2 Border control and visa policy

With the notable exception of Greece, the European Union (EU) has seen an overall downward trend in irregular migration in 2010. However, the specific situation in Greece has raised concerns that those in need of asylum will be prevented from making their claims and that mistreatment awaits those who are returned. At a more general level, steps have been taken to enhance respect for fundamental rights during joint operations undertaken under the coordination of Frontex, including proposed amendments to Frontex's founding regulation to make explicit references to human rights. While the extension of visa-free travel has allowed easier entry and free movement within the EU for citizens of some non-EU countries, the establishment of databases containing personal information raises questions about the right to data protection.

This chapter covers developments in EU and Member State policies and practices in the area of border control and visa policies for the year 2010. The chapter first considers the rights of irregular migrants and those seeking asylum when they are intercepted at the EU's borders. It then looks at visa policies allowing entry into, and travel within, the EU. In order to gain a comprehensive overview of this area, it should be read together with Chapter 1 on asylum, immigration and integration, which focuses on the situation of fundamental rights of those within the asylum-seeking process, as well as legally resident migrants.

This chapter will make frequent reference to the Schengen area and the Schengen Borders Code.[1] It is therefore important to recall that not all EU Member States are part of the Schengen area, which includes non-EU states, as shown in Figure 2.1.

Key developments in the area of border control and visa policy:

- cooperation agreements between EU Member States and third states, which allow for interception and return of migrants at maritime borders, risked preventing those in need of international protection from claiming asylum;
- steps were taken to ensure respect for fundamental rights in the context of operations under the coordination of Frontex at the EU's external borders;
- for the first time, Frontex deployed Rapid Border Intervention Teams (Rabits) at the land border with Turkey, at the request of Greece;
- visa-free travel was granted to holders of biometric passports from Albania, Bosnia and Herzegovina and holders of Taiwanese passports.

2.1. Border control

This section will examine developments relevant to fundamental rights protection for irregular migrants at two levels. It will first explore the rights of irregular migrants and those seeking access to the asylum-seeking process at the external borders of the EU in the context of interception and return to their country of origin or country of transit. It will then analyse the rights of irregular migrants once they are within the EU.

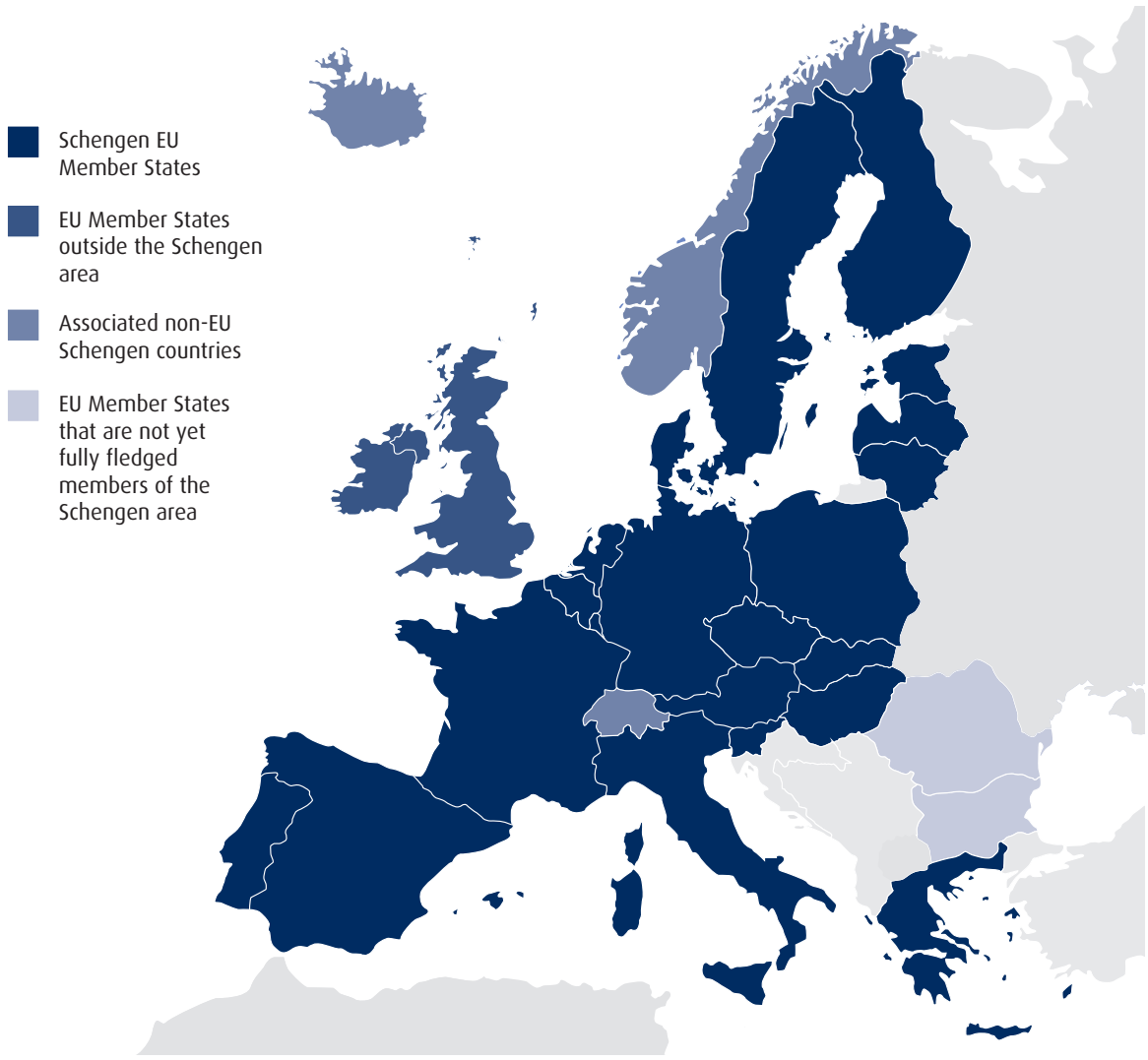
2.1.1. Curtailment of migration into the EU

In its World Migration Report 2010,[2] the International Organisation for Migration (IOM) considered that by 2050 the number of international migrants worldwide could be as high as 405 million. It also notes that the growing pressure to migrate, whether for economic reasons or to avoid or escape the effects of environmental change, far outstrips the availability of legal opportunities to do so. Therefore,

1 Regulation (EC) No. 562/2006, p. 1.

2 IOM (2010), p. 3.

Figure 2.1: EU Member States and associated states of the Schengen area



Source: FRA, 2010

it will continue to test the ability of states to manage their borders and address the complexities of irregular migration.[3]

Nevertheless, figures from Frontex on detected illegal border crossings into the EU show that illegal migration flows decreased in the period from January to September 2010, except at the Greek land borders.[4] The decrease in illegal migration flows is mainly due to two factors: a fall in employment opportunities in the EU, and more effective migration and asylum policies in the Member States, including better cooperation with third countries or between Member States.[5] For instance, the UK Border Agency attributes the 80% fall between September 2009 and 2010 in the number of irregular migrants attempting to enter the **UK** from Calais over a 12-month period to the closing of a makeshift camp for irregular migrants in **France** in 2009, as well as to the intensity of British and French checks in Calais.[6]

Increased cooperation has taken place at two levels: among EU Member States themselves, and between Member States and third states with regard to maritime borders. Member States, such as **France** and **Italy**, have announced increased cooperation in patrolling maritime borders in the western and central Mediterranean,[7] where irregular entries remained low before the political uprising in north African countries. EU Member States and third states have also increased their cooperation with regard to maritime borders. In **Spain**, detections of illegal border crossings dropped from 39,000 detections in 2006 to only about 4,450 detections in the first three quarters of 2010, partly

3 *Ibid.*, p. 4.
4 Frontex (2010a).
5 Frontex (2010b).
6 UK Border Agency (2010).
7 For example, Italy and France announced that they would intensify cooperation with regard to joint maritime patrols in the Mediterranean and joint training of coast guards. For more information, see France, Ministry of Immigration (2010).

due to increased cooperation in border management with west African states.[8] Italy experienced a similarly dramatic decrease in irregular migrants landing on Italian coasts, supposedly mainly due to the agreement with Libya signed on 30 August 2008 and adopted on 3 February 2009.[9] The agreement provides for Italian coastguards to turn intercepted boats carrying illegal immigrants in the Mediterranean sea back to the Libyan coast.[10]

FRA ACTIVITY

Visit to Greek-Turkish border in January 2011

In 2010, the FRA decided to carry out an in-depth investigation at the Greek-Turkish border in order to understand the obstacles and difficulties in responding immediately to a humanitarian emergency. FRA's fieldwork research also aimed at providing evidence-based advice to the relevant authorities to fully respect fundamental rights. The report, entitled *Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner*, was presented to EU institutions and the Greek government. It provides evidence for the development of effective policies at EU and national level for similar situations that may occur in future, both in Greece and in other Member States.

For more information, see: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2011/pub_greek-border-situation_en.htm

It has been highlighted that cooperation with third states, such as Libya, may run the risk of preventing those in need of international protection from actually reaching EU borders in order to lodge their applications.[11] Various organisations, including the Council of Europe and UNHCR, have criticised Italy for not observing the *non-refoulement* principle as the treatment of irregular immigrants in Libyan camps raises serious human rights concerns.[12] A case was filed with the European Court of Human Rights (ECtHR) in May 2009 by 11 Somalis and 13 Eritreans who were among the first group of about 200 migrants intercepted by Italian coastguards and summarily returned to Libya.[13] Following public statements criticising the returns, in June 2010 Libya, which is not a party to the 1951 UN Convention relating to the status of refugees and has no asylum system, asked the UNHCR to close its office in Tripoli and stop its activities, which included registration of asylum seekers, refugee status determination and visiting detainees.[14] An agreement concluded between the European Commission and Libya is discussed in the following subsection.

2.1.2. Responses at EU level

In parallel to steps to curtail migration, three measures occurred at EU level that may have an impact on fundamental rights guarantees: firstly, an agreement between the European Commission and Libya on migration; secondly, the strengthening of human rights protection as part of the mandate of Frontex; and thirdly, the deployment of Rapid Border Intervention Teams (Rabits) at the Greek-Turkish land border.

The situation of asylum seekers in Libya, including potential problems resulting from cooperation between Libya and EU Member States, has given rise to concern. In October 2010 the European Commission and Libya signed a *joint communiqué* on a migration cooperation agenda which contains a list of agreed initiatives for possible further dialogue and cooperation.[15] These initiatives include support and assistance to Libya in screening people in need of international protection in mixed migration flows, and enhancing Libya's reception capacities.

> *"The situation at the Greek land border with Turkey is increasingly worrying. The flows of people crossing the border irregularly have reached remarkable proportions and Greece is manifestly not able to face this situation alone. I am very concerned about the humanitarian situation. I trust that proper assistance will be given to all person[s] crossing the border and that the request for international protection will be considered, in full compliance with EU and international standards."*
>
> *Statement by Cecilia Malmström, European Commissioner in charge of Home Affairs, upon the request of the Greek government to get assistance via Rapid Border Intervention Teams at the land border between Greece and Turkey. MEMO/10/516, 24 October 2010.*

The European Commission's joint *Communiqué* with Libya was subject to criticism from the European Council on Refugees and Exiles (ECRE), which questioned whether the task of distinguishing irregular migrants from those seeking international protection could be left to Libya without posing a barrier to genuine asylum seekers.[16] However, the cooperation agenda could entail future EU assistance to reinforce Libya's capacity to prevent irregular migrants from entering Libya through its southern border, as well as the development of Libyan patrol, search and rescue capacities in its territorial waters and on the high seas.

A second development relates to the mandate of Frontex. Following the entry into force of the Treaty of Lisbon, a number of steps were taken to enhance respect for fundamental rights during joint operations of several EU Member

8 Frontex (2010a, 2010b and 2010c)
9 Italy (2009).
10 Italy, Ministry of Interior (2010). The impact of the sudden flow of large numbers of people leaving Libya as a result of the ongoing armed conflict that erupted in February 2011 will be considered in the Annual Report of 2011. See UNHCR (2011).
11 European Parliament (2011), para. (1) (f).
12 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2009); UNHCR (2009); Amnesty International (2010); Jesuit Refugee Service (2010).
13 ECtHR, *Hirsi and others v. Italy*, No. 27765/09, pending before the Grand Chamber.
14 UNHCR (2010).
15 European Commission (2010a).
16 ECRE (2010).

States undertaken at the EU's external borders under the coordination of Frontex. In February 2010, the European Commission proposed amendments to the founding regulation of Frontex.[17] These amendments include explicit references to human rights, particularly as regards training of border guards and the conduct of joint operations. For example, in the area of forced removals it requires the establishment of a code of conduct to guide the implementation of joint return flights.

A third development relates to the deployment of Rapid Border Intervention Teams (Rabits). In early November 2010, at the request of Greece, Frontex deployed Rabits to patrol the Greek-Turkish land borders. In 2010, the largest inflow of irregular migrants (both in terms of absolute numbers and of percentage increase) was registered at external land borders in Greece. According to Frontex figures, Greece was the point of entry for about 90% of all illegal border crossings into the EU in the second quarter of 2010. Greece has stated that it cannot deal with the situation alone, as it does not have the material or human capacity to process, accommodate and address the basic needs of all undocumented migrants and asylum seekers entering Greece. As discussed in Chapter 1 on asylum, immigration and integration, the situation raises serious fundamental rights concerns.

> *"[F]or the return of illegally present third country nationals by air ... common standardised procedures ... should simplify the organisation of joint return flights and assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination."*
>
> *Article 9.2 of the proposal to amend the Frontex Regulation, COM(2010) 61 final.*

Following a request from the Council of the European Union, the European Commission proposal was amended to allow Frontex to process the personal data of individuals returned in joint operations. The European Data Protection Supervisor (EDPS) indicated that this would require articulation of a clear legal basis in the regulation as well as data protection safeguards.[18] The proposal remained under discussion at the end of 2010 in the European Parliament and the Council.

In April 2010, the Council adopted a decision that supplemented the Schengen Borders Code and provided for rules and guidelines for maritime surveillance operations coordinated by Frontex.[19] This measure is being challenged by the European Parliament in the Court of Justice of the EU (CJEU), on the grounds that it exceeds the powers granted to implement the Schengen Border Code.[20]

This Council Decision contains a set of legally binding 'Rules for sea border operations coordinated by the Agency' (i.e. Frontex) and non-binding 'Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency'. The rules address such general issues as compliance with fundamental rights, *non-refoulement* of persons intercepted at sea, and assistance to persons with special needs, along with specific rules on the measures to be taken when intercepting vessels suspected of carrying irregular migrants. The guidelines concern issues relating to search and rescue operations and disembarkation of any persons rescued or intercepted, with priority to be given to disembarkation in the state from which those persons departed. Where it would be impossible to disembark rescued or intercepted persons in the state of departure, disembarkation should occur in the state hosting the operation. This new set of rules led **Malta** to announce that it would not host joint Frontex operations.

Some 200 border-control specialists have been made available by the other 26 Member States and Schengen-Associated Countries participating in the first ever Rabit deployment.[21] All Rabit officers receive mandatory human rights awareness training as part of their pre-deployment training by Frontex. Shortly prior to the Rabit deployment, NGOs expressed concerns regarding the identification of persons in need of special protection, including children.[22] Others have observed the inadequacy of providing a security-driven response to what should be seen as a humanitarian crisis which needs to be dealt with according to EU fundamental rights standards.[23]

FRA ACTIVITY

Cooperation agreement with Frontex

FRA has been cooperating with Frontex at an informal level in a variety of contexts. On 26 May 2010, the European Day of Border Guards, the FRA and Frontex signed a cooperation arrangement.[24] The arrangement includes collaboration in a number of areas, including research and training, as well as support in the development of standards and good practices to guide Frontex-led joint operations.

17 European Commission (2010b).

18 EDPS (2010).
19 Council of the European Union (2010a).
20 CJEU, C-355/10, *European Parliament v. Council*, pending.
21 Frontex (2010c).
22 Pro Asyl (2010).
23 Carrera, S. and Guild, E. (2010).
24 European Union Agency for Fundamental Rights (FRA) (2010).

2.2. Visa policy

From April 2010, EU Member States began the direct implementation of the EU Visa Code.[25] Alongside the further implementation of the Schengen borders code, the Visa Information System (VIS) and the Schengen Information System (SIS II), this led to a series of legislative changes and draft proposals in a number of Member States in 2010, including **Austria**, **Czech Republic**, **Estonia**, **Germany**, **Hungary**, **Finland**, **Italy**, **Lithuania**, **Poland**, **Slovakia**, and **Sweden**. While the relationship between visa policies and fundamental rights is not always self-evident, visa policy has an impact on the right of everyone to leave his or her country (guaranteed by Article 2 of Protocol No. 4 to the ECHR and Article 12 of the International Covenant on Civil and Political Rights). Visa policies and procedures can work to facilitate or obstruct admission into the EU. In addition to free movement rights, the establishment of databases with personal information raises questions regarding the right to data protection, as protected by Article 8 of the EU Charter of Fundamental Rights.[26]

The two main databases in the area of visa policies and border control are the SIS II and the VIS. Although not all EU Member States are part of the Schengen system, they do all have access to these information systems. The SIS[27] is an information system used by border guards, police, customs, judicial and vehicle registration authorities and authorities issuing visas in the Schengen states for the purposes of law enforcement and border control. It contains alerts on persons subject to arrest warrants or police monitoring, persons who are to be refused entry to the Schengen area, and information on lost or stolen objects such as identity documents, firearms, motor vehicles and banknotes.

The VIS[28] will contain data on admissible applications for short-stay visas,[29] including the applicant's personal and travel details, photograph and fingerprints, as well as the authorities' decisions relating to the application, such as issuance, refusal, extension or annulment. The VIS will be used by relevant visa, border control and immigration authorities. In both information systems, the original information is supplied, adapted and retrieved by the relevant authorities in Schengen states.

Although national authorities have a duty to ensure that the data they enter into European common databases is correct, up to date and in line with EU data protection and privacy rules, there remains a risk of unfair treatment of individuals.

25 Regulation (EC) No. 810/2009, OJ 2009 L 243, p. 1.
26 Chapter 3, 'Information society and data protection'.
27 Regulation (EC) No. 1986/2006, OJ 2006 L 381, p. 4; Council Decision 2007/533/JHA, OJ 2007 L 205, p. 63. The second generation SIS system (SIS II) is going to be launched in 2013.
28 Regulation (EC) No. 767/2008, OJ 2008 L 218, p. 60. The VIS is going to be launched in June 2011.
29 A short-stay visa is a visa for a stay of less than 90 days.

2.2.1. General developments at EU level

In March 2010, the Council and the European Parliament amended the Schengen Borders Code as regards the movement of persons with long-stay visas.[30] This amendment extends the freedom to travel within the Schengen area for three months in a six-month period to holders of long-stay visas that are issued by a Schengen state in accordance with its national legislation for stays of more than 90 days. The state is obliged to make a prior check in the SIS II before issuing such visas. It also harmonises the format of such visas, and provides for a maximum one-year period of validity for a long-term visa before its replacement with a residence permit.

In late 2009 and 2010, the Court of Justice of the EU (CJEU) ruled on two important cases concerning the implementation of the Schengen Borders Code which indirectly have a bearing on fundamental rights. The 2010 ruling clarified that identity checks at or near internal Schengen borders cannot have an effect equivalent to border checks.[31] The 2009 judgment related to the question of whether a Member State is obliged to take a removal decision under common Schengen rules against a person that does not fulfil, or no longer fulfils, the conditions of duration of stay, or whether it can apply its national legislation allowing, for example, for a fine. According to the CJEU, the relevant European legislation must be interpreted as meaning the Member State is not obliged to adopt a decision to expel that person.[32]

2.2.2. Visa-free travel

In line with the Thessaloniki European Council conclusions, western Balkan states were granted visa waivers in 2009 and 2010, based on the fulfilment of requirements set out in their respective 'roadmaps' for visa liberalisation established by the EU. In November 2009, the Council adopted a Council Regulation waiving visa requirements for nationals of Serbia, the Former Yugoslav Republic of Macedonia (FYROM) and Montenegro.[33] Following the visa liberalisation in December 2009, **Belgium**, **Germany**, and **Sweden** experienced increased numbers of asylum seekers from these Balkan states. After the assessment of individual asylum applications, it seems that the majority of the persons concerned are not likely to qualify for international protection.[34] Many applicants were nationals of Serbia and FYROM, mostly of Roma or Albanian ethnicity, motivated by economic factors to seek asylum in western European countries. Many had been told by travel agents or smug-

30 Regulation (EU) No. 265/2010, OJ 2010 L 85, p. 1.
31 CJEU, Joined cases C-188/10 and 189/10, *Melki and Abdeli*, 22 June 2010.
32 CJEU, Joined cases C-261/08 and C-348/08, *María Julia Zurita García, Aurelio Choque Cabrera v. Delegación del Gobierno en Murcia*, 22 October 2009.
33 Council Regulation (EC) No. 1244/2009, OJ 2009 L 336, p. 1.
34 For more information, see the Eurostat database at: www.epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database.

gling networks that lodging an application for asylum would entitle them to accommodation, pocket money or access to the job market.[35] After measures by Member States to curb these migration flows failed,[36] Commissioner Malmström called on the Serbian and FYROM authorities to take measures to prevent their citizens from asking for asylum in the EU.[37]

These developments did not jeopardise the Commission's proposal to waive visa requirements for nationals of Albania and Bosnia and Herzegovina,[38] on the grounds that those western Balkan countries have satisfied the conditions in their respective roadmaps for visa liberalisation. Following a parliamentary debate in September 2010, the European Parliament voted in favour of lifting visa obligations for holders of Bosnian and Albanian biometric passports.[39] This decision was backed by the Council in November 2010, bringing the total number of non-European Economic Area (EEA) states or administrative regions holding a visa waiver for stays of up to 90 days in the Schengen area to 42 by December 2010.[40]

Other developments include waiving visa requirements for holders of Taiwanese passports,[41] and the conclusion of a visa waiver agreement with Brazil[42] and a visa facilitation agreement with Georgia.[43] The latter agreement was concluded in parallel with a readmission agreement with Georgia, which was formally adopted by the Council in January 2011.[44] On 29 October 2010, the Commission adopted draft negotiating directives for the renegotiation of the existing visa facilitation agreements with Moldova, the Russian Federation and Ukraine.

Several Member States also signed bilateral agreements for visa waivers in order to facilitate border traffic in border areas in accordance with the Regulation on Border Traffic.[45] This regulation allows for derogation from the general rules governing border crossing at the external borders of the EU. It aims to facilitate border crossing for third-country residents living within 50 kilometres of the border by providing for special local border traffic permits. As the external borders of the EU are reinforced, local communities situated near those borders want to ensure that borders with their third-country neighbours are not a barrier to trade, social and cultural life or regional cooperation. **Latvia** and Belarus approved such an agreement in August 2010, which will come into force when ratified by the parliaments of both states.[46] Similarly, an agreement has been signed between **Latvia** and Russia,[47] and a border traffic agreement entailing visa-free travel for border area residents of **Romania** and Moldova entered into force in February 2010.[48] Finally, **Poland** and Russia called for the introduction of visa-free circulation in the Kaliningrad region, although the region extends further than the 50 kilometres allowed under the Regulation on Border Traffic.[49]

Outlook

With regard to border control, evaluation of the first deployment of Rabits in **Greece** will provide useful lessons for future operations of this nature. Close cooperation between Frontex, the FRA and the European Asylum Support Office, as well as the greater prominence of fundamental rights in Frontex's mandate, creates an opportunity for fundamental rights to become an integral element of border management.

Concerning visa policies, it remains to be seen whether visa liberalisation in the western Balkans will continue at the same pace as in 2009 and 2010. Concerns about large numbers of migrants or asylum applicants trying to settle in the EU could slow the process. A second question for the immediate future relates to the harmonised application of the common EU Visa Code. As of April 2010, the Visa Code was applied in all states participating in the common EU visa policy. It is unclear whether the procedural rights of visa applicants, such as fixed processing times and deadlines and the right to appeal negative decisions, will be applied in a similar way by all participating states.

35 Wathelet, M. (2010). For more information on Roma, see 'Roma in the EU – a question of fundamental rights implementation'.
36 Frontex (2010d), p. 20.
37 EurActiv (2010).
38 European Commission (2010c).
39 European Parliament (2010).
40 Regulation (EU) No. 1091/2010, OJ 2010 L 329, p. 1.
41 Regulation (EU) No. 1211/2010, OJ 2010 L 339, p. 6.
42 Council of the European Union (2010b), OJ 2010 L 275, p. 3. See also Council of the European Union (2010c), OJ 2010 L 273, p. 2.
43 Council of the European Union (2010d), OJ 2010 L 308, p. 1.
44 European Commission (2010d).
45 Regulation (EC) No. 1931/2006, OJ 2007 L 29, p. 3.
46 Latvia, www.mk.gov.lv/doc/2005/AMSl_160610_pierobeza_BR.2054.doc.
47 See www.likumi.lv/doc.php?id=70556. available at www.mfa.gov.lv/en/policy/bilateral-relations/bilateral/?mode=out&state=BLR&title=&branch=0&day1=dd%2Fmm%2Fyyyy&day2=dd%2Fmm%2Fyyyy&status=0&day3=dd%2Fmm%2Fyyyy&signer=.
48 See Romania, Office for Immigration (2010).
49 See Poland, www.fakty.interia.pl/swiat/news/inicjatywa-polski-i-rosji-ws-ruchu-bezwizowego-z,1461146.

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UN & CoE

January

February

March

April

May

22 June – CoE Parliamentary Assembly issues resolution on readmission agreements

June

July

August

September

October

November

December

EU

January

February

25 March – EU adopts a regulation amending the convention implementing the Schengen agreement and the regulation regarding movement of persons with a long-stay visa

March

26 April – Council supplements the Schengen Borders Code on the surveillance of external sea borders for Frontex-coordinated operational cooperation

April

May

22 June – CJEU rules on aspects of the Schengen Borders Code in the *Melki and Abdeli* case

25 and 26 June – Council issues conclusions on 29 measures to reinforce the protection of external borders and combat illegal immigration

June

July

August

September

October

November

15 December – EU adopts a regulation amending the regulation listing the third countries whose nationals require visas when crossing borders and those whose nationals are exempt

December