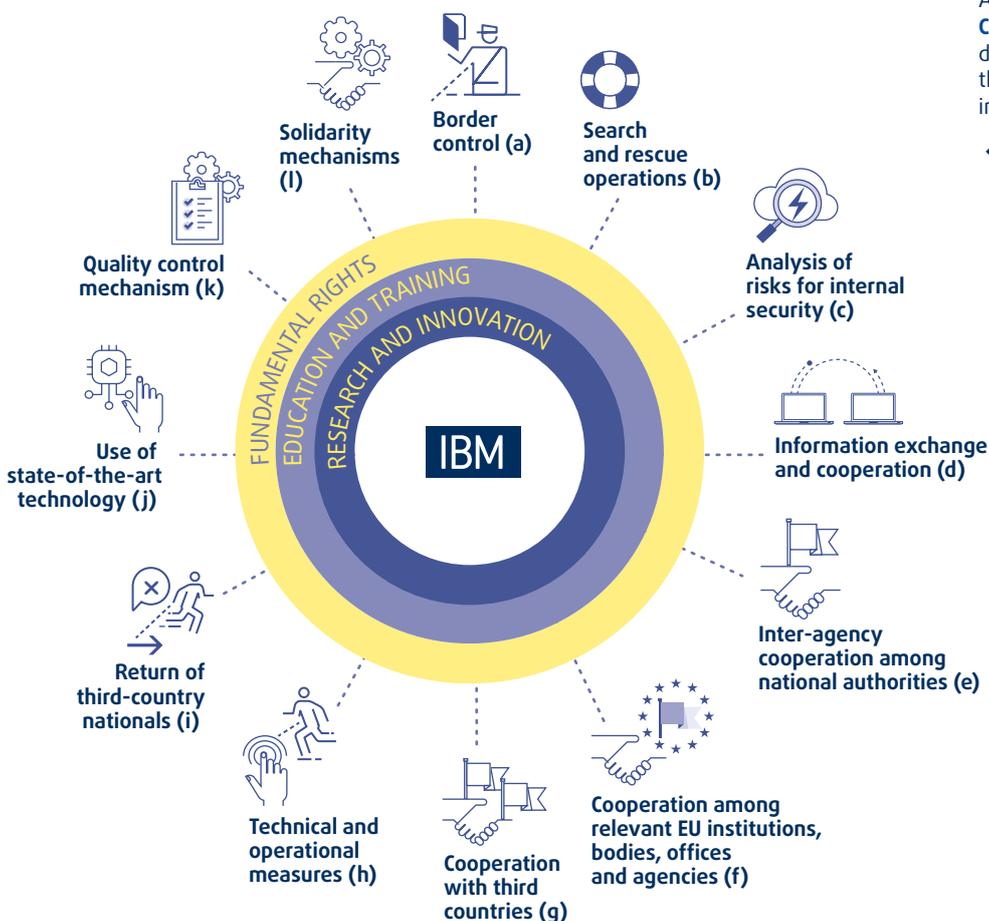
## 2. Duty to protect the state border

Under EU law, Member States are obliged to protect the external border of the EU. The Schengen Borders Code (Regulation (EU) 2016/399) lays down rules on border control of people crossing the EU's external borders. Article 5 allows the crossing of the external EU or the Schengen border only at border-crossing points and during the fixed opening hours. Article 13 of the code obliges Member States to put in place an effective border surveillance system to prevent unauthorised entry.

'Border controls' include checks at border crossing points as well as surveillance activities to prevent unauthorised crossings of the border sections between border-crossing points (Article 2 (10)-(12) of the code).

Border control is only one aspect of border management. As illustrated in Figure 1, Article 3 of the European Border and Coast Guard Regulation (EU) 2019/1896 sets out the twelve components of European integrated border management (IBM). These include activities such as risk analysis; cooperation between Member States, with EU actors and third-countries; as well as inter-agency cooperation within states. This covers, where appropriate, cooperation with national bodies in charge of protecting fundamental rights. Fundamental rights are a horizontal element of European integrated border management.

**FIGURE 1: EUROPEAN INTEGRATED BORDER MANAGEMENT (IBM)**



Note:

Article 3 of the **European Border and Coast Guard Regulation** spells out in more detail the twelve main components and three horizontal elements of European integrated border management.

Source: FRA, 2020

# Legal corner

## Article 4 of the Schengen Borders Code: the fundamental rights clause

“When applying this Regulation, Member States shall act in full compliance with relevant Union law, including [the Charter], relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (‘the Geneva Convention’), obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis.”

## FRA activity

### Highlighting fundamental rights safeguards at borders

In a joint publication with the Council of Europe’s Special Representative on Migration and Refugees (March 2020), FRA summarised the main fundamental rights safeguards that apply to migrants, refugees and asylum applicants at the EU’s external land borders.

Safeguards include, among others, the necessity and proportionality of the use of force, access to asylum, bars to removal, as well as measures taken at borders to protect public health.

The joint re-statement of law is available on [FRA’s website](#).

While exercising border control, Member States have to comply with international and EU law, including the Charter.

Article 3 of the Schengen Borders Code clarifies that border control measures must be without prejudice to the rights of refugees and other people requesting international protection, in particular as regards the principle of *non-refoulement*, meaning the return of an individual to a risk of persecution or serious harm. Article 4 of the Code introduces the duty to respect fundamental rights when carrying out border controls as a general safeguard clause. Under the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has acknowledged that states enjoy an “undeniable sovereign right to control aliens’ entry into [...] their territory”. However, it emphasised that they must exercise this right in line with the provisions of the ECHR.<sup>11</sup>

The principle of *non-refoulement* is the core element of refugee protection and is enshrined in international and EU law.<sup>12</sup> Gradually, the prohibition of refoulement has become a broader, general human rights imperative. Article 33 (1) of the 1951 Refugee Convention, Article 3 of the United Nations (UN) Convention against Torture,<sup>13</sup> and the authentic interpretation of Article 3 of the ECHR prohibit returning any individual to a risk of persecution, torture, inhuman or other degrading treatment or punishment.

EU primary law reflects the prohibition of *refoulement* in Article 78 (1) of the Treaty on the Functioning of the EU (TFEU) and in Articles 18 and 19 of the Charter. Under EU law, the principle also prohibits return to risk of serious harm, for example in case of threats resulting from armed conflict.<sup>14</sup>

As noted, the non-legal term ‘push-back’ is used when a person is apprehended after an irregular border crossing and summarily returned to a neighbouring country without assessing their individual circumstances on a case-by-case basis.<sup>15</sup>

In July 2020, to facilitate compliance with fundamental rights in the daily operational work of border-management staff, and after consultations with the Croatian Presidency of the EU Council, FRA developed practical guidance.<sup>16</sup> It suggests concrete actions that border guards and other competent authorities should take at operational level to uphold fundamental rights in their daily work. This practical guidance is annexed to this report. It focuses on five core areas:

1. Treating everyone with dignity;
2. Identifying and referring vulnerable people;
3. Respecting the legal basis, necessity and proportionality when using force;
4. Applying safeguards when holding people at borders;
5. Respecting procedural safeguards and protecting personal data.

Border guards are often the first authority that those crossing the border, including victims of crime and persons in need of protection and assistance, meet. An important obligation deriving from EU law concerns the identification and referral of persons in need of international protection, victims of trafficking in human beings, and other vulnerable people who need appropriate assistance.<sup>17</sup>

Article 16 of the Schengen Borders Code requires specialised training for detecting and dealing with situations involving vulnerable persons, such as unaccompanied children and victims of trafficking. Several tools provide relevant indicators and checklists. Some have been developed at EU level. For example, the European Commission has issued guidelines for consular services and border guards to identify victims of trafficking;<sup>18</sup> Frontex has produced restricted risk profiles on trafficking in human beings and published the VEGA handbook on children at risk at airports<sup>19</sup> (a version for land borders remains in preparation); and EASO has developed a tool to identify asylum applicants.<sup>20</sup>

## 3. Preventing irregular border crossings

### 3.1. Preventing departures

Under Article 13 of the Schengen Borders Code, Member States have a duty to prevent unauthorised border crossings. Following an integrated border management approach, Member States should cooperate with third countries, in particular with neighbouring third countries and with third countries that have been identified through risk analysis as countries of origin or transit for irregular immigration.<sup>21</sup>

The importance of cooperation with third countries in preventing unauthorised border crossings is illustrated by the following examples. The International Organization for Migration (IOM) reported that in 2019, as the EU increased its border management support to Morocco, irregular migrants reaching Spain from Morocco dropped by 54 % compared to the year before, because of Morocco's enhanced capacity to detect irregular migrants.<sup>22</sup> According to Frontex, in 2019, Morocco detected more than 27,000 irregular migrants.<sup>23</sup> Meanwhile, according to Frontex, Turkey prevented over 41,000 land-borne departures by migrants towards the EU in 2019 (excluding December)<sup>24</sup>

In the context of the European Border Surveillance System, called 'Eurosur',<sup>25</sup> Member States are obliged to provide a national situational picture that should include the pre-frontier area.<sup>26</sup> In recent years, through enhanced infrastructure at borders – such as fixed cameras placed along the border and the use of thermovision vans, satellite imagery and aerial surveillance – the EU and its Member States have significantly enhanced their capacity to detect and monitor movements of migrants and refugees at the EU's external border. An issue to further explore is whether records of such surveillance equipment could also be used to provide evidence on fundamental rights protection at borders.

Several EU Member States have upgraded installations at borders or are doing so. For example, in October 2020, Croatia announced the use of EU funds to upgrade stationary and mobile devices at the border with Serbia and with Bosnia and Herzegovina, as well as its aerial surveillance means.<sup>27</sup> Similarly, in autumn 2020, Hungary further strengthened its border surveillance infrastructure along the borders with Serbia by deploying additional assets, including helicopters, to help border surveillance from the air.<sup>28</sup>

Frontex implements Multipurpose Aerial Surveillance (MAS) activities, including at land borders. This involves deploying small manned and unmanned aerial assets – such as aircraft and drones – to border areas. These deliver near real-time videos and pictures to operations rooms in Frontex' Headquarters in Warsaw and in the Member State concerned. This information also helps national authorities to detect people who cross the border in an irregular manner.<sup>29</sup>

Depending on the terrain, vegetation and weather conditions, technical means often allow border guards to spot people at a significant distance from the border, while they are still inside the territory of a third country.

If the cooperation with neighbouring third countries allows,<sup>30</sup> such information can also be used to intercept people.<sup>31</sup> When border guards identify people moving towards the border and suspect that they intend to cross it in an unauthorised manner, they may share the information on approaching groups of migrants with the neighbouring country, so that their authorities stop them before they reach the border. There is no EU-wide data as to how many persons were prevented from reaching the EU external land border in this way.

In case of fundamental rights violations during or after the interception in the third country, the third-country authorities bear primary responsibility – for example, if the intercepted persons are subject to ill-treatment or placed in facilities under inhuman conditions.

EU Member States are bound by the duty – enshrined in Article 3 of the ECHR (Article 4 of the Charter) – not to subject individuals to torture, inhuman or degrading treatment or punishment. This duty can exceptionally apply extraterritorially when effective control over persons is exercised.<sup>32</sup>

An unresolved legal question is whether, under certain circumstances, the information-sharing by EU Member States could trigger their responsibility for any harm suffered by people as a result of their interception by the third country.

The EBCG Regulation contains fundamental rights safeguards that restrict Member States' discretion with regard to information they intend to share with third countries:

- ★ Bilateral or multilateral agreements or arrangements that form the basis for operational cooperation must respect fundamental rights (Article 72);
- ★ Member States must assess the general situation in the third country and take it into account in their cooperation (Article 72 (3));
- ★ Sharing of personal data must respect the EU data protection *acquis* (Article 89); and
- ★ Exchanging information that provides a third country with data that could be used to identify persons or groups of persons whose request for access to international protection is under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment, or any other violation of fundamental rights, is prohibited (Article 89 (5)).

Such safeguards reflect a due diligence duty for EU Member States. This obliges them to take into account the situation in the third country and not to take action when they know, or should know, that the individuals concerned face a risk of serious harm there. In practical terms, this means that before requesting third countries to intercept people approaching the EU external border outside a border-crossing point, Member States' responsible authorities should assure themselves that, once intercepted, refugees or migrants will not face ill-treatment, persecution or other forms of serious harm.

## 3.2. Border fences

The Schengen Borders Code leaves some discretion to Member States on how to implement their obligation to protect the external borders and to prevent unauthorised border crossings. It does not exclude erecting fences, although the Commission discourages their use.<sup>33</sup>

The use of fences along the external and Schengen land borders is increasing. Before 2015, only Spain, Greece and Bulgaria had fences at parts of their external land borders. By 2020, nine EU Member States had erected border fences to prevent irregular migration and cross-border crime, as shown in Table 3. Greece and Slovenia plan to extend their fences.

**TABLE 3: FENCES AT THE EU'S EXTERNAL LAND BORDER**

| Member State     | Location   | Length   | Year(s) of construction |
|------------------|--|--|-------------------------|
| <b>Bulgaria</b>  | Border with Turkey   | 235 km   | 2014-2017               |
| <b>Estonia</b>   | Russian border   | 4 km   | 2016-2018               |
| <b>France</b>    | Coquelles, Eurotunnel to the United Kingdom                  | 1 km along both sides of the main road to the tunnel | 2015-2016               |
| <b>Greece</b>    | Border with Turkey between Kastanies and Nea Vyssa           | 12.5 km  | 2012                    |
|                  | Fence planned in Ferres area                                 | 27 km  | --                      |
|                  | <i>Border with North Macedonia</i>                           | <i>37 km</i>   | <i>2015, 2016</i>       |
| <b>Hungary</b>   | Border with Serbia   | 158 km   | 2015 and 2017           |
|                  | Border with Croatia  | 131 km   | 2015                    |
| <b>Lithuania</b> | Border with Russian exclave Kaliningrad                      | 45 km  | 2017-2018               |
| <b>Lithuania</b> | Belarus  | 71.5 km  | 1999-2000               |
| <b>Latvia</b>    | Russian border   | 93 km  | 2015-2019               |
|                  | Extension planned  | 193.3 km   |                         |
| <b>Spain</b>     | Border with Morocco around the enclaves of Ceuta and Melilla | Melilla: 10.5 km<br>Ceuta: 7.8 km                    | 1996, 2005, 2009, 2020  |
| <b>Slovenia</b>  | Border with Croatia  | 198.7 km   | 2015, 2019, 2020        |
|                  | Extension planned  | 40 km  |                         |

Note:

Protection fences located exclusively around border-crossing points are not included in the table.

The fence on the border between Greece and North Macedonia is in italics as it was constructed by North Macedonia and is located on North Macedonia's territory.



Source: FRA, 2020 [based on input from national authorities and other official sources]

# FENCES AT THE EU EXTERNAL BORDER

## AS OF OCTOBER 2020



Note: Border fence at Estonia-Russia: ©iStock/NordicMoonlight; Latvia-Russia: ©iStock/FooTToo; Greece-Turkey: ©iStock/FooTToo; Greece-North Macedonia: ©iStock/tatakis; Melilla (ES)-Morocco: ©iStock/mcurado; Ceuta (ES)-Morocco: ©Reduan Ben Zakour/El Faro de Ceuta; Hungary-Croatia: ©iStock/tatakisBalkansCat.

For border fences at Lithuania-Russia, Lithuania-Belarus, Hungary-Serbia, Bulgaria-Turkey, Slovenia-Croatia, and France-United Kingdom, photos provided by national border management authorities in Lithuania, Hungary, Bulgaria, Slovenia and France, respectively.

The design of the fences varies, as the [map on border fences](#) illustrates. Some are equipped with smart technology, such as motion sensors, cameras, and loudspeakers.<sup>34</sup> In response to voiced concerns, Spain in 2020 removed the ‘concertinas’ (coil-shaped blades) from the fences of Ceuta and Melilla to prevent serious injuries of migrants jumping the fence. However, the fence was extended from 6 to 10 metres in some areas, which can also lead to serious injuries if people climb the fence and fall.<sup>35</sup>

Border fences are built on the EU Member State’s territory, usually with a margin of land strip on the outer side, in part to allow the authorities to undertake maintenance and repair work without having to ask the neighbouring country for access. This means that migrants are already on the EU Member State’s territory before they actually arrive at the fence.

The two main fundamental rights issues fences raise relate to access to asylum (Article 18 of the Charter) and to the right to integrity of the person (Article 3 of the Charter).

Border fences may limit the ability of persons in need of international protection to seek safety. Access to asylum procedures must exist in law and in practice. Where EU Member States have erected fences at the border, there must be accessible points where people can safely apply for international protection. If there are no places along the border that asylum seekers can reasonably reach to request international protection without undue delay – i.e. there are no gates in the fence which are at reasonable distance from each other or if border-crossing points are not accessible, as for example in the Spanish enclaves of Ceuta and Melilla following the COVID-19 pandemic)<sup>36</sup> – this raises serious issues in light of the obligation of EU Member States under Article 4 of the Schengen Borders Code to apply the code in full compliance with the Charter, the requirements of the 1951 Geneva Refugee Convention, and obligations related to access to international protection.

Furthermore, features that put people’s life at risk or create a risk of disproportionate harm – such as coil-shaped blades or wires giving dangerous electric shocks – do not appear to be a proportionate measure<sup>37</sup> to implement the duty to prevent unauthorised entry under the Schengen Borders Code.

## 4. Border surveillance and apprehensions

Under the Schengen Borders Code, the term ‘border surveillance’ means border control activities between border-crossing points and the surveillance of border-crossing points outside the fixed opening hours, to prevent persons from circumventing border checks and to prevent unauthorised border crossings.<sup>38</sup>

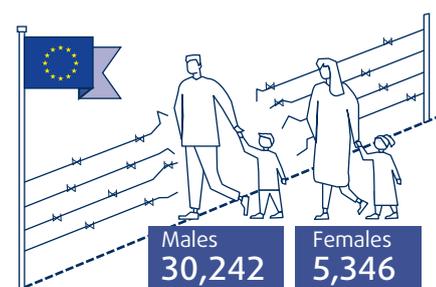
According to data Frontex provided to FRA, in 2019, a total of 35,600 people were apprehended after having crossed the EU’s external border in an unauthorised manner. At least one out of ten was a child, namely under the age of 18.

In recent years, the number of alleged fundamental rights violations reported in connection with border surveillance activities have increased significantly, as FRA noted in its 2018, 2019 and 2020 Fundamental Rights Reports.<sup>39</sup> The regularity and seriousness of alleged incidents constitute a serious fundamental rights concern. This section examines five different aspects of such activities on the basis of data covering 2018-2020, complemented by older data in some instances to show trends.



**BORDER SURVEILLANCE**

### EUROPE BY LAND



January - December 2019

**35,600\***  
**APPREHENDED**

\*Includes at least 2,250 boys and 1,510 girls / 141 unaccompanied children. For an additional 13 people, no details known.

Source: Frontex, 2020

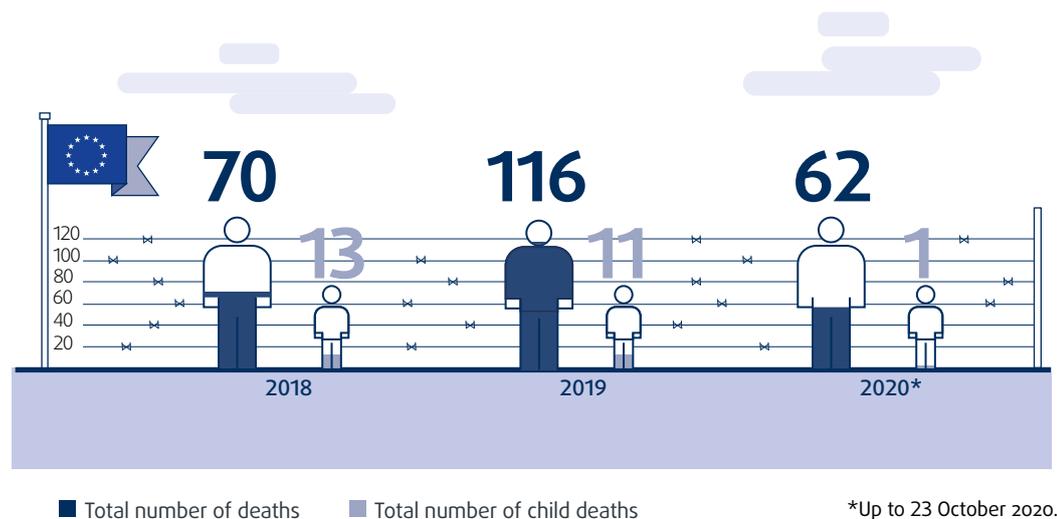
### 4.1 Deaths at land borders

Article 2 of the Charter as well as Article 2 of the ECHR guarantee everyone the right to life. According to the ECtHR, this provision also contains, in certain circumstances, a positive obligation for states to take appropriate steps to safeguard the lives of those within their jurisdiction.<sup>40</sup>

Migrants and refugees continue to die at the EU’s borders. Although land routes to Europe are less hazardous than the Mediterranean Sea crossing, overland journeys continue to claim many lives.<sup>41</sup> In a tragic event in 2015, 71 smuggled migrants suffocated inside a lorry left by smugglers at the side of a motorway in Parndorf, Austria.<sup>42</sup>

Between 1 January 2018 and 23 October 2020, the IOM Missing Migrants Project recorded the deaths of 248 people at the EU external land borders (without counting deaths at Schengen borders between EU Member States).<sup>43</sup> Information on sex and age is only known for 203 people: among them, 149 were men, 28 women and 25 children. As not all incidents are known, real numbers may be higher.

**FIGURE 2: DEATHS AT THE EU'S EXTERNAL LAND BORDERS, JANUARY 2018 – OCTOBER 2020**



Source: International Organization for Migration

During this period, the most common cause of death was drowning in border rivers (102 deaths), followed by vehicle accidents (56 deaths), various forms of violence (20 deaths), train-related incidents (18 deaths, including electrocution on rails), and exposure to hardship (14 deaths, including deaths linked to hypothermia and exhaustion). Other causes include sickness and falling from mountain slopes or border fences.

Most deaths occurred on the Greece-Turkey land border. IOM recorded 86 persons, including 16 children, who drowned in the Evros river; and 47 persons who died of other causes, mainly vehicle and train incidents. At the external land borders along the Western Balkan route, IOM recorded 84 deaths (without counting deaths at Schengen borders between EU Member States). IOM also recorded 31 deaths on the Spain-Morocco land border, in or around the border fences in Ceuta (7 persons) and Melilla (24 persons). It also recorded three deaths at the Eurotunnel between France and the United Kingdom; and four deaths along the Finnish border with the Russian Federation.

Border guards are regularly required to carry out search-and-rescue operations. For example, the Hellenic Coastguard has, on different occasions, initiated search-and-rescue operations for people trapped on islets of the Evros River, or who went missing after their boat capsized.<sup>44</sup> The Croatian border police also initiated several search-and-rescue operations, some of them jointly with the Croatian Mountain Rescue Service. For example, in November 2019, they rescued a person from the Mrežnica River, who subsequently applied for asylum and was transferred to an ambulance for medical treatment.<sup>45</sup>

Under the ECHR, state authorities must take preventive measures within the scope of their powers in situations where they know or ought to know of a real and immediate risk to the life of an individual or individuals.<sup>46</sup> In the context of border controls, this may include the duty to inspect suspicious vans or trucks and adopting measures to limit the risk of fatalities, including search-and-rescue actions.

In many cases, migrants and refugees use the services of smugglers to cross the border. The EU legal instruments adopted to combat the smuggling of migrants oblige EU Member States to impose effective, proportionate and dissuasive sanctions against such crime.<sup>47</sup> Contrary to Article 16 of the United Nations (UN) Protocol against the Smuggling of Migrants,<sup>48</sup> EU law contains only few and broad provisions – in the context of Frontex-coordinated operational cooperation

## In numbers

Between 2014 and 2018, **at least 40 children** died while travelling by foot, bus, truck or train across Europe. IOM, *Fatal Journeys Volume 4: Missing Migrant Children 2019*, p. 6.

## Legal corner

Article 16 of the **UN Protocol against the Smuggling of Migrants** obliges contracting parties to preserve and protect the rights of smuggled migrants under international law. These include the right to life and the right not to be subjected to torture or other forms of ill-treatment. States must also:

- ★ Protect smuggled migrants from smuggling-related violence “whether by individuals or groups”;
- ★ Assist those whose lives or safety are endangered through smuggling, particularly women and children; and
- ★ For smuggled migrants in detention, ensure their right to be informed of consular assistance.

between EU Member States at external sea borders – on protection and assistance measures for persons who are smuggled.<sup>49</sup> In its 2015 Action Plan against migrant smuggling, the European Commission committed to step up efforts to provide assistance and protection to smuggled migrants, “in particular vulnerable groups such as children and women.”<sup>50</sup>

### 4.2 Push-backs and excessive use of force

Article 78 (1) of the TFEU as well as Articles 18 and 19 of the Charter prohibit *refoulement*, meaning the return of an individual to a risk of persecution or serious harm. An important safeguard to prevent *refoulement* is the duty to give an effective opportunity to persons apprehended after their unauthorised border crossing to raise issues which would bar their removal. In accordance with the general principles of Union law, any decision affecting a person’s rights must be taken on an individual basis.<sup>51</sup>

#### Fundamental rights concerns in national law

In some instances, Member States have adopted national legislation that envisages carrying out removals without an individual procedure.

Following the arrival of thousands of people at the Greek land border with Turkey, as Turkey announced that it would no longer stop refugees from entering the EU, on 2 March 2020, Greece suspended for one month the access to asylum by third-country nationals who had arrived in Greece in an irregular manner after 1 March 2020.<sup>52</sup> The issue was subsequently resolved. In April, the authorities took measures to enable those who arrived in March 2020 to seek international protection in Greece.

In June 2020, Hungary enacted new legal provisions<sup>53</sup> allowing for the immediate removal from its territory of any person who crossed the Hungarian border unlawfully and sought asylum. The new procedure, in effect until 31 December 2020, requires individuals to express their intent to seek asylum at designated Hungarian Embassies in Belgrade (Serbia) and Kiev (Ukraine). In case of a positive decision on the ‘declaration of intent’, the designated Embassy issues a 30-day entry visa to lodge the asylum claim, after which the rights of and support to applicants for international protection become accessible.<sup>54</sup> This is complemented by the escorting of apprehended migrants in an irregular situation to the outer side of the border fence, which has been occurring since March 2017.<sup>55</sup>

Spanish law allows the “rejection at the border” of any third-country national detected scaling the fence in the enclaves of Ceuta and Melilla, provided this complies with international refugee law.<sup>56</sup> The authorities announced a protocol to clarify how to ensure such compliance in practice but this has not yet been adopted.<sup>57</sup>

#### Push-back allegations

It is in most cases unlawful under domestic law to remove, without an individual identification procedure, persons who are apprehended after an irregular border crossing. Nonetheless, national human rights institutions, international organisations and civil society organisations regularly report cases where this happens. The European Commission has in the past also launched inquiries into push-back practices in Bulgaria, Greece and Spain.<sup>58</sup> Alleged push-back incidents are sometimes reportedly accompanied by ill-treatment.

Table 4 provides a non-exhaustive list of reports by national human rights institutions, Council of Europe entities and by the UN Refugee Agency (UNHCR) of alleged push-backs and other rights violations at the EU's land borders since September 2018. Most concern the Croatian and Greek land borders, with some reports also referring to Bulgaria, Hungary, Poland, Romania, and Spain. Concerning Hungary, in November 2019, the ECtHR found a violation of Article 3 of the ECHR for not adequately assessing the risk of the return of two Bangladeshi nationals to Serbia from a Hungarian transit zone.<sup>59</sup>

At some of these border sections, Frontex was carrying out joint border surveillance operations at the time.<sup>60</sup>

**TABLE 4: SELECTED REPORTS OF ALLEGED PUSH-BACKS AND OTHER FUNDAMENTAL RIGHTS VIOLATIONS BY NATIONAL HUMAN RIGHTS INSTITUTIONS, COUNCIL OF EUROPE ENTITIES AND UNHCR, SEPTEMBER 2018 – NOVEMBER 2020**

| Date           | Author and title  | Types of violations reported   | Border concerned  |
|----------------|---|--|---|
| November 2020  | European Committee for the Prevention of Torture (CPT), <b>Report to the Greek Government on the visit to Greece</b> carried out from 13-17 March 2020  | Detention conditions amounting to inhuman and degrading treatment, push-backs, ill-treatment of detained migrants by the police  | Greece-Turkey   |
| September 2020 | Ombudsperson, Republic of Croatia, <b>Report on the performance of the activities of the National Preventive Mechanism for 2019</b>   | Lack of independent and effective investigation of push-backs, improper police conduct   | Croatia-Bosnia Herzegovina, Croatia-Serbia  |
| December 2019  | The Greek Ombudsperson, <b>National Mechanism for the Investigation of Arbitrary Incidents</b> , Report 2019  | Violation of physical integrity with racist motivation   | Greece-Turkey   |
| November 2019  | Ombudsperson, Republic of Croatia, <b>Report on the performance of the activities of the National Preventive Mechanism for 2018</b>   | Improper police conduct, physical violence, collective expulsion   | Croatia-Bosnia Herzegovina, Croatia-Serbia  |
| October 2019   | UNHCR, <b>Desperate Journeys</b> , January – September 2019   | Beatings, violence, push-backs, <i>refoulement</i>   | External borders of Croatia, Greece, Hungary and Romania  |
| June 2019      | Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Displaced Persons, <b>Pushback policies and practice in Council of Europe member States</b> , Doc. 14909                                | Collective expulsions, push-backs, physical violence by police, destroying migrants' belongings, no access to administrative or legal procedures, chain <i>refoulement</i> | Croatia-Bosnia Herzegovina, Hungary-Serbia, Greece-Turkey, Bulgaria-Turkey, Poland-Belarus, Spain-Morocco |
| April 2019     | <b>Report of the fact-finding mission to Bosnia and Herzegovina and to Croatia</b> , on 24-27 July and 26-30 November 2018 by the Council of Europe Special Representative of the Secretary General on migration and refugees | Summary returns, ill-treatment, dog bites, confiscation and destruction of property  | Croatia- Bosnia Herzegovina   |
| February 2019  | European Committee for the Prevention of Torture (CPT), <b>Report on the visit to Greece carried out from 10 to 19 April 2018</b>   | Poor conditions in the pre-departure centre at Fylakio (poor hygiene, overcrowding, limited access to open space), insufficient provisions for children, push-backs        | Greece-Turkey   |
| January 2019   | <i>Consejo Superior de Investigaciones Científicas</i> , UNHCR, Spanish Government, <b>Refugees and Migrants arriving in Spain</b>  | Psychological and physical abuse   | Spain-Morocco   |
| September 2018 | <b>Report of the fact-finding mission to Spain</b> on 18-24 March 2018 by the Council of Europe Special Representative of the Secretary General on migration and refugees   | Summary returns  | Spain-Morocco   |

Source: FRA, 2020 [based on sources embedded in the links]

Non-governmental organisations also regularly report on fundamental rights at the external borders. In November 2020, Refugee Rights Europe issued a report on the state of play of alleged push-backs and rights violations at borders, covering the external borders of Bulgaria, Croatia, Greece, Hungary, Romania, Poland, Slovakia and Spain.<sup>61</sup>

The Danish Refugee Council publishes monthly snapshots on their monitoring activities along the border of Bosnia and Herzegovina with Croatia, reporting alleged push-backs, unlawful use of force, as well as humiliating and degrading treatment.<sup>62</sup>

Amnesty International and Human Rights Watch have been giving attention to fundamental rights at borders, with Amnesty International also reporting on alleged incidents in Slovenia.<sup>63</sup>

Furthermore, national civil society organisations in Croatia, Greece, Hungary and Spain publish reports on alleged fundamental rights violations, some of them on a periodic basis.<sup>64</sup>

The reports listed in Table 4 also show that in some cases, allegations of push-backs go together with other alleged fundamental rights violations, such as excessive use of force, ill-treatment, arbitrary detention or destruction of personal belongings. Sometimes, alleged push-back incidents concern people moved back across more Member States.<sup>65</sup> The following paragraphs present examples of serious incidents reported.

In its report on the visit to Greece in April 2018, the European Committee for the Prevention of Torture (CPT) conducted 15 interviews with migrants who made “consistent and credible allegations” of push-back operations from Greece to Turkey via the Evros River border. Most of these allegations included physical ill-treatment by police, border guards or paramilitary groups, in particular slaps and kicks to various parts of the body (including to the head). Personal belongings, including mobile phones and identity documents, were confiscated and destroyed. Afterwards, the people were transported to a military zone at the Evros River and forced to board small inflatable boats. Their repeated requests to apply for asylum in Greece were ignored. In their response to the CPT’s report, the Greek Government denied the allegations.<sup>66</sup>

In March 2020, the CPT “again received consistent and credible allegations” of push-backs and arbitrary detention. One of the testimonies collected by the CPT concerned a two-and-a-half-year old girl who, along with her older brother of 21 years, was separated from her mother and father and five other siblings. The family had been transferred to the Poros facility, from where officers wearing balaclavas are said to have transferred people, including the mother and four of her children, to the Evros River, where they were put into wooden boats and taken across to the Turkish side. A day later, the father and another brother were pushed back across the river in a similar manner. All of the family’s belongings, including a backpack with clothing, documents, and money, were allegedly taken by the officers. According to the Committee, the lack of records about persons deprived of liberty at the Poros facility corroborates “the very detailed allegations that the [...] facility was used to hold persons arbitrarily without any access to their rights, and that it served as a staging post for push-backs of migrants to Turkey.” In their response to the CPT, the Greek Government denied the allegation, indicating that it received no complaints.<sup>67</sup>

In mid-October 2020, the Danish Refugee Council informed FRA that their on-site team in a Bosnian border town treated a group of some 75 people who reported having been pushed back from Croatia, most of whom had severe injuries from beatings. Reportedly, one person had a fractured leg and had to undergo surgery in the Bihac hospital. According to the statements provided by interviewed victims, the push-backs involved violent behaviour, degrading treatment, as well as theft and destruction of personal belongings – and, in one case, severe sexual abuse.<sup>68</sup> The Croatian authorities informed FRA in November 2020 that they are committed to investigating the incident.

Another incident that received considerable publicity occurred in November 2017. A six-year-old Afghan girl, Madina Hosseini, was killed by a passing train at the border between Croatia and Serbia. According to the report of the Croatian Ombudswoman,<sup>69</sup> Madina and her family had reached Croatia and asked for asylum, when they were told to go back to Serbia. They were transported in a police vehicle close to the railway, and instructed to follow the rail tracks to Serbia. Soon afterwards, the six-year-old girl was killed by a train. The investigations in Croatia were closed after review by the constitutional court.<sup>70</sup> Two cases relating to this incident are pending before the ECtHR.<sup>71</sup>

Pursuant to Article 33 of the 1951 Convention relating to the Status of Refugees, the principle of *non-refoulement* prohibits the return of refugees to a risk of persecution. Such prohibition covers any person who fulfils the criteria included in the refugee definition of the convention,<sup>72</sup> including persons who did not yet apply for asylum and people seeking asylum, until a final decision is made on their application.<sup>73</sup>

Under the ECHR, states may not send back people if their removal would result in a breach of their rights guaranteed by Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment).<sup>74</sup> This prohibition concerns any person who has an arguable claim that his or her rights under Articles 2 or 3 of the ECHR would be violated. The authorities have to examine of their own motion bars to removal.<sup>75</sup> In light of the potentially irreversible consequences of the removal, the ECtHR also elaborated procedural safeguards that states must respect before they remove or turn back a person. These include the right to obtain sufficient information to enable persons to gain effective access to relevant procedures (which may require the assistance of interpreters and legal advisors), as well as the right to seek an effective remedy.<sup>76</sup> Article 15 of the ECHR further clarifies that these rights are absolute and cannot be derogated from, even in times of emergency.

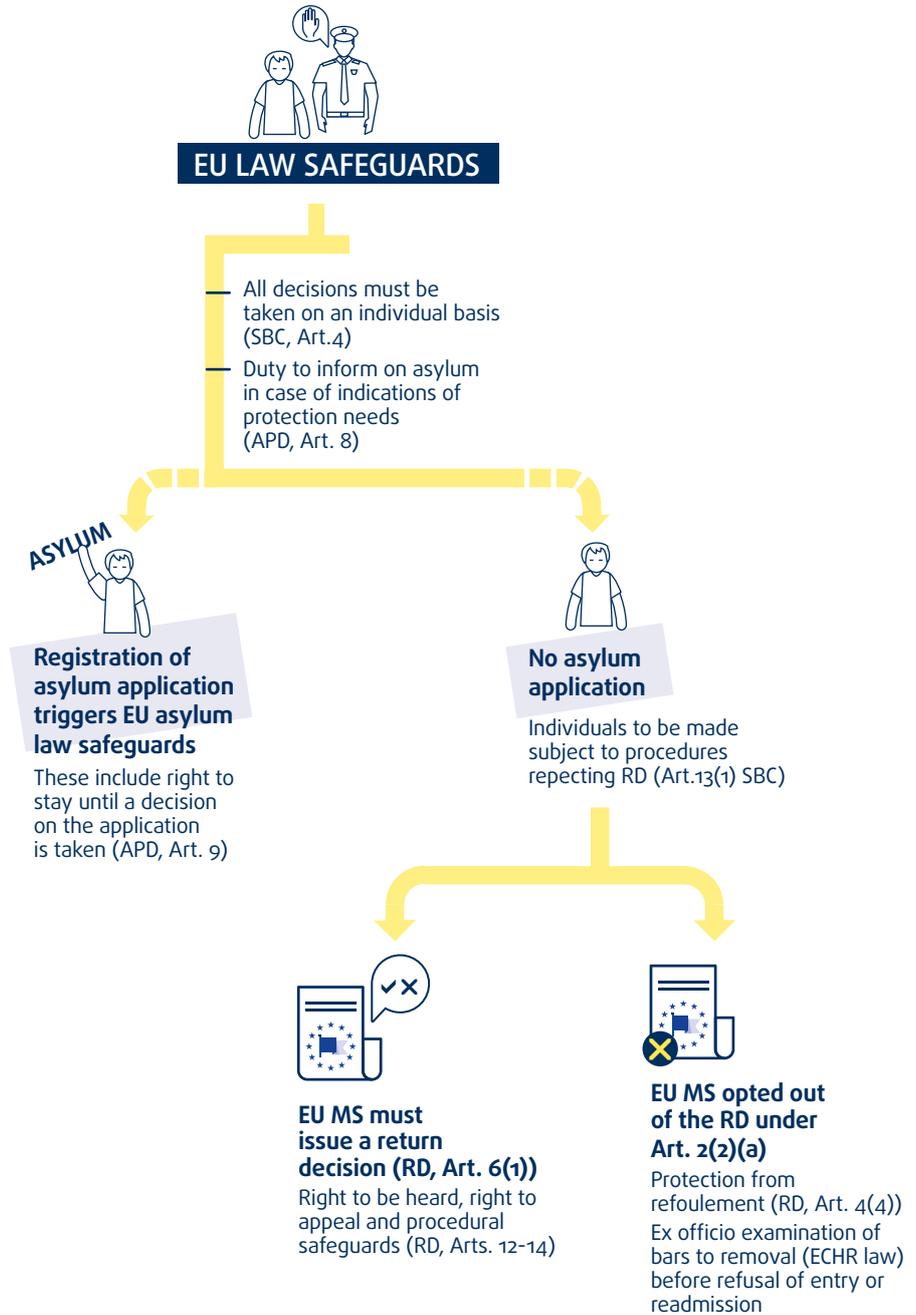
Safeguards flowing from international refugee law and from the case law of the ECtHR are also reflected in relevant EU law, namely the Schengen Borders Code, the Asylum Procedures Directive and the Return Directive, as illustrated in Figure 3. EU law requires Member States to carry out an individualised refusal of entry, an individual return or an individual readmission procedure. Such procedures must respect, in view of Article 52 (3) of the Charter,<sup>77</sup> those basic safeguards which the ECtHR has elaborated in its case law on Article 3 of the ECHR. Failure to respect such safeguards would result in a violation of procedural requirements flowing from the principle of *non-refoulement*.

**FIGURE 3: EU LAW SAFEGUARDS FOR PERSONS APPREHENDED AFTER UNAUTHORISED BORDER CROSSINGS**



Notes:

SBC = Schengen Borders Code.  
 APD = Asylum Procedures Directive 2013/32/EU.  
 RD = Return Directive 2008/115/EC.  
 EUMS = EU Member State.



Source: FRA, 2020

The safeguard included in Article 4 of the Schengen Borders Code aims to prevent a person apprehended in connection with an irregular border crossing being directed, transferred or otherwise returned to the other side of the border, without their individual situation being assessed. The absence of such individual assessment would infringe the procedural safeguards elaborated by the ECtHR in connection with arguable claims under Article 3 of the ECHR. Pursuant to Article 52 (3) of the Charter, this also raises issues under Articles 18 and 19 of Charter (right to asylum and prohibition of *refoulement* and collective expulsion, respectively).

The return of a group of persons who cross the border in an irregular manner without individual identification and examination may also violate the prohibition of collective expulsion set out in Article 19 of the Charter, in light of the interpretation of the corresponding provision in Article 4 of Protocol 4 of the ECHR.<sup>78</sup> Such prohibition also applies to situations in which a large number of persons storm a border fence, creating a disruptive situation that is difficult to control and endangers public safety. If the authorities provide genuine and effective access to means of legal entry and the persons, without objective justification, do not make use of it, the lack of an individual identification does not breach the prohibition of collective expulsion.<sup>79</sup>

Excessive use of force in areas that fall under the scope of EU law may result in violations of Article 2 (right to life), Article 3 (right to integrity of the person) and Article 4 of the Charter (prohibition of torture, inhuman or degrading treatment or punishment). Under the ECHR, use of force is allowed only as a last resort, if it is necessary, proportionate and justified to achieve a legitimate aim.<sup>80</sup> States are obliged to protect people against loss of life and inhuman treatment or punishment. This includes protection from disproportionate violence.

## Investigations

Under the ECHR, whenever Articles 2 and 3 are violated, states' competent authorities must carry out an effective official investigation.<sup>81</sup> To be effective, an investigation must be prompt, expeditious and capable of leading to the identification and punishment of those responsible. This requires that the investigation is thorough and makes serious attempts to find out what happened; people responsible for the investigation or carrying it out must be independent in practice; victims should be able to effectively participate in the investigation and the next of kin of the victim must be involved to the extent necessary to safeguard their legitimate interests.<sup>82</sup>

Depending on the type of complaint and in line with national legislation, investigations may be carried out at police level; by the ministry in charge of border management; as well as by judicial authorities. FRA requested national authorities to share information about investigations of alleged incidents of push-backs and/or excessive use of force by authorities at borders (see Table 5).

**TABLE 5: NUMBER OF INVESTIGATED CASES OF ALLEGED PUSH-BACKS AND/OR OF EXCESSIVE USE OF FORCE AT BORDERS, 1 JANUARY 2019 – 15 OCTOBER 2020**

|          | Cases investigated by police |                            | Cases investigated by prosecutors |                            |
|----------|------------------------------|----------------------------|-----------------------------------|----------------------------|
|          | 2019                         | 2020<br>(until 15 October) | 2019                              | 2020<br>(until 15 October) |
| Croatia  | 36                           | 24                         | 2                                 | 3                          |
| Greece   | 3                            | 2                          | 4                                 | 4                          |
| Slovenia | 1                            | -                          | -                                 | -                          |

Source: FRA, 2020 [based on information from National Liaison Officers and other national authorities]



### Notes:

No such cases at external land borders have been investigated in Estonia, Finland, Latvia, Lithuania, Poland, France, Romania, Slovakia and Slovenia. FRA did not receive information on this issue from Hungary or Spain. In Bulgaria, there have been no investigations of police officers' excessive use of force causing bodily injury or death. In France, investigated cases concern incidents in the region of Calais, but not the external border itself.

## In numbers

### Examining complaints against the Croatian Police

In 2019, **1,873** complaints were submitted to the Croatian Ministry of the Interior. The Internal Control Department reviewed them and deemed:

**75** complaints as founded

**132** complaints as partially founded

**377** complaints as unconfirmed

**1,289** complaints as unfounded

In Greece, disciplinary procedures in two of the five cases the police investigated were closed, while the other three cases remain pending as of November 2020. In the past, the Greek Ombudsperson indicated that such cases are closed without a thorough review.<sup>83</sup>

In Croatia, internal investigations are carried out both by the special team within the Office of the General Directorate of the Police, and the Internal Control Department of the Croatian Ministry of the Interior. In response to the increased number of allegations, the ministry increased the capacity of the Internal Control Department and its four regional divisions in 2019, deploying an additional 61 police officers to it. By 15 October 2020, the Internal Control Department had reviewed 633 complaints, finding 75 well-founded and 132 partially founded.<sup>84</sup>

In Croatia, on the basis of the investigations by the Internal Control Department and by the General Directorate of the Police, some 30 police officers have been sanctioned. Disciplinary sanctions may include warnings, suspension of promotion for four years, demotion, financial sanctions or dismissal.<sup>85</sup>

As illustrated in [Table 5](#), in some cases, prosecutors investigate complaints. In Croatia, for example, between 2018 and October 2020, the Centre for Peace Studies informed FRA that they filed three criminal complaints at the State Attorney's Office in Zagreb based on a reasonable concern that refugees were unlawfully pushed back from the territory of Croatia. Two complaints concerned unidentified police officers. The third complaint, submitted in July 2020, concerned an incident of ill-treatment, humiliation and push-back of 16 refugees from Croatia to Bosnia-Herzegovina allegedly committed by eight armed men in unmarked black uniforms and with balaclavas on their heads.<sup>86</sup>

In Greece, in June 2019, the Greek Refugee Council filed three complaints with the Prosecutor concerning three separate incidents of alleged push-backs in the Evros region between April and June 2019, representing five Turkish citizens, including one child.<sup>87</sup> The lawyers informed FRA that two of the three cases were still pending on 30 October 2020 and the third one was closed. Another case opened by the Prosecutor in Orestiada following civil society reports on allegations of systematic violence against migrants and refugees in the Evros region was closed.<sup>88</sup>

Court decisions are few. In July 2020, the Slovenian Administrative Court (case under appeal) found that, in August 2019, the authorities had wrongly removed a Cameroonian national seeking international protection shortly after he was apprehended in connection with his irregular border crossing. Subsequently, he ended up in Bosnia and Herzegovina. To support its decision, the court referred to Articles 18 and 19 of the Charter.<sup>89</sup>

In Spain, judges initiated investigations into a case where 14 migrants drowned while trying to swim to Ceuta in February 2014. Civil society organisations presented evidence that their death was linked to actions taken by the Civil Guard to prevent them to cross the border, including by shooting rubber bullets into the water and using tear gas. Following different stages of review, the case was closed for lack of evidence.<sup>90</sup>

Authorities underline a zero tolerance policy towards ill-treatment. For example, the Croatian police issued two orders in 2018 and 2019, reminding police officers of the duty to respect fundamental rights.<sup>91</sup> The annual report by the Hellenic Police issued in 2020 mentions that similar guidance has been given to various police services.<sup>92</sup> The Croatian Ministry of the Interior also informed FRA that the Croatian Police Headquarters carried out 92 monitoring visits to police stations at the external border in 2019 and 2020. These visits also served to verify whether police officers treat migrants in a legal and professional manner and in full respect of their human rights, as set out in relevant national legislation and in the Protocol on the Treatment of Unaccompanied Minors and the Standard Operating Procedures on the Treatment of Applicants for International Protection.<sup>93</sup>

In many cases, there is limited information about the exact time and location of the incident or the evidence is not considered sufficiently solid to start formal investigation proceedings.<sup>94</sup> Authorities state that claims are looked into, but that they did not contain enough information to initiate criminal investigations.<sup>95</sup> Another obstacle to seeking a remedy is the absence of a formal decision on the removal that could be challenged before the competent authorities.<sup>96</sup> Finally, many people who experienced violations of their rights are not interested in seeking a remedy, as several legal aid providers noted.

Fundamental rights issues at land borders also feature in internal Frontex fundamental rights oversight mechanisms. In 2019, eight of the nine Serious Incidents Reports that reached the Frontex Fundamental Rights Officer related to land border surveillance activities. These are reports submitted by participants in Frontex activities or working in Frontex operations who come across fundamental rights violations during their work.<sup>97</sup> In 2020, by 1 October, the Frontex Fundamental Rights Officer coordinated three such Serious Incidents Reports, two of which concerned land border surveillance. As regards the Frontex complaints mechanism, between January and August 2020, Frontex received 20 complaints (not all admissible) under Article 111 of the EBCG Regulation, six relating to land borders.<sup>98</sup>

In some EU Member States, National Preventive Mechanisms established under the 2002 Optional Protocol to the Convention Against Torture<sup>99</sup> regularly deal with allegations of fundamental rights violations at land borders. For example, in 2019, the Croatian Ombudsperson opened 35 cases regarding police conduct towards irregular migrants and asylum seekers, a significant portion of which concerned persons apprehended after their irregular border crossing.<sup>100</sup> The Greek Ombudsperson also confirmed to FRA that in 2019 and 2020 they have conducted various investigations into police conduct towards irregular migrants and asylum seekers.

Sometimes a remedy comes from international bodies. In 2019, the UN Committee on the Rights of the Child found that Spain violated Articles 3, 20 and 37 of the 1989 Convention on the Rights of the Child<sup>101</sup> by returning an unaccompanied child from Mali, who had scaled the fence in Melilla, to Morocco in December 2014, without him being provided information on his rights or assistance from a lawyer or an interpreter.<sup>102</sup>

### 4.3 Deprivation of liberty after apprehension

Deprivation of liberty is a major interference with the right to liberty guaranteed in Article 6 of the Charter and Article 5 of the ECHR. Detention has to be distinguished from restriction on the right to freedom of movement, although the difference is essentially one of degree or intensity, and not one of nature or substance, as the ECtHR has clarified.<sup>103</sup> A person is not deprived of liberty in case of residence restrictions, unless these are so serious to be considered as tantamount to detention, which has to be assessed on the basis of the individual circumstances. When reviewing cases of asylum applicants and people subject to return held in the Hungarian transit zones, the CJEU concluded that under EU law, the applicants had been deprived of their liberty,<sup>104</sup> whereas in another case with very similar circumstances, the ECtHR came to a different conclusion.<sup>105</sup>

Any deprivation of liberty must respect the safeguards that have been established to prevent unlawful and arbitrary detention.

## Bright spots

### Pilot project on border monitoring

The Croatian Ministry of the Interior plans to establish an independent national border monitoring mechanism along the lines proposed by the European Commission in the **Pact on Migration and Asylum**. The Ministry has contacted several actors, including FRA, asking them to share their expertise.

In many cases, persons apprehended after their unauthorised border crossing are arrested and placed in closed facilities, at least until the police, border guards or reception authorities complete the procedures required under national law to identify the person and decide on the next steps.<sup>106</sup> National law regulates the maximum time frame a person can be kept under short-term arrest and after which, deprivation of liberty, if continued, requires a detention decision.<sup>107</sup>

Facilities for holding migrants in the first hours or days after they are apprehended may be closed areas within reception facilities, police cells or holding rooms at or near the border. In some instances, *ad hoc* arrangements may result in apprehended persons being temporarily held in facilities that are not adequate to host people, even for a short time period – even more so if they are vulnerable.

In 2019, the Croatian Ombudsperson, for example, investigated allegations of migrants, including children, being held in the garage of a police station near the border with Bosnia and Herzegovina, where some of them had to sleep on the concrete floor.<sup>108</sup> The investigative procedure is still ongoing.

Along the Greek-Turkish land border, in May 2018 FRA observed that, when there was no capacity to receive newly arrived persons in the Reception and Identification Centre in Fylakio,<sup>109</sup> newly arrived migrants remained in the adjacent pre-removal detention facility, sometimes for prolonged periods of time. In the report on its visit to Greece in March 2020, the European Committee for the Prevention of Torture noted that the detention conditions in certain facilities in the Evros region could amount to inhuman and degrading treatment. The CPT found the conditions in Fylakio pre-removal centre “appalling” and “traumatising”, especially for small children, let alone babies.<sup>110</sup> In Greece, also unaccompanied children experienced prolonged deprivation of liberty in inadequate conditions, in particular when no room in dedicated shelters was available.<sup>111</sup> In November 2020, the Ministry of Migration and Asylum announced upcoming legislative changes that will put an end to this practice, known as protective custody.<sup>112</sup>

When detention is imposed on an asylum applicant or following the issuance of a return decision, national authorities have to comply with the requirements of Articles 8 to 11 of the Reception Conditions Directive (2013/33/EU) or Articles 15 to 17 of the Return Directive (2008/115/EC). If other sufficient but less coercive measures cannot be applied in the individual case, detention may be ordered. However, a person may only be detained for grounds permitted under EU law, detention must be based on law, be necessary in the individual case, and comply with procedural and substantive rules.

Deprivation of liberty prior to the issuance of a return decision or the registration of an asylum claim remains regulated by national law. It has to comply with the strict requirements flowing from Article 5 of the ECHR, Article 31 of the 1951 Convention Relating to the Status of Refugees, the 1989 Convention on the Rights of the Child, and other applicable international human rights law instruments.<sup>113</sup> In light of the significant short- and long-term consequences deprivation of liberty may have on a child’s development, there is a strong presumption against child detention.<sup>114</sup>

## 4.4 Punishment for irregular entry

In 2014, 17 EU Member States had rules that allowed sanctioning irregular entry, including with imprisonment.<sup>115</sup> These provisions are rarely applied in practice, particularly for persons in need of international protection, as sanctions raise issues from a refugee law point of view.

However, in some EU Member States, punishments do occur.

As of March 2020, examples of punishment for irregular entry emerged in Greece. The judicial authorities in Orestiada (Evros region) and in Kos (an island in the Eastern Aegean) had convicted at least 56 persons between the end of February and mid-March for irregularly entering the country, based on Article 83 of L. 3386/2005.<sup>116</sup>

Criminal procedures concerned men, women as well as unaccompanied children, and also led to the separation of families. Having been sentenced in spring 2020 through an expedited procedure foreseen by law in cases of *flagrante delicto*,<sup>117</sup> some of the men received prison sentences of 4 years and fines up to 10,000 EUR and were sent to prison. Their wives received suspended prison sentences of 3 years and a fine up to 5,000 EUR and were placed in the Reception and Identification Centre of Fylakio in the Evros region. Other sentenced individuals were sent to male or female penal facilities, respectively.<sup>118</sup>

Charges were also pressed against twelve children. At least two of them were only 12 years old. Since the expedited procedure cannot be applied to children, their trials were postponed to November 2020. Some of these children were held in the Reception and Identification Centre of Fylakio for 3-4 months.<sup>119</sup>

According to information provided by UNHCR, the practice of imposing sanctions for the offence of illegal entry across the land border continues. However, arrested people are no longer tried and sentenced using the expedited procedure.

Following changes to the Criminal Code in September 2015, Hungary punishes the illegal crossing and/or damaging of the border fence.<sup>120</sup> Large numbers of criminal proceedings were initiated for irregularly crossing the border by evading, destroying or committing some other form of abuse of the fence guarding the state border. As individuals usually admitted having crossed the border irregularly, they were processed quickly.<sup>121</sup> Table 6 summarises the officially registered offences of 'illegal crossing of the border fence' between September 2015 and October 2020.

**TABLE 6: OFFENCES OF "ILLEGAL CROSSING OF THE BORDER FENCE", HUNGARY, SEPTEMBER 2015 – OCTOBER 2020**

| Offence  | 2015 | 2016  | 2017 | 2018 – October 2020 |
|--|------|-------|------|---------------------|
| Illegal crossing of the border fence (Art. 352/A of the Hungarian Criminal Code) | 914  | 2,843 | 22   | 42                  |

Source: *Unified Hungarian Criminal Statistics of the Investigation Authorities and the Prosecutors' Office*

Those convicted received an expulsion order, the implementation of which was suspended if they requested asylum.<sup>122</sup> They also received a one- or two-year entry ban. Furthermore, a number of people, including some with likely international protection needs, were charged with the aggravated form of irregular border crossing, which is punishable by one to five or, in some cases, two to eight years of imprisonment.<sup>123</sup> Depending on the circumstances, this may raise issues in view of the non-penalisation provision in Article 31 of the 1951 Geneva Convention, which under Article 78 of the TFEU, EU law must respect.

Criminal sanctions may also be imposed for other acts connected with the irregular crossing of the border. For example, in Spain, where irregular entry is not a crime, in October 2019, a court in Ceuta condemned nine migrants to one-and-a-half year prison terms for public disorder and for causing injuries and damage when apprehended after climbing the fence, as well as to compensate for damages caused to the fence and other objects.<sup>124</sup>

These crimes may also feature in criminal records systems. Under Articles 571 and 573 of the Greek Code of Criminal Procedure, the crime of irregular entry may feature in criminal record extracts (affecting, for example, employment opportunities) for a period of three or eight years, depending on the punishment. Pursuant to Article 100 (1) (g) and (h) of the Hungarian Criminal Code, conviction for illegal crossing of the border fence will feature in any criminal record extracts (affecting, for example, employment opportunities) for five or eight years (in aggravated cases).

Once the European Criminal Record System of Third-Country Nationals (ECRIS-TCN)<sup>125</sup> will be operational and interoperable with other EU information technology systems, the information about the existence of a national criminal record will be accessible by all EU Member States. The interoperability of EU IT systems allows national authorities, who could not access this information before, to establish that a person has a past criminal record in the EU.<sup>126</sup>

Under EU asylum law, sanctions must comply with Article 31 of the 1951 Convention Relating to the Status of Refugees.<sup>127</sup> According to the Court of Justice of the EU, criminal law sanctions for irregular entry or stay may be applied to irregular migrants subject to return, but must not undermine the effectiveness of the Return Directive. They must not hamper or delay the removal procedure. Therefore, under EU law, national legislation can permit the imprisonment of persons in return procedures only after the administrative measures envisaged in the Return Directive have been exhausted.<sup>128</sup> Furthermore, Member States are bound by the protective provisions of the 2000 UN Protocol against the Smuggling of Migrants (Article 16 – see also [Section 4.1](#)).

## 4.5 Dignified reception conditions for asylum applicants

Under EU law, Member States must provide asylum applicants with a dignified standard of living as laid down in the Reception Conditions Directive (2013/33/EU). The directive applies from the moment an individual has expressed the intention to seek international protection, for example upon apprehension or when interviewed for identification purposes.<sup>129</sup> As pointed out in Section 4.3, EU law also obliges Member States to provide humane conditions to persons detained for asylum or return purposes.

After the initial police identification interview with a person apprehended in connection with an irregular border crossing is completed and if the person does not leave the territory soon thereafter, he or she is either moved to an immigration detention facility or to a regular reception facility for asylum applicants. The description of reception conditions in these facilities is beyond the scope of this report.

Three Member States – Greece, Hungary and Spain – set up special first reception facilities near or at the external land border itself. Such facilities serve different purposes, as laid down in national law. Hungary carried out the full asylum procedure in its transit zones, until it stopped using them in May 2020, after the CJEU deemed keeping people in the Hungarian transit zones as unlawful detention.<sup>130</sup> The facilities in Greece and Spain host applicants for the first weeks or months after their irregular entry, until they are transferred or allowed to move onwards. Table 7 provides an overview of such first reception facilities established at or near the external border.

Notes:

Hungary also established two transit zones at the Croatian border, Beremend and Letenye. However, these have not been in use for some years.

CETI = Migrant Temporary Stay Centre (Centro de Estancia Temporal para Inmigrantes)

✓ = in use in October 2020

✗ = no longer in use

**TABLE 7: FIRST RECEPTION FACILITIES AT OR NEAR THE EXTERNAL BORDER, OCTOBER 2020**

| EU Member State | Location             | Year of creation | Capacity | Short description   |   |
|-----------------|----------------------|------------------|----------|---|---|
| Greece          | Fylakio (Orestiada)  | 2013             | 282      | Container-based identification and registration centre with adjacent pre-removal facility. Operates as a closed facility.   | ✓ |
| Hungary         | Rösztke transit zone | 2015             | 450      | Transit zone in use until May 2020; closed facility located at the border fence with Serbia. Composed of closed container-made sectors surrounded by fences and barbed wire.  | ✗ |
| Hungary         | Tompa transit zone   | 2015             | 250      | Transit zone in use until May 2020. Similar to Rösztke.   | ✗ |
| Spain           | CETI Ceuta           | 1998             | 512      | Concrete building with open regime. Hosts migrants and asylum applicants entering the enclave in an irregular manner.   | ✓ |
| Spain           | CETI Melilla         | 1998             | 782      | Concrete building and tents with open regime, except during the lock-down. Hosts migrants and asylum applicants entering the enclave in an irregular manner. New arrivals in Melilla are hosted in bullring due to lack of space in CETI. | ✓ |

Source: FRA, 2020

FRA's sources indicate that, as of November 2020, asylum applications submitted in Fylakio and in the CETIs in Ceuta and Melilla are mainly examined through the regular procedure (and not border asylum procedures).<sup>131</sup> No asylum procedures are carried out in the Hungarian transit zones, as these have been closed down.

The Reception and Identification Centre in Fylakio (Greece) and the Migrant Temporary Stay Centre (CETI) in Melilla (Spain) regularly experienced overcrowding and inadequate reception conditions, particularly for vulnerable people.<sup>132</sup> The fundamental rights compliance of the systematic placement of asylum applicants, including vulnerable people under a *de facto* deprivation of liberty regime in Fylakio would benefit from assessment in light of the right to liberty in Article 6 of the Charter.

Sections of the external border where people seek asylum are often situated in remote locations, where it is difficult to adjust reception capacities and provision of services – for example, legal counselling – to increased number of arrivals or to their extended period of stay. In its updated opinion on hotspots (2019), FRA noted the challenges of providing adequate reception conditions to asylum applicants accommodated in the hotspots on the Greek islands. As asylum applicants were staying there, on average, for over five months FRA found that it had been difficult to deploy the necessary experts to the hotspots, such as social workers, lawyers, doctors and other professionals – sometimes because such professionals were not even available for the resident population.<sup>133</sup>

Specific reception challenges emerged as a result of the COVID-19 pandemic.<sup>134</sup> To respect lock-down rules and quarantine new arrivals, *ad hoc* solutions emerged. Often, the authorities accommodated new arrivals in hotels. In some instances, these solutions were inadequate. For example, the Council of Europe Commissioner for Human Rights highlighted the substandard living conditions of around 500 persons accommodated in the bull-ring in Melilla, following the lock-down of the CETI. She referred to the limited access to showers and toilets, lack of provision of hygiene products and serious overcrowding, and to the lack of identification of vulnerable persons or medical screening.<sup>135</sup>

## 5. Border checks

'Border checks' are the controls carried out at border-crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it.<sup>136</sup> Along the EU's external land borders, there are 451 border-crossing points, according to Frontex.<sup>137</sup>

This section describes border checks carried out by border management authorities to verify if a person is entitled to enter the territory of an EU Member State, and their fundamental rights implications. It also touches upon checks undertaken for sanitary or public health reasons (e.g. in the context of the global COVID-19 pandemic), but does not address checks on goods carried out by customs officials.

Whereas several international organisations and non-governmental organisations (NGOs) have analysed the fundamental rights situation of persons apprehended after an irregular crossing in the context of border surveillance, there is limited analysis that looks at respect for fundamental rights during border checks at regular crossing points. This section aims to fill this gap.

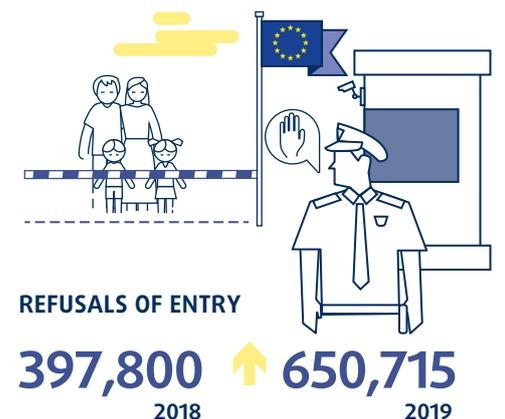
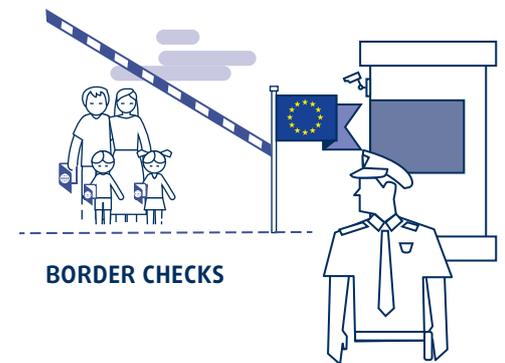
At least tens of millions of third-country nationals<sup>138</sup> enter the EU every year via land border-crossing points.<sup>139</sup> At the borders, they are subject to checks pursuant to the Schengen Borders Code (Regulation (EU) 2016/399). The authorities of the third country they are leaving check them first, followed by those of the EU Member State they are entering. Checks cover persons as well as goods.

Under the Schengen Borders Code, border checks on persons carried out at EU external land borders may be divided into two stages. Every person undergoes a first-line (minimum) check to verify their identity and entry requirements (Article 8 (2)). At land borders, Article 10 (1) of the Schengen Borders Code encourages the creation of separate lanes, specifically designated for EU, European Economic Area (EEA) and Swiss nationals, and for nationals from other countries ('third countries'). Thorough checks are compulsory for third-country nationals on entry and exit, as described in Article 8 (3)-(5) of the Schengen Borders Code.

Requirements other than those set out in the code may not be applied during checks. The European Commission re-launched an infringement procedure against Estonia in October 2020, requiring it to remove additional conditions for crossing the external land borders when exiting the EU. Currently, Estonia requires travellers who want to exit the EU to reserve a place in a border-crossing queue and to pay a fee for the reservation and for the use of the waiting area.<sup>140</sup>

If a more thorough verification is required, a passenger is referred to a second-line (thorough) check in application of Article 8 (3) of the Schengen Borders Code. These are usually carried out in special rooms or offices. There are no comprehensive European statistics on the number of persons who are subjected to second-line checks. In any event, it is significantly higher than those who are refused entry.

After a first- or a second-line check, travellers may be allowed to enter the EU Member State or be refused entry and told to return to the third country from which they came. This may imply practical complications, for instance waiting for the bus/train to return or having to walk a long distance.



Source: Eurostat, 2020

## Legal corner

More favourable rules for crossing the EU external borders exist for third-country nationals who enjoy free movement rights. Authorities must also ensure that border checks do not prevent persons enjoying the Union right of free movement from returning to their country of nationality or residence (Articles 3 and 8 (6) of the Schengen Borders Code).

# Legal corner

*Zakaria* (C-23/12) involved a permanent resident of Sweden who was travelling on a Palestinian refugee travel document issued by Lebanon. He flew from Beirut (Lebanon) to Copenhagen (Denmark) via Riga (Latvia). At the Riga airport, border guards allegedly inspected his travel documents in an “offensive and provocative manner”, in a way the applicant felt “violated his human dignity.” Border guards finally allowed him to enter Latvia, but due to lengthy border check, he missed his connecting flight.

The CJEU ruled that, under the Schengen Borders Code (Article 14), Member States are obliged to establish remedies only against refusal of entry decisions, and not against the alleged treatment or decision-making process at the border-crossing points.

The CJEU noted, however, that border guards performing their duties are required to fully respect human dignity. Member States’ domestic legal systems must provide for appropriate remedies against such infringements, in line with either the Charter – if the situation falls within the scope of EU law – or with the ECHR – if it does not.

See CJEU, *C-23/12, Mohamad Zakaria*, 17 January 2013.

## 5.1 Human dignity

Under Article 7 of the Schengen Borders Code, when carrying out border checks, border guards must fully respect human dignity. They also have special duties toward vulnerable persons.

Issues of human dignity may also come up in the context of public health measures implemented at the borders in response to the COVID-19 outbreak. Compulsory health screening, measuring body temperature, questioning passengers, and examining medical statements showing negative COVID-19 test results, as well as any follow up action taken, must be carried out in a manner respecting human dignity.<sup>141</sup>

Furthermore, under Recital (36) and Article 7 of the Schengen Borders Code, such measures must be non-discriminatory and proportionate.

## 5.2 Access to asylum

Overall, actually accessing EU territory to seek asylum is challenging at the EU’s external borders.<sup>142</sup> It is generally acknowledged that only a small number of persons request international protection at land border-crossing points, as a 2014 FRA report on fundamental rights at land border-crossing points has confirmed.<sup>143</sup>

There are several possible reasons why few asylum seekers submit claims at border-crossing points. These stem from practical difficulties for undocumented persons in reaching the border (as they would be stopped at exit checks by the third country) and, for those who have travel documents, from advice they receive from smugglers, friends or others. Likewise, they might be afraid of being detained at the borders and then subjected to summary return. Obstacles also relate to the knowledge and skills of border guards and the training they have received on how to handle asylum applications.<sup>144</sup>

In practice, it is mainly nationals of the neighbouring country or nationals who are staying lawfully in the third country who approach a border-crossing point to request asylum. Examples are nationals of Eastern European or Central Asian countries at Europe’s Eastern land borders or Syrians lawfully staying in Morocco at the border-crossing point in Melilla, before it closed with the COVID-19 lock-down.

In Poland and Lithuania, a number of recent court cases concern individuals who tried unsuccessfully to seek international protection at land border-crossing points.<sup>145</sup>

In *M.A. and Others v. Lithuania*,<sup>146</sup> the applicants, who had fled the Chechen Republic, attempted to cross the border from Belarus to Lithuania on three separate occasions. Although they claimed they were seeking international protection each time, they were refused entry on the grounds that they did not have the necessary travel documents. The Lithuanian border guards had not accepted their asylum applications and had not forwarded them to a competent authority for examination and status determination, as required by domestic law. The ECtHR found that no assessment had been carried out of whether or not it was safe to return the applicants to Belarus, a country that was not a Contracting Party to the ECHR. The court ruled that the failure to allow the applicants to submit their asylum applications and their removal to Belarus amounted to a violation of Article 3 of the ECHR. The ECtHR later reached similar conclusions in *M.K. v. Poland*.<sup>147</sup>

Border control measures to contain the pandemic may not prevent people from seeking protection from persecution or ill-treatment (Article 3 (b) of the Schengen Borders Code). Alternative measures such as testing, self-isolation and quarantine may enable authorities to manage the arrival of asylum applicants in a safe and orderly manner, while respecting the right to asylum and the protection from *refoulement* and providing the necessary healthcare to those in need.

### 5.3 Procedural safeguards

Under the Schengen Borders Code, third-country nationals subject to second-line checks must be given written information in a language they understand – or may reasonably be presumed to understand – about the purpose and nature of such checks. If requested, the information must include the name and service identification number of the border guards (Article 8 (4)-(5)).

If entry is refused, authorities must issue a written, substantiated decision – using the standard Schengen form<sup>148</sup> – stating the precise reasons, in fact and in law, for the refusal. The completed standard form must be handed to the third-country national concerned, who has to acknowledge receipt of the decision (Article 14 of the Schengen Borders Code).

Under Article 14 (3) of the Schengen Borders Code, persons refused entry have a right to appeal. Border guards must provide the person concerned with a written list of contact points who can give information on professionals providing legal assistance. In case the appeal concludes that refusal of entry was ill-founded, a cancelled entry stamp<sup>149</sup> has to be corrected, and authorities have to make any other necessary cancellations and corrections.<sup>150</sup>

As a horizontal obligation in all actions concerning travellers at border-crossing points, any personal data, including health data and other sensitive data, must be collected and processed in accordance with EU data protection rules.<sup>151</sup> This implies that authorities must inform all travellers about the processing of their personal data, including which data is processed, for what purpose, and who will have access to it, as well as how the travellers can access and obtain a copy of their personal data stored and what steps they can take to have inaccurate or unlawfully stored information corrected or deleted – for example, if a database contains old information that has been retained beyond the allowed time period.

The first five-year cycle of the reformed Schengen evaluation and monitoring mechanism, established by Regulation (EU) No. 1053/2013,<sup>152</sup> has identified a number of fundamental rights concerns. In fact, each of the 36 visits conducted between 2015 and 2019 to assess border management at all borders (air, land, sea) in 23 Member States led to one or more fundamental rights-related recommendations, producing more than 150 recommendations in total.<sup>153</sup> A large share of them related to specific shortcomings identified during the evaluation of individual border-crossing points.

The majority of the recommendations issued regarding border-crossing points focus on issues arising during the border-check procedure. In some cases, travellers were not provided with information on the purpose of more thorough second-line checks or on the reasons for refusal of entry, or the information was not provided in the relevant foreign language. Lack of language skills and unavailability of interpretation, but in some cases also security elements (such as the design of the control booths), prevented effective communication between the staff and the travellers.

Recommendations also include measures to increase respect for the dignity of passengers waiting for border checks or ensuring proper facilities for persons refused entry.

Many recommendations relate to human resources and training. They address language skills. Others cover training on children as well as identifying and referring persons in need of international protection or victims of trafficking who present themselves at border-crossing points. Table 8 provides an overview of relevant recommendations.

**TABLE 8: SCHENGEN EVALUATIONS 2015-2019: RECOMMENDATIONS ON SAFEGUARDS DURING BORDER CHECKS AND LANGUAGE TRAINING, 36 VISITS IN 23 MEMBER STATES**

Note:

The table does not include EU Member States not subject to regular evaluations (Bulgaria, Cyprus, Ireland and Romania); the evaluation of Poland conducted in 2019, for which recommendations were not yet adopted as of October 2020; or the four Schengen associated countries.

| <b>Fundamental rights issue</b>        | <b>Number of findings, including <i>ad hoc</i> evaluations</b> | <b>Number of EU Member States</b> |
|--|--|-----------------------------------|
| Procedural safeguards in border checks | 71   | 21                                |
| Language training                      | 24   | 14                                |

Source: FRA, 2020 [based on Council documents listed in endnote]<sup>154</sup>

## Concluding observations

Compliance with fundamental rights is an essential component of effective border management. EU law instruments relevant for border control contain clear fundamental rights safeguards, as this report has outlined. The starting point for ensuring respect for fundamental rights at borders is to make sure such safeguards are fully applied and implemented – as the European Council<sup>155</sup> and the Council of the EU<sup>156</sup> have also repeatedly reiterated. To facilitate this, FRA considers that the following actions could help.

First, as this report shows, existing oversight mechanisms can be improved. Section 5.3 underlines the role that Schengen evaluations are playing with regard to respecting the procedural safeguards and promoting professional conduct during border checks. However, recommendations to Member States relating to the issue of *refoulement* and push-backs have so far not been adopted, despite the number of reported incidents in different EU Member States in recent years.<sup>157</sup> Ways to enhance the effectiveness of the Schengen evaluation and monitoring mechanism to address also fundamental rights issues that might be taking place outside of the context of border-crossing points should continue to be explored.

Second, at an operational level, during the day-to-day work of border guards, there is still lack of clarity as to which actions and tactics are allowed under EU law and which are not. Whereas border guards receive clear instructions and training on the use of weapons and means of restraint, there remains a different understanding, for example, with regard to the procedural safeguards that must characterise the interview with a person apprehended in connection with their unauthorised border crossing. In practice, there are also different understandings as to what constitute indications of international protection needs. Similarly, there are grey zones with regard to the limits of operational cooperation with neighbouring third countries, as mentioned in Section 3.1. Various actors, including FRA, have developed fundamental rights-related practical guidance, tools and training to support border guards in their daily work. Their use should be promoted, including through practical exercises.

Third, there is a need for a victims-focused approach when combating organised crime at borders. The envisaged action plans and strategies on trafficking in human beings and on smuggling of migrants are an opportunity to suggest concrete initiatives to further victims' rights, strengthening identification and referral systems and mainstreaming a child and gender sensitive approach in border management. Many smuggled people are victims of violent crimes and require assistance and protection.<sup>158</sup> A victims-focused approach would also encourage migrants and refugees to report rights' violations, empowering them in the exercise of their rights and obligations, as envisaged under objective 16 of the UN Global Compact for Safe, Orderly and Regular Migration.<sup>159</sup>

Fourth, transparency on actions taken at national level to investigate allegations of push-backs and ill-treatment at borders by border guards, but also by private actors, should be increased. To be effective, an investigation must be independent, prompt, expeditious and capable of leading to the identification and punishment of those responsible. This requires that investigations be thorough; those conducting the investigations must be, in practice, independent from those implicated in the events; and victims should be able to participate in the investigation effectively.

# Legal corner

## Proposal for a Screening Regulation, Recital (23)

“The monitoring mechanism should cover in particular the respect for fundamental rights in relation to the screening, as well as the respect for the applicable national rules regarding detention and compliance with the principle of *non-refoulement* as referred to in Article 3 (b) of [the Schengen Borders Code].”

*European Commission (2020), Proposal for a regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020)612 final*

Fifth, preventive measures are needed. On 23 September 2020, the European Commission published its proposal for a new EU Pact on Migration and Asylum.<sup>160</sup> It sets out a new approach to migration, with a stronger focus on border procedures. The Pact presents a package of hard and soft law instruments. Among these, a proposal for a Screening Regulation seeks to introduce common rules for the initial interview with people apprehended in connection with their unauthorised border crossing, those rescued at sea, and those who seek asylum at the border.<sup>161</sup> Article 7 of the proposal suggests the creation of an EU mechanism to monitor fundamental rights at the external borders. The mechanism should be independent and any alleged fundamental rights violations should be rigorously investigated.

The idea of monitoring rights compliance at borders is not new. UNHCR has traditionally promoted the setting up and putting into operation independent border monitoring mechanisms. Since the 2000s, in a number of Central and Eastern European countries,<sup>162</sup> UNHCR, border guards and NGOs have concluded tripartite arrangements to monitor border control along European land borders. They formalised the cooperation, roles and responsibilities, and working methodologies among the actors in the area of border management. They also provide a platform for dialogue among national authorities, UNHCR and its NGO partners as well as other stakeholders.<sup>163</sup> Although such agreements were in most cases not extended, UNHCR continues to monitor refugee protection in border areas together with its partners as part of its mandate under its Statute.<sup>164</sup>

Other United Nations actors as well as Council of Europe bodies regularly visit border areas. In several EU Member States, national human rights institutions, and particularly those who also have a National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture, monitor human rights compliance and follow up on alleged violations at borders, although in one Member State limitations to accessing documents emerged.<sup>165</sup> As Section 4.2 shows, civil society organisations also contribute to enhancing transparency through their independent reporting.

Establishing independent monitoring mechanisms at borders has proven to be a useful way for states to ensure that border control activities comply with fundamental rights. Monitoring can also help identify problems, gaps and training needs on fundamental rights standards and safeguards.

Building on these experiences, the proposed national independent monitoring mechanism under EU law could increase transparency on the fundamental rights situation at the border, help address deficiencies and facilitate investigations. To be effective, such national mechanisms would not only need to be independent but also include safeguards for unimpeded access to places, people and documents, the monitoring of all relevant border management activities, as well as the allocation of sufficient resources to allow visits to the border areas on a regular basis and follow up on findings.<sup>166</sup> FRA stands ready to contribute with its expertise, in line with the provisions which will be set out in EU law.

## Endnotes

- 1 On Andorra, Monaco and San Marino, see European Commission, *Obstacles to access by Andorra, Monaco and San Marino to the EU's Internal Market and Cooperation in other Areas*, **SWD/2012/0388 final**, 20 November 2012.
- 2 See Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – **Protocol No. 3** on the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, OJ 2003 L 236/940, Art. 5, as well as the **Protocol No. 10 on Cyprus**, OJ 2003 L 236/955, Art. 2 (2).
- 3 See **Schengen Borders Code** (Regulation (EU) 2016/399) (OJ 2016 L 77/1), Recital (37) which states that the code does not apply to French and Dutch overseas territories.
- 4 For an overview of temporary controls reinstated at internal borders, see European Commission, Migration and Home Affairs, **Temporary Reintroduction of Border Control**, available on the European Commission's website.
- 5 See Frontex, *Information Management*, available on the **Frontex website**.
- 6 Frontex (2019), **Technical and operational strategy for European integrated border management**, 20 August 2019, p. 17. See also: **Update of the list of border crossing points referred to in Article 2(8) of 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)**, OJ 2007 C 316/1, as updated regularly thereafter (e.g. due to Croatia's accession to the EU, **OJ 2013 C 242/2**).
- 7 See Council of the EU (2011), **Council Conclusions on Borders, Migration and Asylum – Stocktaking and the way forward**, 3096<sup>th</sup> meeting of the Council, Luxembourg, 9–10 June 2011, para. 5.
- 8 See Ireland, Citizens Information, **Common Travel Area between Ireland and the United Kingdom**.
- 9 This opt-out clause cannot be applied at internal borders even if border controls have been reinstated there, see Court of Justice of the European Union (CJEU), **C-444/17, Préfet des Pyrénées-Orientales v. Abdelaziz Arib** [GC], 19 March 2019.
- 10 See Gumenyuk, I., Kuznetsova, T. & Osmolovskaya, I. G. (2016), 'Local border traffic as an efficient tool for developing cross-border cooperation', *Baltic Region* 1 (8), January 2016, pp. 76–82; and Visa Free Europe, **Local border traffic agreement ratified by Lithuania**, 29 June 2011.
- 11 See, inter alia, ECtHR, *Saadi v. United Kingdom* [GC], **No. 13229/03**, 29 January 2008; ECtHR, *Chahal v. the United Kingdom* [GC], **No. 22414/93**, 15 November 1996; ECtHR, *Amuur v. France* [GC], **No. 19776/92**, 25 June 1996, para. 41.
- 12 See FRA (2016), **Scope of the principle of non-refoulement in contemporary border management: evolving areas of law**, Luxembourg, Publications Office of the European Union (Publications Office), December 2016; Duffy, A. (2008), 'Expulsion to Face Torture? Non-refoulement in International Law', *International Journal of Refugee Law*, Vol. 20, pp. 373–390.
- 13 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, entered into force on 26 June 1987 (U.N.T.S. Vol. 1465, p. 85).
- 14 **Qualification Directive 2011/95/EU** (OJ 2011 L 337/9), Art. 15.
- 15 See also FRA and Council of Europe (2020), *Handbook on European law relating to asylum, borders and immigration. 2020 Edition*, Luxembourg, Publications Office [forthcoming], section 1.9.
- 16 FRA (2020), **Border controls and fundamental rights at external land borders**, Luxembourg, Publications Office, July 2020. This is also available as a 'pocket edition'.
- 17 This obligation derives from the EU asylum acquis, in particular the **Asylum Procedures Directive 2013/32/EU** (OJ 2013 L 180/60), Arts. 6 and 8 and from the **Anti-Trafficking Directive 2011/36/EU** (OJ 2011 L 101/1), Art. 11, see also its Recital (25) on training. For Frontex operations, pursuant to Art. 38 (3) (m) of the **European Border and Coast Guard Regulation 2019/1896** (EBCG Regulation) (OJ 2019 L 295/1), referral procedures must be set out in operational plans.
- 18 European Commission (2013), **Guidelines for the identification of victims of trafficking in human beings** (especially for consular services and border guards), Luxembourg, Publications Office, 2013.
- 19 Frontex (2015), **VEGA handbook; children at airports**, Warsaw, 14 October 2015.
- 20 EASO, **Practical Tools for First-Contact Officials: Access to the Asylum Procedure**, which includes practical guidance, a poster, a leaflet and pocket booklet.
- 21 **EBCG Regulation**, Art. 3 (g) and Art. 71.
- 22 European Commission (2019), **Progress report on the Implementation of the European Agenda on Migration**, COM(2019) 481 final, Brussels, 16 October 2019, p. 4; and International Organization for Migration, Mixed Migration Hub (2020), **Trend Bulletin**, April 2020, p. 3.
- 23 Frontex (2020), **Risk Analysis for 2020**, p. 21.
- 24 Frontex (2020), **Annual Risk Analysis for 2020**, March 2020, p. 20.
- 25 **EBCG Regulation**, Art. 2 (9) and Chapter II, Section 3 [EUROSUR].
- 26 **EBCG Regulation**, Art. 25. Its Art. 2 (10) provides a definition of 'situational picture'.
- 27 Croatia, Ministry of the Interior, **Project "Technical equipment of the external border of the European Union for the purpose of protection and control"**, 22 October 2020 and Ministry of the Interior, **Project: "Procurement of drones"**, 8 October 2020.
- 28 FRA (2020), **Migration: Key fundamental rights issues – Quarterly Bulletin 4 – 2020**, Luxembourg, Publications Office, November 2020, p. 13.

- 29 Frontex, Frontex Situation Centre (2018), **Multipurpose aerial surveillance**, Luxembourg, Publications Office, 2018.
- 30 On EU Member States' border management-related cooperation agreements and arrangements with third countries, see FRA (2018), **How the Eurosur Regulation affects fundamental rights**, Luxembourg, Publications Office, September 2018, Section 2 [Cooperation with third countries].
- 31 See, for example, the description of the *modus operandi* at the border by the Greek Ministry of Citizen Protection in Greek Government, **Response to the report on its visit to Greece** from 10 to 19 April 2018, February 2019, p. 35.
- 32 See ECtHR, *Banković and Others v. Belgium and Others* [GC], **No. 52207/99**, 12 December 2001, para. 73; *Hirsi Jamaa and Others v. Italy* [GC], **No. 27765/09**, 23 February 2012, para. 180; *Medvedyev and Others v. France*, **No. 3394/03**, 29 March 2010, para. 67; *Öcalan v. Turkey*, **No. 46221/99**, 12 March 2003, para. 93, confirmed by *Öcalan v. Turkey* [GC], 2 May 2005; *Al-Saadoon and Mufhdi v. United Kingdom*, **No. 61498/08**, 2 March 2010; *Al Skeini and Others v. United Kingdom* [GC], **No. 52207/99**, 7 July 2011.
- 33 European Commission, **Questions and Answers: Future EU funding for Borders and Migration**, 12 June 2018; European Parliament, Parliamentary Questions, **Answer given by Mr Avramopoulos on behalf of the Commission**, 29 February 2016.
- 34 See European Court of Auditors, Special Report N. 15/2014, **'The External Borders Fund has fostered financial solidarity but requires better measurement of results and needs to provide further EU added'**, 2014, p. 43.
- 35 See *El Diario*, 14 October 2020.
- 36 Spain, Ministry of the Interior, **Orden INT/595/2020**, 2 July 2020, Art. 2.
- 37 See **Schengen Borders Code**, Recital (7): "Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued."
- 38 **Schengen Borders Code**, Art. 2 (12).
- 39 FRA (2018), **Fundamental Rights Report 2018**, Luxembourg, Publications Office, June 2018, sub-section 6.1.2; FRA (2019), **Fundamental Rights Report 2019**, Luxembourg, Publications Office, June 2019, sub-sections 6.1.2-6.1.4; FRA (2020), **Fundamental Rights Report 2020**, Luxembourg, Publications Office, June 2020, p. 117.
- 40 ECtHR, *L.C.B. v. the United Kingdom*, **No. 23413**, 9 June 1998, para. 36; ECtHR, *Öneryildiz v. Turkey*, **No. 48939/99**, 18 June 2002, paras. 62-63.
- 41 International Organization for Migration (IOM), **Fatal Journeys Volume 4: Missing Migrant Children**, Geneva, 2019, p. 6.
- 42 FRA (2019), **Migration: Key Fundamental Rights Concerns – Quarterly Bulletin**, June 2019, p. 17.
- 43 Information provided by IOM in October 2020. See **Missing Migrants Project** for more details.
- 44 Greece, E-evros.gr, **14 Turkish dissidents trapped for 12 hours on an islet of Evros river**, 15 October 2020; and CNN Greece, **Evros: Ongoing operation to locate migrants – no trace of the missing persons**, 2 February 2019.
- 45 *Policijska uprava karlovačka* [Karlovac Police Department], **"Još jedan slučaj spašavanja migranata"** ["Another case of rescuing migrants"], 20 November 2019. See also Dnevnik newspaper, **"Četvorica migranata spašena iz rijeke Une, policija ih pronašla pothlađene i iznemogle"** ["Four migrants rescued from the Una River, the police found them hypothermic and exhausted"], 4 March 2020.
- 46 ECtHR, *Öneryildiz v. Turkey*, **No. 48939/99**, 18 June 2002, paras. 62-63.
- 47 **Directive 2002/90/EC** of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328/17) and Council **Framework Decision 2002/946/JHA** of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328/1).
- 48 **Protocol against the Smuggling of Migrants by Land, Sea and Air**, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000 (U.N.T.S., Vol. 2241, p. 507), Art. 16. The EU is party to the Protocol (see Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community (2006/617/EC), OJ 2006 L 262/34).
- 49 **Regulation (EU) No. 656/2014** establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2014 L 189/93); see Recitals (9)-(15) and (19), and Arts. 4, 9-10.
- 50 European Commission, **EU Action Plan against migrant smuggling (2015 – 2020)**, COM(2015) 285 final, Brussels, 27 May 2015, p. 7.
- 51 **Schengen Borders Code**, Art. 4; Return Directive (**2008/115/EC**) (OJ 2008 L 348/98), Recital (6).
- 52 Greece, *Act of legislative content*, **Official Gazette** 45/A/02.03.2020.
- 53 Hungary, Act No. LVIII of 2020 on the transitional rules related to the termination of the state of danger and on the epidemiological preparedness (**2020. évi LVIII. törvény a veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készülségről**), Arts. 267-275; and Government Decree No. 292/2020 on designating diplomatic missions to receive declarations of intents for lodging asylum applications (**292/2020. (VI. 17.) Korm. rendelet a menedéjogi kérelem benyújtására irányuló szándéknyilatkozattal kapcsolatban nagykövetségek kijelöléséről**).
- 54 At the end of October, the European Commission **opened an infringement procedure against Hungary** by sending a letter of formal notice on the incorrect application of EU asylum acquis. The Commission considers that the above-mentioned new Hungarian asylum legislation is in breach of EU law, in particular the Asylum Procedures Directive 2013/32/EU as interpreted in light of the Charter.
- 55 Hungary, Act No. LXXXIX of 2007 on the State borders (**2007. évi LXXXIX. törvény az államhatárról**), Art. 5 (1b).

- 56 Spain, Aliens Act amended by Organic Law 4/2015 on the protection of citizens' security (*De protección de la seguridad ciudadana*), Official State Bulletin No. 77, 31 March 2015, pp. 27242–27243. See also United Nations, Human Rights Council (2020), **Report of the Working Group on the Universal Periodic Review**, Spain, A/HRC/44/7, 18 March 2020, recommendations relating to access to asylum.
- 57 See UNHCR, **Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights**, at point 2.2.2. The Spanish authorities informed FRA on 4 November 2020 that such protocol has not yet been approved.
- 58 European Commission (2015), **Seventh bi-annual report on the functioning of the Schengen area (1 November 2014 – 30 April 2015)**, COM(2015) 236 final, Brussels, 29 May 2015, p. 8.
- 59 ECtHR, *Ilias and Ahmed v. Hungary* [GC], **No. 47287/15**, 21 November 2019.
- 60 Frontex, **Consolidated Annual Activity Report (2018)**, Reg. No. 5865, 12 June 2019, p. 111; Frontex, **Joint Operation Flexible Operational Activities 2018 – Land on Border Surveillance**, 22 March 2019, pp. 3-4; Frontex, **Management Board Decision 14/2020 adopting the annual activity report 2019 and its assessment**, Reg. No. 5495, 29 June 2020, p. 54; Frontex, **2019 in brief**, 17 January 2020, p. 20.
- 61 Refugee Rights Europe and End Pushbacks Partnership (2020), **Pushbacks and rights violations at Europe's borders. The state of play in 2020**, November 2020.
- 62 Danish Refugee Council, Border Monitoring Snapshots, available **on the DRC's website**.
- 63 See, for example, Amnesty International, **Greece/Turkey: Asylum-seekers and migrants killed and abused at borders**, April 2020 (reporting on unlawful use of force, killings at the border, push-backs, arbitrary detention and suspension of asylum, physical violence, push-backs, confiscation and destruction of migrants' belongings); Amnesty International, **Slovenia: Push-backs and denial of access to asylum**, June 2018 (referring to push-backs, inadequate information and interpretation, inappropriate conduct by some interpreters, excessive use of force, appropriation of money and destruction of mobile phones, poor reception conditions); Human Rights Watch, Greece, **Violent Pushbacks at Turkey Border**, December 2018 (reporting on Push-backs, confiscation and destruction of migrants' belongings).
- 64 See, for example for Croatia, Centre for Peace Studies, Are you Syrious, and Welcome, **Fifth report on pushbacks and violence from the Republic of Croatia: Illegal Practices and Systemic Human rights Violations at EU Borders** April 2019 (reporting on physical violence, push-backs, confiscation and destruction of migrants' belongings); Border Violence Monitoring Network, Centre for Peace Studies, Society for Psychological Assistance, Welcome Initiative, **Pushback report on children and unaccompanied children in Croatia**, May 2020. For Greece, see for example, Human Rights 360, **Defending human rights in times of border militarization**, October 2020 (reporting on unlawful use of force, push-backs, confiscation of belongings including documents); Human Rights 360, **During and After Crises: Evros Border Monitoring Report**, May 2020 (reporting on private actors patrolling the border, suspension of asylum, *de-facto* detention of unaccompanied children) and Greek Council for Refugees, Human Rights 360, Arsis, **The new normality: Continuous push-backs of third country nationals on the Evros river**, December 2018 (reporting on push-backs and excessive use of force). For Hungary, see materials published by the Hungarian Helsinki Committee at <https://www.helsinki.hu/menekultek-es-kulfoldiek/monitorozas/> and <https://www.helsinki.hu/cimke/tranzitzonak/>. For Spain, see for example, La Comisión Española de Ayuda al Refugiado (CEAR), **Annual Report 2020**, reporting on push-backs, restriction of movement, prolonged stay, extreme overcrowding in the reception centres and difficulties in ensuring speedy family reunifications in Ceuta and Melilla. See also CEAR **press release** from 25 May 2020, through which 11 civil society organisations in Spain requested the Public Prosecutor's Office to initiate an urgent investigation into a push-back of an unaccompanied child from Cameroon in Ceuta. See also, Border Violence Monitoring Network, **Special Report on COVID-19 and Border Violence along the Balkan Route**, April 2020 (covering Croatia-Bosnia Herzegovina, Croatia-Slovenia, Greece-Turkey).
- 65 For example, in November 2020, the organisation Asylkoordination informed FRA of a group of persons apprehended late September 2020 in Southern Austria who requested international protection but were returned through Slovenia and through Croatia to Bosnia and Herzegovina; see also Italy, Camera dei Deputati, **Resoconto stenografico dell'Assemblea, Seduta n. 379**, 24 July 2020; Amnesty International, **Slovenia: Push-backs and denial of access to asylum**, June 2018; Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), **"Riammissioni informali" dei cittadini stranieri alla frontiera terrestre italo-slovena, lettera aperta dell'ASGI al Governo e ad UNHCR**, 3 August 2020.
- 66 European Committee for the Prevention of Torture (CPT) (2019), **Report on the visit to Greece from 10 to 19 April 2018**, pp. 59–62. In their response, the Greek authorities denied the push-back allegations. See Greek Government, **Response to the report on its visit to Greece** from 10 to 19 April 2018, February 2019, p. 36.
- 67 European Committee for the Prevention of Torture (CPT) (2020), **Report on the visit to Greece from 13 to 17 March 2020** pp. 13 and 26. See also Greek Government, **Response to the report on its visit to Greece** from 13 to 17 March 2020, p. 20.
- 68 Danish Refugee Council, information provided to FRA in October 2020.
- 69 Ombudsperson of the Republic of Croatia, **Report on the Performance of Activities of the National Preventive Mechanism for 2017**, p. 45.
- 70 See Constitutional Court of the Republic of Croatia, **Decision U-III/1385/2018**, ruling on 18 December 2018.
- 71 See ECtHR, *M.H and others v. Croatia*, **No. 15670/18**, lodged on 16 April 2018; and *M.H. and others v. Croatia* (No. 2), **No. 43115/18**, lodged on 13 July 2018.
- 72 See Article 1 of the **Convention** for the elements of the refugee definition (being outside the own country; having a well-founded fear of persecution; lack of state protection)
- 73 See UNHCR (2007), **Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**, January 2007, para. 6 and in particular footnote 9 which contains references to the relevant conclusions of the UNHCR Executive Committee.
- 74 ECtHR, *N.A. v. Finland*, **No. 25244/18**, 14 November 2019; ECtHR, *Saadi v. Italy* [GC], **No. 37201/06**, 28 February 2008.

- 75 ECtHR, *F.G. v. Sweden* [GC], **No. 43611/11**, 23 March 2016, para. 127.
- 76 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], **No. 27765/09**, 23 February 2012, paras. 201-207.
- 77 Charter, Art. 52 (3): "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention." This obligation also implies the observance of relevant ECtHR case law interpreting those Convention rights.
- 78 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], **No. 27765/09**, 23 February 2012; ECtHR, *N.D. and N.T. v. Spain* [GC], **Nos. 8675/15 and 8697/15**, 13 February 2020; ECtHR, *M.K. and Others v. Poland*, **Nos. 40503/17 and 2 others**, 23 July 2020.
- 79 ECtHR, *N.D. and N.T. v. Spain* [GC], **Nos. 8675/15 and 8697/15**, 13 February 2020.
- 80 ECtHR, *McCann and Others v. the United Kingdom* [GC], **No. 18984/91**, 27 September 1995, para. 149.
- 81 ECtHR, *Mocanu and Others v. Romania* [GC], **Nos. 10865/09 and 2 others**, 17 September 2014, paras. 315-326.
- 82 ECtHR, *Ibid.*; ECtHR, *Armani da Silva v. the United Kingdom* [GC], **No. 5878/08**, 30 March 2016, paras. 229-239.
- 83 For an example of police investigation, see the Greek Ombudsperson **Report 2019 of the National Mechanism for the investigation of arbitrary incidents**, pp. 42-43 (reporting the results of an official police investigation at the land borders, ordered for "violation of physical integrity with a racist motive").
- 84 Croatia, Ministry of the Interior, information provided to FRA in November 2020.
- 85 Croatia, Ministry of the Interior, information provided to FRA in November 2020.
- 86 Centre for Peace Studies, **CPS filed one more criminal complaint: What is the connection between Croatian police and armed men in black?**, 23 July 2020.
- 87 See Greek Refugee Council, '**GCR initiated legal action following the allegation of push backs in Evros**', 19 June 2019. On the push-backs of Turkish nationals see also Human Rights 360°, **Defending human rights in times of border militarisation**, October 2020.
- 88 Information received from the Greek Refugee Council, 30 October 2020.
- 89 Slovenia, Administrative Court, judgement I U 1490/2019-92, 16 July 2020. Judgment not final.
- 90 The case is reported by the Spanish Commission for Refugees (CEAR), **The accusations of the 16 agents in the Tarajal case are a decisive step for justice**, 25 September 2019. For further details see the information published in "**El País**" and "**El Confidencial**" (which followed up on the case in **2015** and **2019**).
- 91 See Order by the General Police Director Class: 212-04/18-01/178, Reg. No.: 511-01-63-18-1 of 30 November 2018 and Order by the General Police Director Class: 212-04/19-01/14, Reg. No.: 511-06-61-19-1 of 17 January 2019 (not public).
- 92 Greece, Hellenic Police Headquarters (Administrative Support and Human Resources Department, Organisation and Legal Support Unit), Annual Report on measures taken in the area of the protection of human rights during policing, June 2020.
- 93 Relevant national legislation includes the Croatian Aliens Act, Official Gazette 130/11, 74/13, 69/17, 46/18; the International and Temporary Protection Act Official Gazette 70/15, 127/17. Protocol on procedures for unaccompanied and separated children adopted by the Ministry of the Interior of Croatia on 31 August 2018, Class: 011-02/18-01/48, Reg. No. 511-01-152-18-20 (not public); Instructions on Standard Operating Procedures on the Treatment of Applicants for International Protection, adopted by general police director on 27 August 2019 (not public).
- 94 See, however, in this context, the innovative approach by Forensic Architecture, **Pushbacks across the Evros/ Meriç river: Analysis of video evidence**, 13 December 2019.
- 95 See for Croatia, Ombudsperson, **Report on the performance of the activities of the national preventive mechanism for 2019**, p. 27. FRA received similar information from the Hellenic Police in July 2020.
- 96 See, for example, UN Committee on the Rights of the Child, *D.D. v. Spain*, **CRC/C/80/D/4/2016**, 1 February 2019, paras. 2.5 and 13.6.
- 97 Frontex standard reporting mechanism envisages that in case a participant in Frontex activities witnesses, is involved in, or has grounds to believe that a possible violation of fundamental rights or of the Frontex Code of Conduct has taken place, he/she is obliged to report the case as soon as possible to Frontex.
- 98 Information provided by Frontex, October 2020.
- 99 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 18 December 2002, entered into force on 22 June 2006 (U.N.T.S. Vol. 2375, p. 237).
- 100 Croatia, Ombudsperson, **Report on the performance of the activities of the national preventive mechanism for 2019**, p. 25.
- 101 United Nations Convention on the Rights of the Child, New York, 20 November 1989, entered into force on 2 September 1990 (U.N.T.S. Vol. 1577, p. 3).
- 102 UN Committee on the Rights of the Child, *D.D. v. Spain*, **CRC/C/80/D/4/2016**, 1 February 2019.
- 103 ECtHR, *Guzzardi v. Italy*, **No. 7367/76**, 6 November 1980, para. 93.
- 104 CJEU, **Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság** [GC], 14 May 2020.
- 105 ECtHR, *Ilias and Ahmed v. Hungary* [GC], **No. 47287/15**, 21 November 2019, para. 248. See also ECtHR, *Amuur v. France*, **No. 19776/92**, 25 June 1996, para. 49.

- 106 See, for example, Hungary, Act No. II of 2007 on the Entry and Stay of Third-Country Nationals (**2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról**), Art. 55 [immigration detention for the purposes of identification]; Greece, L. 4636/2019 (International Protection Act and other provisions), Art. 39 (4).
- 107 See in this context also FRA (2010), **Detention of third-country nationals in return procedures**, Luxembourg, Publications Office, November 2010, Section 4.2, p. 40.
- 108 Croatia, Ombudsperson, **Report on the performance of the activities of the national preventive mechanism for 2019**, pp. 25-26.
- 109 Greece, International Protection Act, Art. 39 (1) requires new arrivals to be placed in a reception and identification centre.
- 110 See European Committee for the Prevention of Torture (CPT), (2020), **Report on the visit to Greece from 13 to 17 March 2020**, pp. 14-21.
- 111 See FRA (2017), **European legal and policy framework on immigration detention of children**, Luxembourg, Publications Office, June 2017, p. 78; European Committee for the Prevention of Torture (CPT) (2019), **Report on the visit to Greece from 10 to 19 April 2018**, p. 42 (concerning the pre-removal centre in Fylakio which was functioning as a closed detention facility) and p. 54 (concerning 'protective custody').
- 112 Greece, Ministry of Migration and Asylum, **Greece puts an end to the accommodation of unaccompanied children in police stations**, 18 November 2010.
- 113 All EU Member States are parties to these instruments. For an overview of the applicability of international human rights law instruments to EU Member States, see FRA and Council of Europe, **Handbook on European law relating to asylum, borders and immigration. 2020 Edition**, December 2020 [forthcoming], Annex 4.
- 114 For a more detailed analysis of the legal framework concerning deprivation of liberty of children for immigration and asylum related purposes, see FRA (2017), **European legal and policy framework on immigration detention of children**, Luxembourg, Publications Office, June 2017. See also on ending immigration detention of children, UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, **Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return**, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, paras. 8-10; UN, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, **Ending immigration detention of children and providing adequate care and reception for them**, A/75/183, 20 July 2020.
- 115 FRA (2014), **Criminalisation of migrants in an irregular situation and of persons engaging with them**, Luxembourg, Publications Office, March 2014.
- 116 Information provided by UNHCR, October 2020.
- 117 Art. 242 – Code of criminal procedure.
- 118 Information provided by UNHCR, October 2020.
- 119 *Ibid.*
- 120 **Hungarian Criminal Code** as amended by Act No. CXL of 2015 on the Amendment of Certain Acts relating to the Management of Mass Immigration, Art. 352/A (illegal crossing of the border fence), Art. 352/B (vandalisation of the border fence), and Art. 352/C (obstructing construction works related to the border fence).
- 121 FRA (2016), **Asylum and migration into the EU in 2015. Focus**, Luxembourg, Publications Office, June 2016, p. 12.
- 122 According to Art. 43/A of Act No. CCXL of 2013 on the execution of punishments, certain coercive measures and confinement for infraction (**2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról**).
- 123 See e.g. FRA (2016), **Asylum and migration into the EU in 2015. Focus**, Luxembourg, Publications Office, June 2016, p. 12; and FRA's **weekly overviews of migration-related fundamental rights concerns** from Update # 2 (5 October – 9 October 2015) to Update # 8 (16 November – 22 November 2015), under the section "Hungary".
- 124 Spain, Provincial Court of Cádiz in Ceuta, judgement 80/2019, 15 October 2019.
- 125 **Regulation (EU) 2019/816** of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 (O) 2019 L 135/1).
- 126 On the risks relating to information on criminal records through large-scale IT-systems, see also FRA (2018), **Interoperability and fundamental rights implications**, Opinion of the European Union Agency for Fundamental Rights, Vienna, April 2018, p. 38.
- 127 TFEU, Art. 78, which requires EU asylum law to be in conformity with the 1951 Geneva Refugee Convention and other relevant treaties.
- 128 CJEU, **C-61/11, El Dridi, alias Soufi Karim**, 28 April 2011 and **C-329/11, Achughbabian v. Prefet du Val-de-Marne** [GC], 6 December 2011.
- 129 **Reception Conditions Directive** 2013/33/EU (OJ 2013 L 180/96), Art. 1 read in conjunction with its Art. 2 (a) and 2 (b). For the definition of 'application for international protection', see the Qualification Directive (2011/95/EU), Art. 2 (h).
- 130 CJEU, **joined cases C-924/19 PPU and C-925/19 PPU, FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság und Országos Idegenrendészeti Főigazgatóság** [GC], 14 May 2020.
- 131 For Greece, see **AIDA Country Report: Greece-2019 Update**, 23 June 2020, p. 90; Spain, Audiencia Nacional, Decision SAN 1780/2017, 24 April 2017. See also EASO (2020), **Border Procedures for Asylum Applications in EU+ Countries**, September 2020.

- 132 For Fylakio see for example, European Committee for the Prevention of Torture, (CPT) (2019), **Report on the visit to Greece from 10 to 19 April 2018**, pp. 42-44; UNHCR, **Submission by the Office of the United Nations High Commissioner for Refugees in the case of International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece (Complaint No. 173/2018) before the European Committee of Social Rights**, 9 August 2019, para.2.4.2. For Ceuta and Melilla see Spain, Ombudsperson, **More than a thousand complaints on COVID-19**, 3 April 2020; Spain, Ombudsperson, **Recommendation on the transfer from the CETI of Melilla to the peninsula of asylum seekers in a situation of particular vulnerability**, 29 July 2020; Spain, Minister of the Interior, **letter to the Commissioner for Human Rights of the Council of Europe on the situation in the Autonomous City of Melilla**, 2 September 2020.
- 133 FRA (2019), **Update of the 2016 FRA Opinion on fundamental rights in the hotspots set up in Greece and Italy**, Vienna, 4 March 2019, p. 6.
- 134 See in this regard also FRA (2020), Migration: Key fundamental rights concerns – **Quarterly bulletin 2**, May 2020; FRA (2020), Migration: Key fundamental rights concerns – **Quarterly bulletin 3**, July 2020 and, more generally, FRA (2020), **Coronavirus pandemic in the EU – Fundamental rights implications. Bulletin 1**, 1 February – 20 March 2020, April 2020.
- 135 Council of Europe, Commissioner for Human Rights (2020), **Spain’s authorities must find alternatives to accommodating migrants, including asylum seekers, in substandard conditions in Melilla**, letter, 3 September 2020. See also UNCHR and IOM, press release, **Urgent Coordinated Response Needed to the Alarming Conditions of Migrants and Refugees Detained in Melilla**, 29 August 2020; Amnesty International, **It is urgent to transfer and relocate migrants and asylum seekers in Melilla in dignified conditions**, 27 August 2020.
- 136 **Schengen Borders Code**, Art. 2 (11).
- 137 Frontex (2019), **Technical and operational strategy for European integrated border management**, 20 August 2019, p. 17.
- 138 Based on United Nations World Tourism Organisation (2020), **World Tourism Barometer**, Vol. 18, Issue 4, July 2020 Update, p. 6.
- 139 On the treatment of third-country nationals at EU’s external land borders, based on the Agency’s fieldwork at selected border crossing points carried out in 2012, see FRA (2014), **Fundamental rights at land borders: findings from selected European Union border crossing points**, Luxembourg, Publications Office, October 2014.
- 140 See the information on the Commission’s letter of formal notice of 30 October 2020, available on the **Commission’s website**.
- 141 For an overview of public health measures see IOM, **DTM (COVID-19) Points of Entry Baseline Assessment**, biweekly reports.
- 142 UNHCR (2020), **EU Pact on Migration and Asylum – Practical considerations for fair and fast border procedures and solidarity in the European Union**, Geneva, October 2020, p. 1.
- 143 FRA (2014), **Fundamental rights at land borders: findings from selected European Union border crossing points**, Luxembourg, Publications Office, October 2014.
- 144 *Ibid.*, p. 41.
- 145 ECtHR, *M.A. and Others v. Lithuania*, **No. 59793/17**, 11 December 2018; *M.K. and Others v. Poland*, **Nos. 40503/17 and 2 others**, 23 July 2020. See also Poland, Supreme Administrative Court (*Naczelny Sąd Administracyjny*), **Decision II OZ 169/19 of the Supreme Administrative Court**, 13 March 2019; **Judgement II OSK 3423/18 of the Supreme Administrative Court**, 5 May 2019; **Judgement II OSK 225/19 of the Supreme Administrative Court**, 13 June 2019; **Judgement II OSK 414/19 of the Supreme Administrative Court**, 18 July 2019; **Judgement II OSK 2219/19 of the Supreme Administrative Court**, 18 December 2019; Regional Administrative Court of Warsaw, *Iman Tashaeva v. Poland*, 17 May 2018, as well as 12 cases decided on 20 September 2018: **case II OSK 345/18-Wyrok NSA**; **case II OSK 1674/18-Wyrok NSA**; **case II OSK 890/18-Wyrok NSA**; **case II OSK 1025/18-Wyrok NSA**; **case II OSK 1532/18-Wyrok NSA**; **case II OSK 962/18-Wyrok NSA**; **case II OSK 1062/18-Wyrok NSA**; **case II OSK 445/18-Wyrok NSA**; **case II OSK 829/18-Wyrok NSA**; **case II OSK 830/18-Wyrok NSA**; **case II OSK 999/18-Wyrok NSA**; **case II OSK 1675/18-Wyrok NSA**; and **case II OSK 2361/16-Wyrok NSA**.
- 146 ECtHR, *M.A. and Others v. Lithuania*, **No. 59793/17**, 11 December 2018.
- 147 ECtHR, *M.K. and Others v. Poland*, **Nos. 40503/17 and 2 others**, 23 July 2020.
- 148 Annex V, Part B, of the **Schengen Borders Code**.
- 149 In case of refusal of entry, this obligation to affix an entry stamp on the passport, cancelled by a cross derives from Annex V, Part A of the **Schengen Borders Code** (see point 1 (b)).
- 150 Detailed rules governing refusal of entry are given in Annex V, Part A of the Schengen Borders Code; and in the non-binding Commission recommendation called “**Schengen Handbook**” (C(2019) 7131 final, Brussels, 8 October 2019), Part Two – 1.3 (border checks), and 8.4, 8.7 (refusal of entry).
- 151 See the **General Data Protection Regulation (EU) 2016/679** (OJ 2016 L 119/1), Chapter 3; **Directive (EU) 2016/680** (OJ 2016 L 119/89), Chapter 3; Schengen Information System (SIS) Border Checks **Regulation 2018/1861** (OJ 2018 OJ L 312/14), Chapter 9; SIS Police Cooperation **Regulation 2018/1862** (OJ 2018 OJ L 312/56), Chapter 16; Visa Information System (VIS) **Regulation 767/2008** (OJ 2008 L 218/60), Chapter 6; **Eurodac Regulation 603/2013** (OJ 2013 L 180/1), Art. 29; Entry/Exit System (EES) **Regulation 2017/2226** (OJ 2017 L 327/20), Arts. 50 and 52; European Travel Information and Authorisation System (ETIAS) **Regulation 2018/1240** (OJ 2018 L 236/1), Art. 64; as well as Interoperability Regulations **2019/817** (OJ 2019 L 135/27) and **2019/818** (OJ 2019 L 135/85), Arts. 47-48.

- 152 **Council Regulation (EU) No. 1053/2013** of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (OJ 2013 L 295/27). For an overview, see European Commission (n.d.), ‘**Schengen evaluation and monitoring**’.
- 153 FRA (2020), **Fundamental Rights Report 2020**, Luxembourg, Publications Office, p. 126. The 2019 Schengen evaluation of Poland is not included in these figures as the recommendations were not adopted as of October 2020.
- 154 The published Schengen evaluation recommendations are available at [www.consilium.europa.eu](http://www.consilium.europa.eu) under ‘Document register’.
- For 2015: Austria, **Doc. INT 2015/0192**; Belgium, **Doc. INT 2016/0026**; Germany, **Doc. INT 2016/0017**; Greece, **Doc. INT 2016/0035**; Hungary, **Doc. INT 2016/0138**; Netherlands **Doc. INT 2016/0227**; Poland (ad hoc), **Doc. INT 2016/0160**; Spain (ad hoc), **Doc. INT 2016/0226**; Sweden, **Doc. INT 2015/0311**.
- 2016: Croatia, **Doc. INT 2017/0037**; Estonia (ad hoc), **Doc. INT 2018/0029**; France, **Doc. INT 2018/0033**; Denmark (ad hoc), **Doc. INT 2016/0249**; Greece, **Doc. INT 2017/0008**; Italy, **Doc. INT 2017/0009**; Luxembourg, **Doc. INT 2016/0235**; Malta, **Doc. INT 2017/0117**; Spain, **Doc. INT 2016/0391**.
- 2017: Croatia, **Doc. INT 2018/0341**; Denmark, **Doc. INT 2017/0313**; Italy (ad hoc), **Doc. INT 2018/0215**; Netherlands (ad hoc), **Doc. INT 2018/0355**; Poland (ad hoc), **Doc. INT 2018/0253**; Portugal, **Doc. INT 2018/0054**; Spain, **Doc. INT 2018/0344**; Sweden, **Doc. INT 2018/0394**.
- 2018: Estonia, **Doc. INT 2019/0213**; Finland, **Doc. INT 8624/2019**; Greece (ad hoc), **Doc. INT 2019/0231**; Latvia, **Doc. INT 2018/0428**; Lithuania, **Doc. INT 2019/0198**.
- 2019 : Czech Republic, **Doc. INT 2019/0250**; France (ad hoc), **Doc. INT 2020/0009**; Hungary, **Doc. INT 2020/0114**; Slovakia, **Doc. INT 2020/0238**; Slovenia, **Doc. INT 2020/0117**.
- 155 European Council (2014), **Conclusions – 26/27 June 2014**, EUCO 79/14, Brussels, 27 June 2014, Part I, paras. 1, 3-4.
- 156 Council of the EU (2014), **Council conclusions on “Taking action to better manage migratory flows”**, 3336<sup>th</sup> meeting of the Council, Luxembourg, 10 October 2014, p. 4; Council of the EU (2011), **Council Conclusions on Borders, Migration and Asylum – Stocktaking and the way forward** 3096<sup>th</sup> meeting of the Council, Luxembourg, 9-10 June 2011, para. 15.
- 157 FRA (2020), **Fundamental Rights Report 2020**, Luxembourg, Publications Office, June 2020, p. 126.
- 158 See also European Commission (2020), **EU Strategy on victims’ rights (2020-2025)**, COM(2020) 258 final, Brussels, 24 June 2020, pp. 14-15.
- 159 UN General Assembly (2018), **Global Compact for Safe, Orderly and Regular Migration**, UNGA Res 73/195 (2018) UN Doc A/RES/73/195.
- 160 European Commission (2020), **New Pact on Migration and Asylum**, 23 September 2020. For the individual legislative proposals associated with it, see the **elements of the package**.
- 161 European Commission (2020), **Proposal for a regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817**, COM(2020)612 final, Brussels, 23 September 2020.
- 162 These include Bulgaria, Croatia, Hungary, Slovakia, Romania, Poland, Slovenia, and Lithuania – all are now EU Member States located at the EU external or Schengen land borders.
- 163 UNHCR (2011), **Refugee Protection and Mixed Migration: The 10-point Plan in action**, Geneva, United Nations High Commissioner for Refugees, February 2011, Chapter 3, pp. 95-96.
- 164 UN General Assembly (1950), **Statute of the Office of the United Nations High Commissioner for Refugees**, A/RES/428(V), 14 December 1950.
- 165 Croatia, Ombudsperson, **Report on the performance of the activities of the national preventive mechanism for 2019**, p. 30.
- 166 See also similarly Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Displaced Persons (2019), **Pushback policies and practice in Council of Europe member States [rapporteur: Ms Tineke]**, Doc. 14909, 8 June 2019, para. 101; Parliamentary Assembly of the Council of Europe, **Resolution 2299 (2019) – Pushback policies and practice in Council of Europe member States**, para. 12.1.3; Parliamentary Assembly of the Council of Europe, **Recommendation 2161 (2019) – Pushback policies and practice in Council of Europe member States**, para. 3.



# Border controls and fundamental rights at external land borders



PRACTICAL GUIDANCE

Under Article 51 (1) of the **Charter of Fundamental Rights of the European Union (EU)** ('the Charter'), which has the same legal value as the Treaties, EU Member States must implement EU law in **full compliance** with the rights and requirements of the **Charter**. In areas not covered by EU law, Member States have to comply with the rights protected by the European Convention on Human Rights (ECHR) and other human rights and refugee law instruments to which they are party. Many Charter rights are the same as those set out in the ECHR.

EU law instruments regulating border controls, notably the **Schengen Borders Code**, contain **fundamental rights protection clauses**. These clauses underline the need to comply with the fundamental rights enshrined in the Charter that are more frequently at stake in border management.

To protect fundamental rights, **national legal systems** must fully incorporate the requirements and safeguards flowing from EU law, the ECHR, as well as international human rights and refugee law. **National integrated border management (IBM) strategies** must also adequately reflect fundamental rights.

The protection of fundamental rights requires an effective system to **prevent or mitigate risks of violations**. For example, in its **practical guidance on the principle of non-refoulement**, when establishing operational cooperation with third countries, the EU Agency for Fundamental Rights (FRA) recommends a prior and ongoing assessment – based on a wide range of sources – of the human rights situation, including access to international protection. Independent monitoring at borders can help flag fundamental rights risks before violations may occur. Effective protection of fundamental rights requires systematic reporting of violations, effective investigation of all allegations, and effective and dissuasive sanctions when violations occur.

This practical guidance addresses border-management staff in European Union (EU) Member States who work at the operational level. It aims to support them in implementing the fundamental rights safeguards of the Schengen Borders Code (Regulation (EU) No. 2016/399) and related EU law instruments in their daily work, when carrying out controls at external land borders.

\* This guidance is also available as a 'pocket edition' (versions in all EU languages forthcoming).

**The protection of fundamental rights must exist in law and in practice.**

To protect and promote fundamental rights and to uphold the highest professional and behavioural standards in border management, the European Border and Coast Guard Agency (Frontex) drew up a Fundamental Rights Strategy, a Code of Conduct containing a duty to report, a complaint mechanism, as well as training and guidance materials.

To **facilitate adherence with fundamental rights in the daily operational work of border-management staff**, after consultations with the Croatian Presidency of the EU Council, FRA developed this practical guidance. It contains ten 'dos' and 'don'ts'. These suggest concrete actions that border guards and other competent authorities should take at operational level to uphold fundamental rights in their daily work. The 'dos' and 'don'ts' are also an integral part of the training for border-management authorities at different levels. They **focus on** the following **five core areas**:

- treating everyone with **dignity**;
- identifying and referring **vulnerable** people;
- respecting the legal basis, **necessity and proportionality when using force**;
- applying **safeguards when holding people** at borders; and
- respecting **procedural safeguards** and **protecting personal data**.

This guidance applies to checks at **border-crossing points** as well as controls during **border surveillance**, unless otherwise specified. It applies to all persons, except where it refers only to third-country nationals.

This guidance does not cover specific benefits EU law provides for certain categories of people, such as persons enjoying the Union right of free movement, their third-country national family members, or holders of local border traffic permits.

This guidance **focuses on EU external land borders and land borders with non-Schengen EU Member States**. However, **many of its points equally apply to sea and air borders**. At sea borders, there are additional safeguards deriving from the international law of the sea. At airports, international civil aviation law, as well as EU instruments on passenger name records (PNR) and advanced passenger information (API), contain further protective provisions.

Nothing in this guidance restricts or adversely affects applicable fundamental rights standards and safeguards.



# 1

## TREAT EVERY PERSON WITH DIGNITY AND IN A PROFESSIONAL AND RESPECTFUL MANNER

### + 1.1.

#### **Familiarise yourself with basic expressions**

in the most common languages of people approaching or crossing the land border.

### + 1.2.

#### **Use easy-to-understand communication tools**

(leaflets, posters or IT tools) to inform travellers about the nature and aim of the border checks.

### + 1.3.

#### **Put information on how to make complaints,**

and the actual complaint forms – including child-friendly versions – in visible places.

### + 1.4.

#### **Respond to questions**

in a factual and polite manner.

### + 1.5.

#### **Provide first aid and refer people who need urgent healthcare to appropriate medical services.**

Familiarise yourself with relevant parts of the **WHO International Health Regulations** that apply at the borders (Part IV). Use protective equipment provided to staff and stay up-to-date with relevant public health recommendations.

### + 1.6.

#### **Be sensitive**

to the person's age, gender and culture.

### + 1.7.

#### **Limit interferences with the person's privacy**

– for example, when checking personal belongings – to what is necessary and proportionate to the aim and nature of the border control.

### + 1.8.

#### **Pay particular attention to vulnerable persons.**

Adjust your behaviour when interacting with people who may have special needs (e.g. children, victims of trafficking in human beings or other violent crime, pregnant women, people with medical conditions, persons with disabilities, etc.). Be aware that some persons may be traumatised. Consult the **EASO Tool for Identification of Persons with Special Needs** in case of doubt.

### + 1.9.

#### **Inform persons placed in holding facilities at points of entry or at police stations on their rights and the procedure applicable to them.**

Do this without delay, both orally and in writing, in a language they understand. Read carefully the **Factsheet on Immigration Detention** of the European Committee for the Prevention of Torture (CPT) to know the safeguards and the material conditions to respect.

### + 1.10.

#### **Whenever possible, work in mixed male-female shifts,**

as this fosters a gender-sensitive approach.

Relevant legal sources: Charter, Art. 1; **Schengen Borders Code**, recital 7, Arts. 2 (21) and 7; **European Border and Coast Guard (EBCG) Regulation**, Art. 3 (1) (a); **Anti-Trafficking Directive**, recital 3; **Return Directive**, Arts. 15-17; **Schengen Handbook**, pp. 14, 16-17, 5.6 (for checks on children) and Annex VII.6 (special rules); ECHR, Art. 5 (1) (f) and (2); **CPT Standards on Immigration Detention**; **WHO International Health Regulations, Part IV**; CJEU, *Zakaria* (C-23/12), 17 January 2013; **ECtHR case law on deprivation of liberty**

## 2

# DON'T USE FORCE AND DON'T CONFISCATE PROPERTY UNLESS NECESSARY, PROPORTIONATE, AND JUSTIFIED UNDER NATIONAL, EU AND INTERNATIONAL LAW TO ACHIEVE A LEGITIMATE AIM

### + 2.1.

#### **Be aware that the use of force can have different forms.**

These include the use of your hands and body; the use of any instruments of constraint; the use of weapons, including firearms; and the use of service dogs or equipment.

### + 2.2.

#### **Make every reasonable effort to resolve a situation using non-violent means first,**

including by means of persuasion, negotiation, or mediation.

### + 2.3.

#### **Take all necessary steps**

to minimise the risk of injury and damage.

### + 2.4.

#### **Follow the rules on the use of force and weapons, notably the principles of necessity, proportionality and precaution.**

For the use of specific weapons and equipment, read carefully the guidance in Annex V to the **EBCG Regulation** (Regulation (EU) 2019/1896) concerning rules on the use of force by Frontex statutory staff.

### + 2.5.

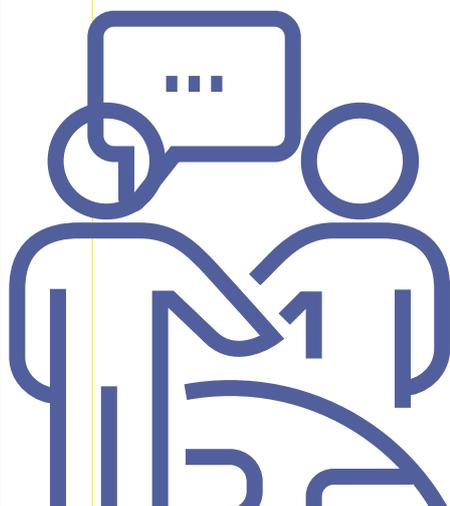
#### **Inform people who wish to complain on how to do this.**

Register complaints you receive according to the established procedure.

### + 2.6.

#### **Keep records of all incidents of force used and all confiscated items, the reason and legal basis for their confiscation**

(e.g. evidence in criminal proceedings, dangerous items, or other reasons), and the further procedure applied to them.



— Relevant legal sources: Charter, Arts. 3-4 and 17; **Schengen Borders Code**, Annex II (registration of information); **EBCG Regulation**, Annex V (formally applicable to Frontex statutory staff only); ECHR Arts. 2-3 and Art. 1 of Protocol No. 1 to ECHR, **ECtHR case law on Arts. 2-3 and 8**; United Nations (UN) **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials**; **UN Code of Conduct for Law Enforcement Officials**

## 3

# PAY ATTENTION TO FUNDAMENTAL RIGHTS RISKS WHEN COOPERATING WITH NEIGHBOURING THIRD COUNTRIES

### + 3.1.

#### **Be aware that there are strict limitations on sharing personal data with third countries.**

Before sharing them, verify that you are complying with all EU law and refugee protection requirements as outlined in your data protection policy.

### + 3.2.

#### **Inform yourself**

on how neighbouring third countries' authorities treat people they intercept near the EU external border.

### + 3.3.

#### **If you are responsible to communicate operational information to neighbouring third countries,**

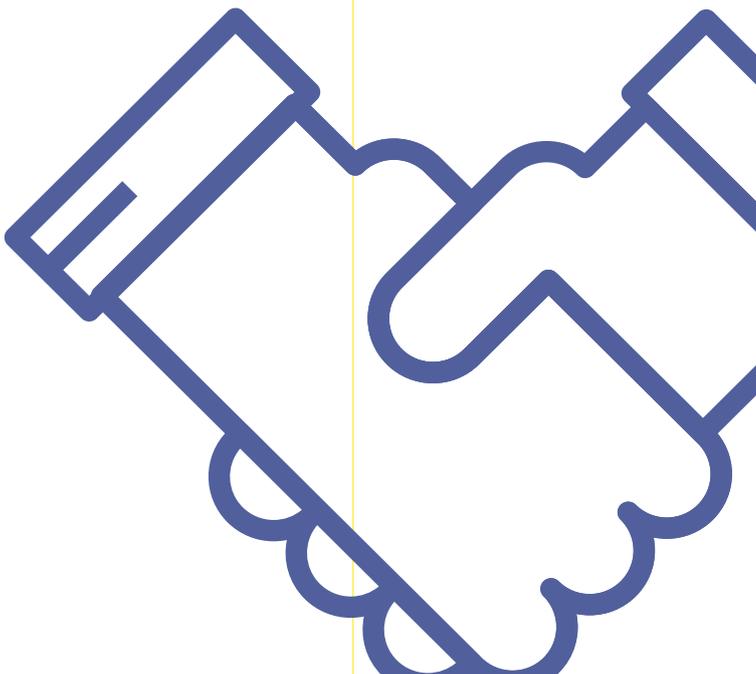
before asking them to intercept people approaching the EU external border outside a border-crossing point, assure yourself that, once intercepted, they will not face ill-treatment, persecution or other forms of serious harm.

### + 3.4.

#### **If the border is fenced,**

indicate to third-country nationals who reach the fence and wish to request asylum how they can reach a place where they can physically request asylum in safety. Consider using written signs as well.

Relevant legal sources:  
*Charter, Arts. 4 and 18; Schengen Borders Code, combined reading of Arts. 3-4 and 13; ECtHR, N.T. and N.D. v. Spain, 13 February 2020*



## 4

# IDENTIFY ASYLUM APPLICANTS AND PROTECT THEM FROM *REFOULEMENT*

### + 4.1.

**Treat any third-country national's expression of fear or risk of suffering serious harm or persecution**

if returned as a wish to seek international protection.

### + 4.2.

**Remember that anybody can be in need of international protection, regardless of nationality, age or appearance.**

It is not your task to decide if the third-country national is in need of asylum or not.

### + 4.3.

**Look out proactively for indications that a third-country national may wish to seek asylum,**

as described in the joint European Asylum Support Office and Frontex Practical Tools for First-Contact Officials on "**Access to the Asylum Procedure**". Pay attention to who the person is, what the person says, but also to what you observe. Carry the tool's pocket booklet with you.

### + 4.4.

**Once you have identified that a third-country national wishes to seek international protection, provide information on how to apply for asylum**

in a language that he or she understands or may reasonably be presumed to understand. Use pictograms, especially for children.

### + 4.5.

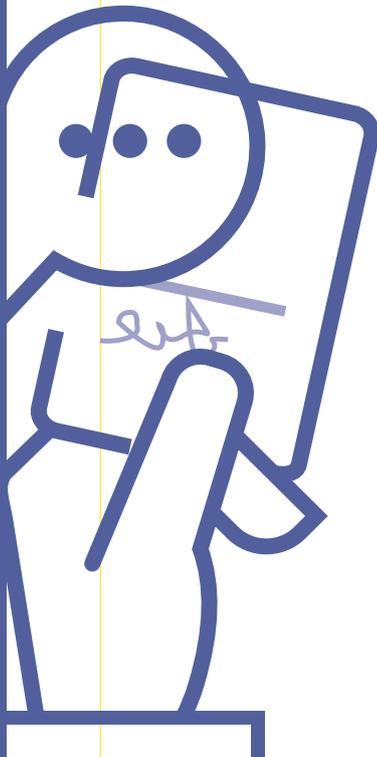
**If a third-country national expresses the wish to apply for asylum,**

refer the applicant to the authorities responsible for registration or, if this falls under your responsibility, register the application in full respect of confidentiality.

### + 4.6.

**Do not return third-country nationals who have expressed a wish to apply for asylum.**

Identify any special needs and refer the person to actors who provide support.



Relevant legal sources: Charter, Arts. 18-19; 1951 Geneva Convention Relating to the Status of Refugees; Schengen Borders Code, Arts. 3-4; Asylum Procedures Directive, Arts. 6 and 8; Qualification Directive, Art. 2 (d) and (f); Schengen Handbook, Part Two – 12.1 and 12.2 (asylum seekers), ECtHR, M.A. and Others v. Lithuania, 11 December 2018

# 5

## PROTECT VICTIMS OF CRIME

### + 5.1.

**Be aware of risk indicators** on trafficking in human beings and regularly update your knowledge.

### + 5.2.

**In case of indications of trafficking in human beings, take immediate steps to protect the presumed victim(s)**

and separate them from the suspected trafficker. Be aware that victims of trafficking may also apply for asylum.

### + 5.3.

**Refer presumed victims of trafficking in human beings to assistance and support services.**

Assistance and support must not be conditional on the victim's willingness to cooperate with the justice system.

### + 5.4.

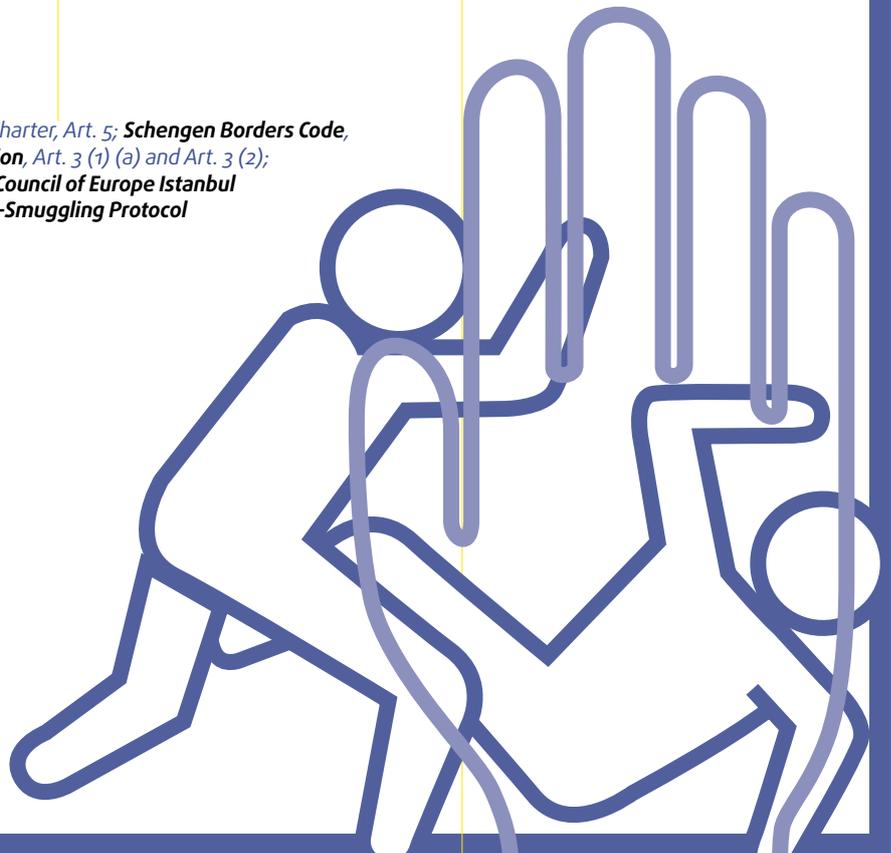
**Be attentive to victims of other violent crimes, including gender-based violence.**

Provide assistance and support to victims in cooperation with relevant support organisations.

### + 5.5.

**Preserve any evidence of crime.**

Relevant legal sources: Charter, Art. 5; Schengen Borders Code, recital 6 and Art. 16; EBCG Regulation, Art. 3 (1) (a) and Art. 3 (2); Anti-Trafficking Directive, Art. 11; Council of Europe Istanbul Convention, Ch. IV and VII; UN Anti-Smuggling Protocol



# 6

## PROTECT CHILDREN AT RISK OF ABUSE OR VIOLENCE

### + 6.1.

#### **Be familiar with the requirements for children to leave and enter the country**

(e.g. parental permission or affidavit), as well as with basic child protection concepts.

### + 6.2.

#### **Inform children about their rights and procedures in a child-friendly manner.**

Give priority to the child's best interests.

### + 6.3.

#### **Use the guidance in the Frontex Vega Handbook**

to identify and protect children at risk.

### + 6.4.

#### **Check that the persons accompanying a child have parental care over them,**

especially where only one adult is accompanying the child and there are serious grounds for suspecting that the child may have been unlawfully removed from the parent(s). Observe and report any unusual behaviour by, including physical or emotional signs from, the child or the accompanying adult(s).

### + 6.5.

#### **When apprehending third-country nationals who cross or attempt to cross the border in an irregular manner, do not separate families,**

except when this is strictly necessary and proportionate to protect family members or required in a particular case for criminal investigation purposes.

### + 6.6.

#### **Observe and actively identify any children travelling on their own.**

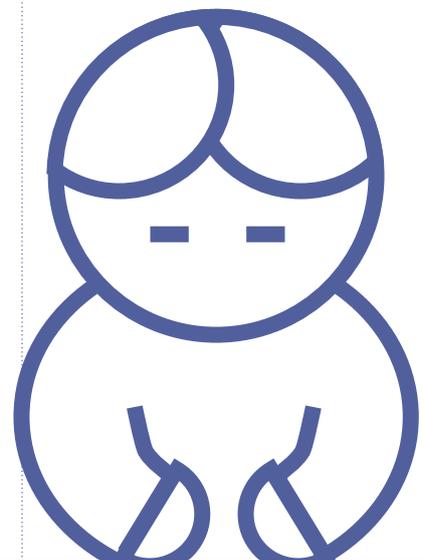
Check the Schengen Information System (SIS) to see whether the child is reported as missing.

### + 6.7.

#### **If, after second-line checks, there are still doubts about the well-being of an accompanied or unaccompanied child,**

contact the responsible guardianship and/or child protection authority and refer the child to them.

Relevant legal sources: Charter, Art. 24; **Schengen Borders Code**, recital 36 and Art. 4 (general fundamental rights safeguard clause), Art. 20 (1) and Annex VII, points 6.2 and 6.5 (special rules on children); **EBCG Regulation**, Art. 3 (1) (a); **Schengen Handbook**, Part Two – 5.6.3 (border checks on children)



# 7

## RESPECT PROCEDURAL REQUIREMENTS AND SAFEGUARDS

### + 7.1.

**Inform all travellers referred to a second-line check, as well as persons stopped during border surveillance, about the nature of the control in a professional, friendly and courteous manner.**

Do this in a language they understand or may reasonably be presumed to understand. For second-line checks, inform the person about the name or service identification number of the border guards.

### + 7.2.

**Make sure that border checks do not prevent persons enjoying the Union right of free movement**

from returning to their country of nationality or residence.

### + 7.3.

**When refusing entry at border-crossing points,**

adopt a substantiated written decision using the Schengen standard form, stating the precise reasons, in fact and in law, for the refusal.

### + 7.4.

**Make sure that the third-country national who is refused entry acknowledges receiving the form,**

notably by signing it. Read carefully any comments the person adds to the form and, if necessary, act upon them.

### + 7.5.

**Hand over a copy of the completed standard form to the person concerned**

and make sure they understand its content. Use a qualified interpreter if needed. Clarify any doubts the person may express.

### + 7.6.

**Inform all third-country nationals who are refused entry about procedures for appeal.**

Do this both orally and using the standard form.

### + 7.7.

**Hand over a written list of contact points who can give information on professional providing legal assistance.**

Post such list at visible points at border-crossing points.

### + 7.8.

**In case the appeal concludes that refusal of entry was ill-founded, correct the cancelled entry stamp,**

and make any other necessary cancellations and corrections.

### + 7.9.

**Record every refusal of entry in a register, including the reasons for refusing entry.**

### + 7.10.

**When stopping undocumented persons during border surveillance and asking them to explain their reasons for being in the border area,**

communicate in a language they presumably understand. In case of communication barriers, use a qualified interpreter.

### + 7.11.

**If further action is necessary after someone is apprehended during border surveillance,**

bring the person to the nearest border guard station and carry out an individualised interview in a language the person presumably understands. Use a qualified interpreter if needed.

### + 7.12.

**Give sufficient opportunity to third-country nationals apprehended after crossing the green border**

to put forward arguments against their removal and examine their individual circumstances. Inform them about their right to appeal against any decision taken.

Relevant legal sources: Charter, Art. 41; **Schengen Borders Code**, recital 7, Arts. 4, 13-14 and Annex V, part A (refusal of entry) and part B (standard form); CJEU, *Air Baltic (C-575/12)*, 14 September 2014; **Schengen Handbook**, Part Two – 1.3 (border checks), 8.4, 8.7 (refusal of entry), and Part Three (border surveillance); ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012; ECtHR, *N.T. and N.D. v. Spain*, 13 February 2020 and ECtHR, *Asady and Others v. Slovakia*, 25 March 2020

# 8

## TAKE ALL NECESSARY PRECAUTIONS TO PROTECT PERSONAL DATA

### + 8.1.

**Ensure that any personal data, including health data and other sensitive data,** is collected and processed in accordance with data protection rules.

### + 8.2.

**Inform all travellers about the processing of their personal data,** including which data is processed, for what purpose, and who will have access to it. Use leaflets or posters to be better understood.

### + 8.3.

**When you take fingerprints for Eurodac, follow the guidance** included in the FRA checklist to act in compliance with fundamental rights when obtaining fingerprints for Eurodac [**available online**].

### + 8.4.

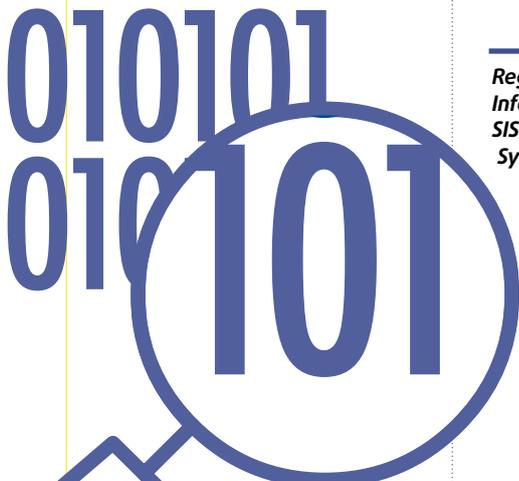
**When you take fingerprints for Eurodac, inform people adequately.** You may use the brochure FRA developed together with the Eurodac Supervision Coordination Group [**available online**].

### + 8.5.

**Inform people how they can access and obtain a copy of their personal data stored** and what steps they can take to have inaccurate or unlawfully stored information corrected or deleted.

### + 8.6.

**Provide travellers with the contact details of the competent national authorities,** including data protection authorities, to enable them to exercise their rights.



— Relevant legal sources: Charter, Art. 8; **General Data Protection Regulation**, Chapter 3; **Directive (EU) 2016/680**, Chapter 3; **Schengen Information System (SIS) Border Checks Regulation 2018/1861**, Chapter 9; **SIS Police Cooperation Regulation 2018/1862**, Chapter 16; **Visa Information System (VIS) Regulation 767/2008**, Chapter 6; **Eurodac Regulation 603/2013**, Art. 29; **Entry/Exit System (EES) Regulation 2017/2226**, Arts. 50 and 52; **European Travel Information and Authorisation System (ETIAS) Regulation 2018/1240**, Art. 64; **Interoperability Regulations 2019/817 and 2019/818**, Arts. 47-48; **Schengen Handbook**, pp. 14, 16

# 9

## COOPERATE WITH HUMAN RIGHTS MONITORING BODIES AND HUMANITARIAN ACTORS

### + 9.1.

**Be aware of and respect the mandate and powers of independent national, European and international monitoring bodies, of fundamental rights and refugee protection agencies,**

as well as other organisations present at the border. Grant them access to information, documents and people in accordance with the law.

### + 9.2.

**Stay informed of any guidance issued by these bodies**

related to the respect of fundamental rights in border management activities.

### + 9.3.

**Interact with them cordially and in a spirit of cooperation,**

respecting rights to access information, documents and people as set out in the legal instruments establishing their individual mandates.

### + 9.4.

**Be aware of the role of Frontex fundamental rights monitors**

and support them in fulfilling their tasks.

Relevant legal source: **EBCG Regulation**, Arts. 3 (1) (e), 3 (2) and 110; **Asylum Procedures Directive**, Art. 29; **European Anti-Torture Convention** (ETS No. 126), Arts. 2-3



# 10

## TAKE TIME FOR LEARNING AND DEVELOPMENT

### + 10.1.

**Attend training on fundamental rights,** comprising how to use force, on a regular basis, including through practical exercises and simulations in the field.

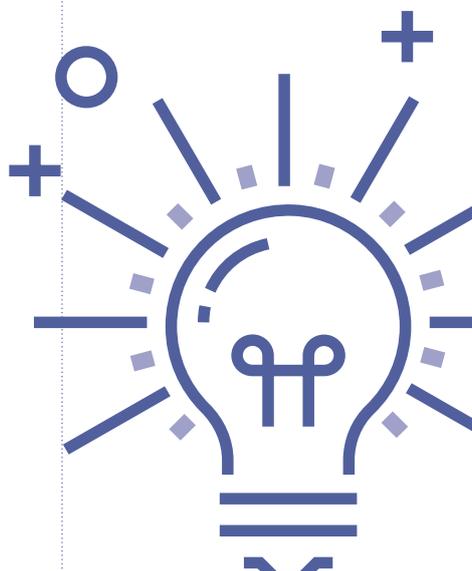
### + 10.2.

**Allow staff under your supervision to receive the necessary training,** including on first aid, as well as on the health and well-being of staff, on a regular basis, to improve continuously their service-oriented and professional behaviour.

### + 10.3.

**Learn, and refresh your knowledge of,** the languages necessary for carrying out your tasks.

Relevant legal sources: **Schengen Borders Code**, Art. 16 (1); **EBCG Regulation**, recital 51, Arts. 3 (2) and 62; **Anti-Trafficking Directive**, recital 25 and Art. 18 (3); **Asylum Procedures Directive**, Art. 6 (1)



FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

[fra.europa.eu](http://fra.europa.eu)

 [facebook.com/fundamentalrights](https://facebook.com/fundamentalrights)

 [twitter.com/EURightsAgency](https://twitter.com/EURightsAgency)

 [linkedin.com/company/eu-fundamental-rights-agency](https://linkedin.com/company/eu-fundamental-rights-agency)

© FRA, 2020

© Luxembourg: Publications Office of the European Union, 2020

Printed by the Publications Office of the European Union in Luxembourg

Print ISBN 978-92-9474-974-1 doi:10.2811/196306 TK-04-20-353-EN-C

PDF ISBN 978-92-9474-973-4 doi:10.2811/639795 TK-04-20-353-EN-N

Icons/illustrations: © iStock.com/Marvid; © iStock.com/Varijanta;  
© iStock.com/da-vooda.



Publications Office  
of the European Union



# PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

For FRA's work on migration, please see:

<https://fra.europa.eu/en/themes/asylum-migration-and-borders>

**FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS**

[fra.europa.eu](https://fra.europa.eu) – [info@fra.europa.eu](mailto:info@fra.europa.eu)

 [facebook.com/fundamentalrights](https://facebook.com/fundamentalrights)

 [twitter.com/EURightsAgency](https://twitter.com/EURightsAgency)

 [linkedin.com/company/eu-fundamental-rights-agency](https://linkedin.com/company/eu-fundamental-rights-agency)

© FRA, 2020

© Luxembourg: Publications Office  
of the European Union, 2020

TK-02-20-857-EN-N



Publications Office  
of the European Union