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FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

COUNTERING THE INSTRUMENTALISATION OF MIGRANTS AND REFUGEES AND RESPECTING FUNDAMENTAL RIGHTS

POSITION PAPER

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Preamble

The European Union Agency for Fundamental Rights,

Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

Recalling Council Regulation (EC) No 168/2007 of 15 February 2007, as amended by Council Regulation (EU) 2022/555 of 5 April 2022, establishing a European Union Agency for Fundamental Rights (FRA),

Recalling Article 2 of Council Regulation (EC) No 168/2007 (as amended) which entrusts FRA with the objective 'to provide the relevant Union institutions, bodies, offices and agencies and the EU Member States when implementing Union law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights',

Having regard to Article 4(1)(d) of Council Regulation (EC) No 168/2007 (as amended), which tasks FRA to 'formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Union law, either on its own initiative or at the request of the European Parliament, the Council or the Commission',

Having regard to FRA periodic migration bulletins published between 2015 and 2023, which describe fundamental rights challenges at the EU's external borders,

Considering Regulation (EU) 2024/1359 which sets out special rules in addressing situations of crisis and *force majeure* in the field of migration and asylum, which apply also in a situation of instrumentalisation of migrants, and Article 5 of the Schengen Borders Code, as amended by Regulation (EU) 2024/710, which envisages measures that Member States may take in situations of instrumentalisation of migrants,

Considering the communication from the European Commission of 11 December 2024, COM(2024) 570 final, on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders,

Noting that the white paper for European Defence Readiness 2030 of 19 March 2025, JOIN(2025) 120 final, covers border protection, and

Noting that the communication from the European Commission of 1 April 2025, COM(2025) 148 final, on the European internal security strategy announces further work to counter the weaponisation of migration,

Submits the following own initiative opinion which sets out FRA's position on the fundamental rights compatible responses to instrumentalisation of migrants and refugees:

Executive summary

1. Over the past five years, some third countries have encouraged or even arranged for migrants and refugees to cross into the European Union (EU), using them as tools to pressure the EU or its Member States for political purposes. Such a phenomenon, which EU law defines as the 'instrumentalisation of migrants', aims at destabilising the EU or a Member State.
2. The EU and its Member States can take action to counter this phenomenon. They have tools at their disposal, which are legal and legitimate, provided they apply them in full respect of EU fundamental rights law, national constitutional law and international law. This FRA (European Union Agency for Fundamental Rights) position paper analyses what EU fundamental rights law requires.
3. Addressing the instrumentalisation of migrants and refugees must not overshadow the human reality and the vulnerability of the people being instrumentalised. In 2023 and 2024, almost 60 people died along the EU land border with Belarus, many from hypothermia while stranded there. In Poland, Médecins Sans Frontières (MSF) treated over 220 people coming across the Belarus border in 2023, 10 % of whom needed life-saving referrals.
4. Many responses to instrumentalisation involve limitations to rights guaranteed in the European Union Charter of Fundamental Rights (the Charter). Under Article 52(1) of the Charter, limitations of fundamental rights must be provided for by law, be necessary and proportionate and respect the essence of the right. Certain rights are absolute and cannot be restricted or derogated from. Even in times of war or other public emergencies threatening the life of the nation, there can be no limitation to some rights, in particular the prohibition of torture and other forms of ill-treatment and the principle of *non-refoulement*, which prohibits returns to persecution or serious harm. *De jure* or de facto denial of access to asylum procedures breaches Article 18 of the Charter on the right to asylum.
5. Some of the actions taken to counter instrumentalisation – particularly those targeting migrants and refugees – entail a heightened risk of crossing a red line. They may have long-lasting consequences for the protection of fundamental rights at the EU's external borders. They may ultimately undermine the nature of asylum as a fundamental right.
6. EU law sets a high threshold for a situation to be labelled as instrumentalisation. In particular, the hostile action must be of such intensity as to objectively put at risk essential state functions. Any exceptional restriction of third-country nationals' fundamental rights as allowed by the Charter must remain confined to countering only those situations which fulfil the strict definition of instrumentalisation. They must be limited in time.
7. Responses to instrumentalisation must not become a blueprint for the treatment of all migrants and refugees crossing the border in an unauthorised manner. The instruments adopted with the pact on asylum and migration, which will apply as of mid-2026, provide legal and policy responses to manage such arrivals, including in case of large-scale movements.

8. Nor should the response to such exceptional instances of instrumentalisation become the way to respond to migrant smuggling and the facilitation of irregular entry. There, repressive measures must target the criminal networks involved – in accordance with the UN Anti-smuggling Protocol, which is binding upon the EU and most of its Member States – and not punish the individuals who are the object of the crime of migrant smuggling. Also, measures against migrant smuggling should not target humanitarian actors supporting migrants and asylum seekers at EU external borders.
9. This paper lists four types of actions to counter the phenomenon of the instrumentalisation of migrants and refugees. The first set of actions are those targeting the actor who instrumentalises such people. These may include combating state-sponsored smuggling of migrants, imposing sanctions and other national law measures and restricting visa policies. These measures may entail restrictions to fundamental rights, for example the right to respect for family life in Article 7 of the Charter or the freedom to conduct a business set out in Article 16 of the Charter, when restricting visa policies. Restrictions to such rights are possible, provided they are provided for by law, are necessary and proportionate to counter instrumentalisation, and do not impair the essence of the right as required by Article 52(1) of the Charter.
10. The second set of actions to counter the instrumentalisation of migrants and refugees is to target transport companies and other commercial operators actively involved in transporting migrants to the EU or to its external borders on behalf of a third country. These may range from softer measures, such as the training of airline staff, to sanctions or the revocation of operating licences when airlines do not meet good repute requirements. When such measures restrict fundamental rights, for example the freedom to conduct a business set out in Article 16 of the Charter, limitations must meet the requirements of Article 52(1) of the Charter. Equality before the law and non-discrimination, as protected by Articles 20 and 21 of the Charter, must equally be respected.
11. The third set of actions relates to the way the EU and its Member States deal with instrumentalised third-country nationals who arrive in the EU. Member States may close border crossing points to traffic or limit their opening hours. Border guards may undertake more thorough checks to verify any security risks. Border surveillance may be strengthened. As soon as the instruments adopted with the pact on migration and asylum apply in mid-2026, Member States may ask for more time to register asylum applications and may process them in the asylum border procedures, with limitations as regards children and applicants with specific needs. EU law will enable Member States to carry out returns of asylum applicants rejected in a border procedure through a swifter return border procedure.
12. Most of these actions fall within the scope of EU law and the Charter applies to them. Without being exhaustive, at least seven fundamental rights safeguards require particular attention when taking measures targeting instrumentalised migrants or refugees. First, the use of force must always remain necessary and proportionate. Second, persons in distress must be rescued and assisted. Third, the principle of *non-refoulement* must always be respected. Fourth, collective expulsions are prohibited. Fifth, denying access to asylum procedures is unlawful. Sixth, deprivation of liberty requires an individual necessity and

proportionality assessment. Seventh, authorities must pay due attention to persons with specific needs.

13. These core safeguards relate to Article 2 (right to life), Article 3 (right to the integrity of the person), Article 4 (the prohibition of torture and inhuman or degrading treatment or punishment), Article 6 (right to liberty), Article 18 (right to asylum) and Article 19(2) (protection in the event of removal, expulsion or extradition), along with Articles 24 to 26 of the Charter, protecting children, the elderly and persons with disabilities.

14. The fourth set of actions relates to the trend to militarise borders. Border management authorities may share more operational information with the military and entrust them with supporting border control functions. These activities are regulated by EU law and must be implemented in full compliance with the Charter. Any actor carrying out border management functions, including the armed forces, must be sufficiently trained on fundamental rights and receive clear and unambiguous instructions on the limits of the use of force, the prohibition of ill-treatment and the need to refer any apprehended third-country national to the responsible authority.

15. Finally, the trend to militarise borders blurs the lines between border management – which falls within the scope of EU law and to which the Charter applies – and defence policies, where Member States typically act outside the scope of EU law. This creates a real risk of circumventing EU fundamental rights law. Dual-purpose technologies – meaning technologies which may serve both civilian and military purposes – may be designed by defence actors without having to assess if they are Charter-compliant and subsequently deployed at borders not only for defence purposes but also in support of border management. For example, physical barriers or fences at borders erected as a defence measure may be equipped with coil-shaped blades or other dangerous technical features without assessing if these are necessary and proportionate in light of the right to physical integrity in Article 3 of the Charter.

Introduction

16. The events at the Greek–Turkish land border in March 2020 when Türkiye announced it would no longer prevent migrants from crossing into the EU, at the EU border with Belarus in the summer of 2021 and at the Finnish border in the end of 2023 triggered policy measures which may have long-lasting consequences for the protection of fundamental rights at the EU's external borders. The annex presents relevant developments, listing also the events in May 2021, when some 8 000 migrants attempted to enter the Spanish town of Ceuta from Morocco.

17. The developments at the Belarus border best illustrate the fundamental rights challenges resulting from the way in which the authorities react to this phenomenon, generally referred to as the 'instrumentalisation of migrants' (see paragraph 24). There, on a daily basis, people cross the EU's external border and are redirected back, partly by force, to Belarus, a country which the European Court of Human Rights (ECtHR) considered not to be safe [1]. The Grand Chamber of the ECtHR will rule on three cases concerning alleged unlawful summary returns from Latvia, Lithuania and Poland to Belarus, concerning alleged breaches of Articles 2, 3 and 13 of the European Convention on Human Rights (ECHR) and Article 4 of Protocol No 4 to the ECHR [2]. Events in Greece and Morocco were of short duration and in Finland, only a limited number of people arrived after the country closed its land border.

18. The number of people who reached the EU as a result of this phenomenon may appear low if compared to irregular arrivals across the Mediterranean Sea. At the same time, the approximately 8 000 border crossings from Belarus to the three bordering Member States in 2021 represented a significant increase compared to the years before. In Finland, arrivals at border crossing points in late 2023 rose from single digits to hundreds per week.

19. Using migrants as part of hostile activities is not new. Academic literature describes multiple situations in which governments and non-state actors use or threaten to use population movements for their political or military objectives [3].

20. The role that third countries have played in facilitating or orchestrating irregular migration to the EU's external borders led to various actions to counter such instrumentalisation. The phenomenon is treated as a 'hybrid threat' [4]. Hybrid threats describe hostile acts which remain below the threshold of formal warfare [5]. Examples of hybrid threats include cyberattacks, massive disinformation campaigns to control the political narrative in the EU and measures disrupting the functioning of critical infrastructure, such as energy supply chains, transport or satellite communication [6].

21. This defence dimension risks overshadowing the human reality and the vulnerability of those being instrumentalised, many of whom are people in need of international protection. In Greece, in March 2020, some allegations – though denied by the authorities – referred to the use of live ammunition that reportedly resulted in the death of two persons and caused several injuries. In light of violent incidents at the border [7], Poland's Homeland Defence Act of July 2024 broadens soldiers' and police officers' rights to use firearms at the border, a measure which also heightens the risks to the right to life as protected by Article 2 of both

the Charter and the ECHR [8]. In 2023 and 2024, almost 60 people died along the EU land border with Belarus, many from hyperthermia while stranded in the border area [9]. About half of the people trapped in the forest on the Polish–Belarusian border MSF treated between November 2022 and November 2024 reported physical injuries related to violence. While violence was reported on both sides of the border, most patients reported experiencing abuse in Belarus [10].

22. The term 'weaponisation' of migration has emerged in EU documents. It focuses on geopolitical considerations and overshadows the humanitarian and human rights aspects of what happens at borders. In December 2024, the European Commission issued a communication on countering hybrid threats from the weaponisation of migration recognising that 'Member States may adopt exceptional measures to defend themselves against external threats'. The EU's internal security strategy of April 2025 announces further work to counter the 'weaponisation of migration'.

23. In its conclusions in October 2021, the European Council underlined that it 'will not accept any attempt by third countries to instrumentalise migrants for political purposes' and condemned all hybrid attacks at the EU's borders. In the conclusions of October 2024, it emphasised that a third country cannot be allowed to abuse EU values, including the right to asylum, and reaffirmed its commitment to countering the instrumentalisation of migrants for political purposes.

Definition of 'instrumentalisation of migrants' in EU law

24. EU law defines 'instrumentalisation of migrants' in Article 1(4)(b) of Regulation (EU) 2024/1359 (Crisis and Force Majeure Regulation) addressing situations of crisis and *force majeure* in the field of migration and asylum. This definition consists of the following four elements.

- Actor: a third country or a hostile non-state actor.
- Action: encouraging or facilitating the movement of third-country nationals to the EU's external border or to a Member State.
- Intention: the action is carried out with the aim of destabilising the EU or a Member State.
- Intensity: the action may objectively put at risk essential Member State functions, including the maintenance of law and order or protection of its national security.

25. Article 5(4) of the Schengen Borders Code, as amended by Regulation (EU) 2024/1717, uses this definition when regulating the measures that Member States can take at their external borders.

26. Recitals 15 and 16 of the Crisis and Force Majeure Regulation clarify that migrant smuggling and the provision of humanitarian assistance should not be considered as instrumentalisation 'when there is no aim to destabilise' the EU or a Member State. Recital 12 of Regulation (EU) 2024/1717 echoes the same distinctions.

27. Article 1(4)(b) of the Crisis and Force Majeure Regulation does not require that migrants or refugees arrive in large numbers for a situation of instrumentalisation to exist. The key factor is whether the action is 'liable to put at risk essential functions of a Member State'. In principle, this is a high threshold, likely to be met only in very exceptional situations.

28. At the same time, evidence to underpin instrumentalisation will often be classified and, therefore, not subject to public scrutiny. Academic literature points to difficulties stemming from the definition of instrumentalisation under EU law. For instance, establishing whether the hostile aim of the undertaken actions is political destabilisation will be crucial to differentiate instrumentalisation from migrant smuggling, which can be very difficult at times [11].

29. To counter the risk of an overly broad interpretation of this formulation, the Crisis and Force Majeure Regulation establishes procedural requirements. First, Member States must describe how essential functions of the state are put at risk (Article 2). Second, the Commission must assess whether the situation can be addressed sufficiently through other means (Article 3(4)d)) and, if not, describe why this is not the case (Article 3(7)). It also sets upper time limits for any derogation (Article 5). Restricting fundamental rights for longer than what is strictly necessary to address the situation would not be compatible with the Charter.

30. The instrumentalisation of migrants and refugees must be distinguished from spontaneous unauthorised arrivals, including large numbers of people, whether facilitated by smugglers or not. After the increased arrivals to the EU in 2015 and 2016, some Member States enacted or proposed emergency measures to counter irregular immigration, invoking national security concerns. For example, since September 2015, Hungary has been maintaining a 'state of crisis due to mass migration' [12] and implementing asylum and return policies, which the Court of Justice of the European Union (CJEU) found to be in violation of EU law [13]. Such measures are unrelated to instrumentalisation and not covered in this position paper.

31. This FRA position paper uses the wording 'instrumentalisation of migrants and refugees', except when referring to EU law definitions, as this phenomenon affects people seeking international protection. Under EU law and international human rights and refugee law binding on Member States, refugees and other people in need of international protection are entitled to specific protection measures. Such protection obligations are reflected, where relevant, in the ensuing legal analysis.

Instrumentalisation and fundamental rights

32. Actions that the EU and its Member States take to counter the instrumentalisation of migrants and refugees that fall within the scope of EU law must respect EU fundamental rights law, including the Charter, which under Article 6(1) of the Treaty on European Union (TEU) has the same legal value as the EU Treaties.

33. Even when Member States act outside the scope of EU law, Member States must respect

the safeguards deriving from national constitutional law and international law, in particular the ECHR, as the CJEU underlined in relation to dignified treatment during border checks [14].

34. Legal and operational responses to the instrumentalisation of migrants and refugees in some Member States restrict fundamental rights to such a degree that it creates serious tensions with primary EU law and international law. This position paper focuses on EU fundamental rights law.

35. To prevent migrants and asylum applicants from entering the EU by circumventing border controls, Member States are resorting to the use of force, including when dealing with children and other people with vulnerabilities. Under the Charter, the use of force which is not necessary and proportionate interferes with the right to the integrity of the person (Article 3), may result in people's death, violating the right to life (Article 2) and may amount to torture, inhuman or degrading treatment, which is prohibited by Article 4 of the Charter. It may also conflict with the provisions in Articles 24 to 26 of the Charter that protect children, the elderly and persons with disabilities.

36. Informal returns or redirections of third-country nationals to the EU external border threaten the long-standing customary international law rule prohibiting *refoulement*, which bans states from returning individuals to persecution or other serious harm. The Charter prohibits *refoulement* in Article 19(2) (protection in the event of removal, expulsion or extradition) and implicitly in Article 4 (prohibition of torture and other forms of ill-treatment) and in Article 18 (right to asylum).

37. A recurrent measure Member States have taken to counter the instrumentalisation of migrants and refugees is to restrict access to asylum. Access to international protection procedures is a key aspect of the right to asylum in Article 18 of the Charter and an essential element of the common European asylum system [15].

38. Certain fundamental rights may be limited, respecting the requirements set out in Article 52(1) of the Charter. Under Article 52(1) of the Charter, limitations to Charter rights must be provided for by law, be necessary and proportionate and respect the essence of the rights. Any response to an exceptional situation, such as instrumentalisation, must be limited in time. Other rights are absolute and cannot be restricted or derogated from. These include, in particular, the prohibition of torture and other forms of ill-treatment and the principle of *non-refoulement*.

Purpose and structure

39. This FRA legal analysis presents a set of tools that the EU and its Member States have at their disposal to respond to instances of instrumentalisation of migrants and refugees. Several of these tools are rights-compliant, provided they are accompanied by certain safeguards. The analysis also includes the EU law instruments adopted with the pact on migration and asylum, which will apply as of mid-2026.

40. The EU and its Member States can use a variety of tools to counter instrumentalisation. Such a toolbox includes:

- measures against the actor who instrumentalises migrants (Chapter 1);
- measures against the private operators that support the actor (Chapter 2);
- measures to deal with arriving migrants and refugees (Chapter 3); and
- measures linked to the involvement of the military at borders (Chapter 4).

41. In light of Recital 4 of Regulation (EU) 2022/555, amending its founding Regulation (EC) No 168/2007, FRA is not in a position to provide advice on acts or activities in relation to or in the framework of the EU's common foreign and security policy (CFSP). This position paper refers, to a certain extent, to measures covering these areas to enable the reader to have an overview. The agency's advice itself concerns matters falling under its mandate, primarily Articles 77 to 79 of the Treaty on the Functioning of the European Union (TFEU).

1. Measures targeting the actor

42. Measures to counter the instrumentalisation of migrants and refugees should first be directed towards the third country and their officials and/or other persons that use migrants to destabilise the EU or a Member State.

43. There are several measures that the EU and its Member States may take against specific individuals or third countries without infringing EU or international law. When strictly observing the safeguards in place, the measures described in this chapter can be compatible with EU fundamental rights law.

Countering state-sponsored smuggling of migrants

44. The smuggling of migrants is a transnational organised crime. The EU and its Member States may use the mechanisms and forums under the UN framework to discuss and address state-sponsored smuggling of migrants.

45. Article 3(a) of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air ('UN Anti-smuggling Protocol' or 'Protocol') defines 'smuggling of migrants' as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. Under Article 4, the Protocol applies to the prevention, investigation and prosecution of migrant smuggling where the offences are transnational in nature and involve an organised criminal group as defined in the UN Convention against Transnational Organized Crime (UNTOC). The EU [16] and all its Member States except Ireland are contracting parties, along with all neighbouring third countries with land borders to the EU and most Mediterranean states [17].

46. Article 11(1) of the Protocol obliges States Parties to 'strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants'. This obligation must be implemented 'without prejudice to international commitments in relation to the free movement of people'. States Parties are also required to 'adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence' (Article 11(2)). The UN has forums, such as the Protocol's review mechanism [18], to discuss the respect and implementation of its provisions.

47. The Protocol does not specify who can be the author of the offence of smuggling of migrants. It leaves the type(s) of perpetrators open. It can thus cover state-sponsored actions when these fulfil the definition of smuggling of migrants [19].

48. In case of any disputes between two or more parties to the UN Anti-smuggling Protocol on its interpretation or application that cannot be settled through negotiation within a reasonable time, one of the parties may request that it be submitted to arbitration. If, six months after the date of such request, the parties concerned are unable to agree on the

organisation of the arbitration, under Article 20(2) of the Protocol, any one of them may refer the dispute to the International Court of Justice (ICJ).

49. Lithuania considered activating such a dispute settlement clause and filing a case against Belarus before the ICJ in 2023 [20]. Belarus deposited, in September 2023, an interpretive declaration to Article 20(2) of the Protocol, to bar the institution of proceedings [21]. The EU and three Member States objected to Belarus' interpretative declaration and declared it unlawful and non-permissible under the 1969 Vienna Convention on the Law of Treaties [22]. In May 2025, Lithuania initiated proceedings before the ICJ against Belarus for alleged breaches of the Protocol [23].

50. In turn, the instrumentalisation of migrants and refugees by hostile state actors may overlap with the activities of criminal networks and migrant smugglers. The EU's 2021–2025 anti-smuggling action plan therefore considers restrictive measures to target individuals, entities and bodies participating in State-led schemes [24].

51. Recital 15 of the Crisis and Force Majeure Regulation clarifies that migrant smuggling does not constitute instrumentalisation when there is no aim to destabilise the EU or a Member State. Policies to counter instrumentalisation must not be used as a blueprint to combat migrant smuggling and the facilitation of irregular entry.

52. Repressive measures must target the criminal networks involved. Article 16 of the UN Anti-smuggling Protocol protects individuals who are the object of the crime of migrant smuggling. In some cases, such individuals are also victims of violence and abuse. Under Directive 2012/29/EU (Victims' Rights Directive), all victims of crime are entitled to protection.

53. Similarly, such measures should not target those who provide humanitarian assistance, including rescue at sea and the provision of food, shelter, medical care and legal advice to migrants in an irregular situation [25]. In 2023, when describing the progress achieved and remaining challenges in the field of asylum and migration, FRA noted that humanitarian actors working at borders face pressure and intimidation from the authorities [26]. Article 1(2) of Directive 2002/90/EC (Facilitation Directive) gives the option to Member States not to punish humanitarian action in support of irregular entry or transit. The Commission's 2020 guidance invites Member States to make use of the humanitarian exception in Article 1(2) of the Facilitation Directive, stressing that humanitarian assistance that is mandated by law must not be criminalised. The CJEU ruled that individuals may not be penalised for facilitating the unauthorised entry of a minor child with whom they travelled and for whom they exercise actual care [27]. The ongoing revision of the EU Facilitation Directive offers an opportunity to better distinguish between migrant smuggling offences and humanitarian action and exclude the latter from the scope of the directive.

Imposing restrictive measures under EU law

54. Restrictive measures under Article 215 of the TFEU, commonly referred to as 'EU sanctions', are a legitimate coercive instrument to counter undue pressure or breaches of international

obligations by a third country. In areas falling under the remit of EU competence, sanctions are decided at the EU level. With more than 40 sanction regimes in place, some transposing UN sanctions, others enacted autonomously [28], the EU is a global actor in addressing various threats to its fundamental values and principles set out in the EU founding Treaties [29]. EU sanctions serve to prevent conflict or respond to emerging or current crises, and to promote peace, democracy, respect for the rule of law, human rights and international law, according to the Council of the European Union.

55. EU sanctions, which aim to ensure consistency of Member States' action [30], are a CFSP tool and, as such, subject to the rules in Chapter 2 of Title V of the TEU. Article 29 of the TEU allows the Council to adopt decisions to define the EU approach to a particular matter. This also entails the possibility of adopting sanctions against third-country governments, non-state entities such as companies, or individuals.

56. Sanctions target specific individuals or legal persons. Typically, they consist of freezing assets and economic resources, travel bans and sectoral measures such as prohibiting the import or export of certain goods or technologies [31].

57. Pursuant to Article 31 of the TEU, decisions on the EU's CFSP are taken by the Council by unanimity. Once such a CFSP decision has been taken, the Council, acting by a qualified majority, can adopt the more concrete implementing measures (Article 215(1) of the TFEU), typically through a regulation. When adopting sanctions, the EU must respect applicable procedural safeguards [32] and the EU's commitments flowing from Article 21 of the TEU.

58. In 2021, the EU started to impose restrictive measures on people and entities involved in the instrumentalisation of migrants and refugees from Belarus to the EU. The Council amended existing EU legal instruments, allowing them to include natural or legal persons, entities or bodies responsible for organising or contributing to activities that facilitate the irregular crossing of the EU's external border [33].

59. When amending existing instruments, senior Belarusian border guard officials, such as the former Chairman of the State Border Committee, former heads of the border groups responsible for Grodno, Brest and Smorgon, along with the heads of the Polotsk and Lida border detachments, were added to the list of sanctioned individuals [34]. In February 2022, the EU also included the Belarusian special border guard unit ASAM (Separate Service for Active Measures) and its head in the list of targeted individuals and entities. Under a special operation, the ASAM forces organised irregular border crossings to the EU, being directly involved in the physical transportation of migrants to the EU border and charging the migrants for the crossing [35].

60. Similarly, the 'planning, directing, engaging in, directly or indirectly, supporting or otherwise facilitating the instrumentalisation of migrants' is one of the actions which may justify restrictive measures against individuals or legal persons operating in Russia [36].

Restricting visa policies

61. States have the sovereign right to regulate the entry of foreigners into their territory [37]. The EU has considerable flexibility when defining its visa policies. Restricting visa policies is a lawful tool to target actors (and their entourage) who are not subject to sanctions but may be involved in the instrumentalisation of migrants and refugees. Ensuing limitations to fundamental rights, such as the right to respect for private and family life in Article 7 of the Charter, are possible as long as they are provided for by law, necessary and proportionate and do not impair the essence of the right as required by Article 52(1) of the Charter.

62. Nationals of over 120 third countries need a visa to visit the EU. Regulation (EU) 2018/1806, which is regularly amended (see consolidated text), enumerates the third countries the nationals of which require a visa to come to the EU [38]. The EU Visa Code regulates the procedure and conditions for short-term visas to visit the Schengen area, meaning travel for short stays to the Schengen area of no more than 90 days within any period of 180 days. These are, for example, visits for tourism, business, sports or cultural events or to visit family and friends. Visa applications are subject to a detailed individual examination.

63. The EU revised the procedure to suspend visa-free travel to the EU. The EU co-legislators added new grounds for suspending visa waivers with third countries, which include hybrid threats such as state-sponsored instrumentalisation of migrants as defined in the Crisis and Force Majeure Regulation [39].

64. In 2023, nationals of Russia ranked fifth as regards the number of short-term Schengen visas issued [40]. Following Russia's war of aggression against Ukraine in February 2022, the Commission advised Member States to subject all visa applications by Russian nationals to thorough scrutiny [41]. For non-essential travel, at least half a dozen Member States stopped issuing short-term visas to Russian nationals or restricted access to their territory if they already held a visa [42]. As long as such policies do not disproportionately affect travels linked to the exercise of a fundamental right, such as the right to respect for family life, such restrictive measures are compatible with the Charter.

65. To facilitate people-to-people contacts and promote economic, humanitarian, cultural, scientific and other ties, the EU has concluded visa facilitation agreements with 13 third countries, including Russia (2007) and Belarus (2020) [43]. These agreements provide for facilitated visa procedures. Such agreements may entail, for example, lower visa fees, simplified documentary evidence, shorter processing time and simpler rules to apply for a multiple-entry visa.

66. The EU may suspend its visa facilitation agreements through a Council decision as per Article 218(9) of the TFEU. Following the increase in irregular migration to Latvia, Lithuania and Poland, orchestrated by the Belarusian regime for political purposes, in November 2021, the EU partly suspended the visa facilitation agreement with Belarus [44]. The suspension affects visa procedures for Belarus officials and members of official delegations and does not affect ordinary citizens [45]. In 2022, following the Russian invasion of Ukraine, the EU also fully suspended the visa facilitation agreement with Russia. As a justification, the suspension decision notes that Russia's military actions in Ukraine have increased the threats to public order, national security and public health of the Member States [46].

67. To limit the negative impact on human rights defenders, such as journalists, dissidents and civil-society representatives, in 2024, the Commission updated the Visa Code Handbook guiding consular staff on visa processing [47]. In addition, several Member States run programmes for human rights defenders, an overview of which is available in FRA's 2023 report Protecting Human Rights Defenders at Risk: EU entry, stay and support.

Taking other measures at the national level

68. Under international law, a dispute – which is 'a disagreement on a point of law or fact, a conflict of legal views or interests …' [48] – between states must be settled peacefully in line with Article 2(3) and Article 33 of the Charter of the United Nations.

69. The obligation of peaceful settlement of interstate disputes does not prevent states from adopting certain unilateral measures. These may include retorsion. Retorsion entails taking lawful measures under international law, such as terminating the payment of development aid, reducing, suspending or terminating diplomatic and/or consular relations or denying ships flying that state's flag access to ports [49].

70. A state can also take certain measures on a reciprocal basis, for example not performing a treaty obligation, if the other party did not perform the same or a related obligation (*exceptio non adimpleti contractus*) [50]. Latvia, Lithuania and Poland may thus suspend bilateral agreements entered with Belarus on good neighbourliness, cooperation and border arrangements, as the instrumentation of migrants by the Belarusian authorities is *prima facie* not compatible with the mutually undertaken obligations set out in these agreements [51].

71. There is also the possibility to take otherwise unlawful countermeasures (reprisals) against a state which is responsible for an internationally wrongful act to induce that state to comply with its international obligations. International law imposes limitations on countermeasures, which must respect certain conditions. For example, they must not affect obligations to protect fundamental human rights or obligations under peremptory norms of general international law (*jus cogens*), for example the prohibition of slavery and torture. Countermeasures must be commensurate with the injury suffered and terminate as soon as the wrongdoing state complies with its obligation [52].

Conclusion

72. The first set of possible measures to counter the instrumentalisation of migrants and refugees targets the actor responsible for an unfriendly or internationally wrongful act.

Combating state-sponsored smuggling of migrants

73. Most third countries at the EU's land and sea borders are party to the UN Anti-smuggling

Protocol. The ICJ will clarify the extent to which the Protocol covers state-sponsored actions. In addition to making full use of the Protocol and related discussion forums in the UN, the EU and its Member States can also use EU law to combat the facilitation of irregular entry to counter state-sponsored smuggling of migrants.

74. FRA recalls that under Article 52(1) of the Charter, any restrictions to Charter rights must be provided for by law and be necessary and proportionate. This also means that any proportionate but extraordinary measures to counter instrumentalisation which may be envisaged in new EU legislation must be clearly delimited to such situations. They should not apply to tackle the lenient behaviour of third countries to combat migrant smuggling, which does not have the intention to destabilise the EU or its Member States, as underlined in Recitals 15 and 16 of the Crisis and Force Majeure Regulation.

75. Furthermore, measures against migrant smuggling should not target humanitarian actors supporting migrants and asylum seekers at EU external borders. They should also not lead to the punishment of those individuals who are the object of the crime of migrant smuggling. When such individuals are victims of violent crimes, they should be afforded the protection of the EU Victims' Rights Directive.

Imposing sanctions and other measures

76. The EU and its Member States have the possibility to impose sanctions on individuals involved in the instrumentalisation of migrants and refugees and adopt other unilateral measures allowed under international law. These measures may entail certain restrictions on fundamental rights. When Member States act within the scope of EU law, under Article 52(1) of the Charter, any limitation must be provided for by law, be necessary and proportionate and respect the essence of the right. When Member States act outside the scope of EU law but in line with commitments made under the EU's CFSP, they are bound by the requirements deriving from relevant international law, including the UN Charter and the general rules on state responsibility, and by international human rights law, in particular the ECHR.

Restricting visa policies

77. Restricting visa policies is another lawful tool to target those involved in the instrumentalisation of migrants and refugees. The EU has considerable flexibility when defining its visa policies. Such policies may restrict fundamental rights, such as the right to respect for private and family life in Article 7 of the Charter, or the freedom to conduct a business set out in Article 16 of the Charter, provided such restrictions are necessary and proportionate and do not impair the essence of the right as required by Article 52(1) of the Charter [53].

2. Measures against private operators

78. The instrumentalisation of migrants and refugees might entail cooperation with or the involvement of transport operators, in particular airlines, or of other commercial actors. They may engage in transferring migrants either to the EU or to nearby third countries, and/or offer accommodation and services on the way.

79. According to the Council, many airborne transport operators have contributed to arrivals of third-country nationals to the EU or neighbouring regions, which have then proceeded to irregular entry or stay in the EU [54].

80. In accordance with Article 4(2)(g) of the TFEU, the EU has a shared competence with Member States in the area of transport (Title VI of the TFEU). In the last few years, the EU has been taking steps to prevent or counter the involvement of transport operators in the smuggling of migrants and trafficking in human beings, more generally, and their involvement in instrumentalising migrants and refugees, more specifically.

Sanctioning involved transport operators

81. Sanctions in response to the instrumentalisation of migrants and refugees also targeted airlines, tour operators and hotels that have helped incite and organise irregular border crossings from Belarus to the EU [55]. Under Article 8(b) of Council Regulation (EC) No 765/2006, the Belarus national airline Belavia is banned from landing in, taking off from or overflying the territory of the EU. Belavia had opened new air routes and expanded existing connections flying third-country nationals from the Middle East who wish to cross into the EU to Belarus. The EU also imposed sanctions on the airline Cham Wings, which increased the number of flights from Damascus to Minsk in 2021, freezing funds and economic resources it may have in the EU [56].

82. The EU also imposed sanctions on the Belarusian state-owned tourism company Tsentrkurort and the tour operator Oskartur for facilitating visas and organising the travel of third-country nationals to Belarus. Hotel Minsk and Hotel Planeta, which accommodated migrants and refugees before they were moved to the border with the EU, are also on the EU sanctions list [57]. In February 2022, the EU imposed restrictive measures on the Belarusian company Bremino Group, responsible for a transport and logistic centre at the Belarus border with the EU, which accommodated third-country nationals intending to cross into the EU, and on its co-owners [58].

Engaging with transport operators

83. To address their involvement in migrant smuggling more generally, as requested by the European Council in 2023 [59], the Commission presented a toolbox to counter the phenomenon of criminal networks taking advantage of services provided by transport

operators to bring irregular migrants close to the EU [60]. Some of the diplomatic and operational measures envisaged therein are also relevant to counter instrumentalisation.

84. The toolbox focuses on airlines and builds on policies and guidance the Commission developed to counter trafficking in human beings. It includes preventive measures, such as outreach to third countries, awareness-raising activities with transport operators in third countries, the training of airline staff and information exchange with third countries and transport operators. The Commission also suggests developing international guidelines on recognising and reporting patterns of facilitation of irregular migration, facilitating the sharing of best practices and an early warning system.

85. Next to such softer measures, the toolbox also lists punitive measures. These include, for example, the suspension or revocation of the operating licence of an EU air carrier if it does not meet good repute requirements. Under Article 3 of Regulation (EC) No 1008/2008, any undertaking established in the EU that wishes to carry air passengers must obtain an operating licence. To obtain such a licence, the undertaking must comply with provisions of good repute (Article 4) [61].

Further targeting transport companies involved in trafficking and smuggling

86. In November 2021, the Commission proposed a regulation concerning measures against transport operators that facilitate or engage in trafficking in persons or the smuggling of migrants [62]. The proposal – based on Article 91 and Article 100(2) of the TFEU – would enable the Commission to take preventive measures against such transport operators. Restrictive measures proposed include, for example, limiting or suspending the right to provide transport services in the EU and suspending the right to transit, fly over the EU, refuel or carry out maintenance in the EU. The proposal is still under negotiation by the EU co-legislators [63].

Conclusion

87. The second set of actions to counter the instrumentalisation of migrants and refugees is to target transport companies and other commercial operators actively involved in transporting people to the EU or to its external borders on behalf of a third country. Such measures should differ depending on whether private operators act consciously in supporting a third country's unfriendly act against the EU or a Member State or not. In the first case, it may include restrictive measures as described in Chapter 1.

88. In the second scenario, the EU and its Member States may take measures under Titles V and VI of the TFEU. These may range from softer measures, such as the training of airline staff, to revocation of operating licences when airlines do not meet good repute requirements. When such measures restrict fundamental rights, including the freedom to

conduct a business set out in Article 16 of the Charter, any limitation must meet the requirements of Article 52(1) of the Charter [64]. They must also respect equality before the law and non-discrimination protected by Articles 20 and 21 of the Charter.

3. Measures to manage arrivals

89. This chapter looks at actions that national authorities can take to tighten border controls, enhance asylum processing, speed up returns for those not in need of international protection and address security and other serious concerns. It examines related fundamental rights issues. In 2020, FRA and the Council of Europe issued a joint note clarifying the fundamental rights of refugees, asylum applicants and migrants at the European borders.

Complying with key fundamental rights safeguards

90. The treatment of third-country nationals at external borders and in asylum and return procedures is largely regulated by EU law.

91. Such EU law must be applied in conformity with the Charter. Under Article 52(3) of the Charter, the meaning and scope of its rights correspond to equivalent rights guaranteed by the ECHR and its protocols. The ECtHR adjudicated many cases relating to asylum applicants and migrants in which it interpreted the rights set out in the ECHR. Such case-law significantly informs how to interpret EU primary law. Moreover, under Article 6(1) of the TEU, fundamental rights, as guaranteed by the ECHR, constitute general principles of EU law.

92. Member States typically adopt emergency measures to respond to the instrumentalisation of migrants and refugees in ways which restrict fundamental rights (see Annex). Derogations from asylum rules under the Crisis and Force Majeure Regulation – which will apply from mid-2026 – require a decision at the EU level, establishing that a Member State faces a situation of crisis [65].

93. Under Article 52(1) of the Charter, limitations to Charter rights must be provided for by law, be necessary and proportionate and respect the essence of the rights. Many Charter rights analysed in this chapter correspond to rights guaranteed by the ECHR. Therefore, restrictions and derogations to these rights must not go beyond what is envisaged in individual ECHR articles and under Article 18 of the ECHR (limitation on the use of restrictions on rights) and what Article 15 of the ECHR (derogations from rights in times of war or other public emergencies threatening the life of the nation [66] allows. Under Article 15 of the ECHR, no derogations are allowed from the right to life (except in respect of deaths resulting from lawful acts of war) and the prohibition of torture, inhuman and degrading treatment or punishment, which – based on the case-law by the ECtHR – encompass also the prohibition of *refoulement* (see paragraph 100).

94. Article 17 of the ECHR (abuse of rights) prohibits any activity aimed at the destruction of the rights and freedoms set forth in the ECHR. The ECtHR applied this provision when applicants misused the ECHR to justify, promote or perform acts that are contrary to the text and spirit of the convention, that are incompatible with democracy and/or other

fundamental values of the ECHR or that infringe the rights and freedoms recognised therein [67]. These considerations do not appear applicable to third-country nationals who arrive at the EU's borders in the context of instrumentalisation. Third-country nationals have limited legal pathways to seek international protection. They may view the offer to travel legally to Europe as their only opportunity to reach a safe place and may be unaware of the risk of ending up stranded in between borders.

95. Without being exhaustive, at least seven fundamental rights enshrined in the Charter require particular attention when taking measures targeting instrumentalised migrants and refugees. These relate to Article 2 (right to life), Article 3 (right to the integrity of the person), Article 4 (prohibition of torture and inhuman or degrading treatment or punishment), Article 6 (right to liberty), Article 18 (right to asylum) and Article 19(2) (protection in the event of removal, expulsion or extradition), along with Articles 24 to 26 of the Charter, protecting children, the elderly and persons with disabilities.

Limits to the use of force

96. First, the use of force and coercive measures by authorities must always remain necessary and proportionate. Applicable principles are set out in Annex V to Regulation (EU) 2019/1896 (EBCG (European Border and Coast Guard) Regulation), which regulates the use of force by the European Border and Coast Guard Agency (Frontex): the use of force must be authorised by law, be necessary and proportionate and respect the duty of precaution. Unlawful use of force that reaches a certain intensity amounts to torture, inhuman or degrading treatment or punishment [68]. Excessive force may also violate Article 2 (right to life) and Article 3 (right to the integrity of the person) of the Charter. EU fundamental rights law and international human rights law always prohibit torture, inhuman or degrading treatment or punishment, with no exception regardless of the context, circumstances or its justification [69].

97. Member States must investigate allegations of excessive use of force at borders. As FRA pointed out in its 2024 guidance on investigating alleged ill-treatment at borders, the ECtHR has developed detailed case-law for prompt and effective investigations. Ineffective judicial protection against widespread rights violations at borders poses a risk to the respect of the rule of law as enshrined in Article 2 of the TEU, as FRA underlined in its 2023 submission to the Commission's rule of law report.

Search, rescue and assistance

98. Second, persons in distress must be rescued and assisted. Article 2 of the Charter and Article 2 of the ECHR guarantee the right to life. In accordance with the ECtHR, state authorities must take preventive measures within the scope of their powers in situations where they know or ought to have known of a real and immediate risk to life [70]. This also includes operational measures at borders [71]. Assisting people in distress at sea is a duty

of all states and shipmasters under international law [72]. Denial of medical or other assistance to cover essential needs may also raise issues under Article 3 of the Charter, which protects the right to respect for people's physical and mental integrity and may amount to torture or inhuman or degrading treatment, which is prohibited by Article 4 of the Charter.

Non-refoulement

99. Third, the principle of non-refoulement must always be respected. It is the core principle of refugee law, as it protects refugees against a return to persecution or other serious harm. It also protects all foreigners against a return to torture, inhuman or degrading treatment or punishment [73]. EU primary law reflects the prohibition of *refoulement* in Article 78(1) of the TFEU and in Articles 18 and 19 of the Charter.

100. Under Article 2(2) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which all Member States are parties, no exceptional circumstances whatsoever may be invoked as a justification for torture. The UN Committee against Torture clarified that the prohibition of ill-treatment and of *refoulement* is also absolute [74]. In Europe, when applying the prohibition of torture in Article 3 of the ECHR, the ECtHR clarified that such prohibition is absolute and that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion [75].

101. The principle of *non-refoulement* applies at borders [76]. It prohibits not only the removal, expulsion or extradition to a country where a person may be at risk of persecution or other serious harm (direct *refoulement*) but also to countries where individuals would be exposed to a serious risk of onward removal to such a country (indirect or chain *refoulement*) [77].

102. Respecting the prohibition of *refoulement* requires rigorous scrutiny of any arguable claim [78]. In accordance with the general principles of EU law, a decision affecting a person's rights must be taken on an individual basis [79].

Prohibition of collective expulsions

103. Fourth, collective expulsions are prohibited by Article 19(1) of the Charter. Such prohibition – which is also reflected in Article 4 of Protocol No 4 to the ECHR – applies to non-admission at borders and on high seas [80]. To qualify as collective expulsion, an action must concern at least two individuals [81]. Removing a person to a narrow strip of land between a border fence and the actual border line may also amount to a collective expulsion [82].

104. Under Article 4 of the Schengen Borders Code, any decision affecting a person's rights must be taken on an individual basis. To prevent collective expulsions, there must be a reasonable and objective individual examination in each case [83]. The degree of such examination depends on several factors. An individual interview is not needed where each person has a genuine and effective possibility of submitting arguments against their

expulsion, and where those arguments are examined in an appropriate manner [84]. An individual's own culpable conduct may exceptionally forfeit the need for an individual expulsion decision [85]. There must be an effective possibility of challenging the expulsion decision, but contrary to the prohibition of *refoulement*, an appeal against a collective expulsion does not need to automatically suspend the removal until a court or tribunal reviews the case [86]. The ECHR, and in consequence, Article 19 read together with Article 52(3) of the Charter, allow some flexibility as regards the individual examination for claims of collective expulsions compared to *non-refoulement* claims. *Non-refoulement* claims entail a risk of irreparable harm and require that any arguable claim undergoes thorough individual scrutiny.

Access to asylum procedures

105. Fifth, denying access to asylum procedures is unlawful. Article 18 of the Charter guarantees the right to asylum. A recurrent measure that Member States have taken to counter instrumentalisation is to restrict access to international protection procedures. Any measure to handle asylum claims made by asylum applicants who have been the subject of instrumentalisation must not undermine the essence of the right to asylum or result in direct or indirect *refoulement*.

106. In M.A. v Valstybės sienos apsaugos tarnyba, the CJEU found that Lithuanian legislation, specifically Article 14012(1) of the Law on Aliens, violated EU law by depriving irregularly staying third-country nationals of the right to apply for international protection, a provision which Lithuania enacted following the 2021 events at the Belarus border. The CJEU stressed that national security measures remain subject to EU law, and blanket exclusions based on public order or security cannot override asylum rights unless specifically justified and proportionate. Relying solely on the mass influx of migrants to deny access to asylum procedures lacked sufficient legal basis under Article 72 TFEU [87].

Right to liberty

107. Sixth, deprivation of liberty requires an individual necessity and proportionality assessment. Any limitation to Article 6 of the Charter (right to liberty) must meet the requirements set out in Article 52(1). No blanket detention policies are possible under the Charter. The right to an effective remedy in Article 47 of the Charter and the right to good administration, which is a general principle of EU law, require that such decisions be subject to judicial review and that their necessity be regularly assessed. Article 4 of the Charter prohibits detention under inhuman or degrading conditions.

Persons with specific needs

108. Seventh, authorities must pay due attention to persons with specific needs. They can be

classified as especially vulnerable and requiring specific attention. Article 24 of the Charter requires that in all actions relating to children, the child's best interests must be a primary consideration. The best interests of the child is a central element of the rights of the child protected by the Charter and the TEU (Article 3(3)). States have more extensive duties to protect children, including unaccompanied children, in the context of migration, the ECtHR pointed out [88]. In addition, Articles 25 and 26 of the Charter protect the elderly and persons with disabilities. In relation to the 1990 Convention implementing the Schengen Agreement, the CJEU recalled the binding nature of the right to respect for family life and the rights of the child in Articles 7 and 24 of the Charter [89].

Tightening border controls

109. Under EU law, Member States are obliged to protect the external border of the EU. The Schengen Borders Code (last amended in 2024) lays down rules on the border controls of people crossing the EU's external borders. In accordance with Articles 2(10) to 2(12), border controls include checks at border crossing points and surveillance activities to prevent unauthorised crossings of the border sections between border crossing points.

110. Under Article 4 of the Schengen Borders Code, which applies to all border controls, any action to prevent unlawful crossing of the border must comply with fundamental rights, including obligations related to access to international protection, and must respect the principle of *non-refoulement.*

111. This entails that anyone who seeks international protection may not be redirected or turned back immediately at the border but must be referred to the authorities to register the asylum application, and – as of mid 2026 – to the authorities in charge of screening under Regulation (EU) 2024/1356. The need to respect the principle of *non-refoulement* when taking border control measures emerged as a horizontal gap in the Schengen evaluation of Lithuania (2023), Latvia (2023) and Poland (2024) [90].

112. This section describes different measures to counter the instrumentalisation of migrants and refugees Member States can take at external borders under EU law and clarifies which fundamental rights safeguards must accompany these.

Reinforcing scrutiny during border checks

113. Persons crossing the external border may be subject to reinforced scrutiny. Article 8(3) of the Schengen Borders Code requires third-country nationals to undergo a thorough check on entry and exit. As a form of hybrid threat, instances of instrumentalisation may aggravate the security and public order risk. They may justify reinforced attention when verifying that the third-country national concerned will not jeopardise the public policy or internal security of any of the Member States. Such verification should be carried out in a coherent fashion across the whole Schengen border, as the Commission noted on

30 September 2022 when providing guidance on controls of Russian citizens at the external borders.

114. In accordance with Article 1 of the Charter, any person must be treated with dignity [91] and border guards must respect the procedural safeguards laid down in the Schengen Borders Code. Human dignity is an inviolable, absolute right that may never be suspended or limited, even in emergencies [92].

Restricting border traffic

115. Restricting border traffic is a second possible measure. In instances of the instrumentalisation of migrants, Article 5(4) of the revised Schengen Borders Code explicitly allows Member States to temporarily close border crossing points or to restrict their opening hours. Such restrictions must be proportionate and take due account of persons enjoying free movement rights in the EU, persons holding residence permits or long-stay visas and persons seeking international protection [93], as the CJEU noted in 2006 [94]. In accordance with Article 39 of the code, the respective Member State needs to notify the Commission, which will make this information public in the *Official Journal of the European Union*.

116. Where bilateral local border traffic agreements under Regulation (EC) No 1931/2006 have been concluded with neighbouring third countries, these may be terminated or suspended in accordance with corresponding treaty provisions. For example, Poland suspended its bilateral local border traffic agreement with Russia in July 2016. Latvia suspended its local border traffic agreement with Russia and Belarus in 2022 following Russia's war of aggression against Ukraine. According to information FRA received from the European Commission, Finland, Estonia and Lithuania do not have such bilateral agreements in force with their eastern neighbours.

Adapting border surveillance capacities

117. Member States may deploy more border guards (on their own or through Frontex) and adapt their surveillance methods and tools to existing or envisaged risks and threats, to fulfil their duty under Article 13 of the Schengen Borders Code to prevent unauthorised border crossings. Patrols along the borderline may use proportionate means [95] to alert people approaching that it is unlawful to cross it outside border control points and discourage them from doing so. However, those who reach the border and seek asylum must be referred to national procedures.

118. Under Article 3(13) of the Asylum Procedure Regulation, read together with Article 26, a person who expresses a wish to receive international protection is an asylum applicant and, under Article 10, protected from immediate return. In case of doubts as to whether a certain declaration is to be construed as an application for international protection, pursuant to Article 26(2) of the regulation the person must be expressly asked whether they wish to

receive international protection [96]. Their immediate return or redirection to the border would contradict Articles 18 and 19 of the Charter. EU law also requires that every person be treated with dignity, that no excessive force be used when applying constraint measures or when stopping and apprehending people who circumvent border controls and that persons in distress found in border areas or at sea be rescued and provided with life-saving assistance.

119. Article 5(3) of the Schengen Borders Code, as amended by Regulation (EU) 2024/1717, contains a specific provision to deal with situations where migrants attempt to cross their external borders in an unauthorised manner, *en masse* and using force. This provision, which is not limited to the situation of instrumentalisation of migrants and refugees, entitles Member States to take 'necessary measures to preserve security, law and order.' It follows Article 4(2) of the TEU, which clarifies that Member States remain in charge of essential state functions: ensuring territorial integrity, maintaining law and order and safeguarding national security. Article 5(3) of the Schengen Borders Code does not allow the disapplying of its rules on controls at external borders, nor its protective safeguards, for example those prohibiting *refoulement*. Doing so would undermine the purpose of the code as described in Article 1, namely to set rules governing controls of persons crossing the external borders.

Enhancing early detection

120. Finally, deploying more resources to enhance early detection of those who enter by circumventing border controls allows the authorities to register them and take immediate action. Apprehended persons can be screened for any security concerns and speedily channelled into asylum, return or other procedures.

Prioritising asylum procedures

121. Based on Article 78(1) of the TFEU, the EU developed a common European asylum system which must comply with the 1951 Convention relating to the Status of Refugees and its 1967 protocol, and with other relevant treaties. This section presents options to examine asylum applications.

122. With the pact on migration and asylum, EU asylum law was revised [97]. Such revision also included measures to respond to instances of instrumentalisation of migrants and refugees. The Crisis and Force Majeure Regulation – which will apply as of mid-2026 – provides a legal framework for managing crisis situations and allows exceptions to standard asylum and return procedures under regulated conditions.

123. Envisaged derogations to deal with crisis situations must be temporary in nature and meet necessity and proportionality requirements, as Articles 1(2) and 1(3) of the Crisis and Force Majeure Regulation clarify. They must be consistent with the obligations of the Member States under the Charter, international law and the EU asylum acquis. Member States can only activate them following a Council implementing decision and only to the extent

envisaged therein, although under Article 10(6) they may apply the extended deadline to register applications immediately, if they notify the Commission of the precise reasons why this is needed.

Using future flexibility in registering asylum requests

124. Article 18 of the Charter does not allow the barring of third-country nationals subject to instrumentalisation from accessing asylum procedures. Their asylum applications must be registered and examined in line with procedural safeguards embedded in the EU asylum acquis and respecting the right to an effective remedy, set out in Article 47 of the Charter. The Schengen evaluations of Lithuania (2023), Latvia (2023) and Poland (2024) recommend various actions to ensure that access to international protection at external borders is effective [98] .

125. Any request for international protection must be registered within the deadlines established in Article 27 of the Asylum Procedure RegulationAsylum Procedure Regulation. When migrants are instrumentalised, Article 10(1) of the Crisis and Force Majeure Regulation allows the extension of the deadline to register their asylum applications from five days to up to four weeks, provided registration in Eurodac occurs within the 72-hour deadline set out in Article 15(1)(b) of Regulation (EU) 2024/1358.

Using future border procedures

126. As of mid-2026, EU law will also permit wider use of border procedures. Article 11(6) of the Crisis and Force Majeure Regulation allows for examining the substance of the claim of asylum applicants subject to instrumentalisation in the asylum border procedure, except for certain categories of applicants. Articles 11(7) and 11(9) exclude asylum border procedures for children under 12 years of age, their parents and persons with special needs whose applications are likely to be well-founded. It also imposes limitations for applicants with special needs whose merits of the claim are unclear. The asylum border procedure, which must normally not exceed 12 weeks (Article 51 of the Asylum Procedure Regulation), may be extended for an additional six weeks in accordance with Article 11(1) of the Crisis and Force Majeure Regulation. These derogations enable Member States to keep applicants in locations designated for border procedures and, in case the asylum application is rejected, to carry out border return procedures (see paragraph 136).

Prioritising claims by instrumentalised applicants

127. Member States may use their flexibility in prioritising the processing of asylum claims by applicants subject to instrumentalisation. Additional registration and case officers, interpreters, reception and legal support staff and appeal judges could be transferred, deployed or allocated temporarily to decide swiftly on the asylum applications – particularly

those that are manifestly unfounded or well-founded – and to identify and refer applicants with specific needs. Member States may request the support of the European Union Agency for Asylum in line with its mandate.

Cooperating with other countries

128. EU law requires Member States to have contingency plans to ensure adequate reception capacity (Directive (EU) 2024/1346, Article 32).

129. When situations of instrumentalisation of migrants and refugees involve a considerable number of people overstretching the national capacity to respond, the UNHCR also suggests responsibility-sharing arrangements with third countries as envisaged in the framework of the Global Compact on Refugees, such as activating a support platform or resorting to regional or sub-regional cooperation. Such cooperation must allow for the widest possible exercise of fundamental rights and freedoms of refugees [99].

Speeding up returns

130. The effective and speedy implementation of return procedures in full respect of applicable safeguards may discourage the instrumentalisation of migrants and refugees. If most of those individuals who are not in need of international protection return within weeks of their arrival, there may be fewer incentives by hostile actors to use ordinary people to put political pressure on the EU or its Member States. The return of persons who are not in need of international protection is also essential to uphold the credibility of the EU's asylum system. This section describes possible return-related measures.

Prioritising returns of instrumentalised migrants

131. Pursuant to Article 13 of the Schengen Borders Code, an individual apprehended after an unauthorised border crossing and who has no right to stay on the territory of the Member State concerned is subject to return procedures respecting the Return Directive. The Return Directive is under revision [100].

132. In light of Member States' procedural autonomy, which is a general principle of EU law [101], as long as they do not contradict the Return Directive, Member States are free to prioritise return procedures for migrants who have been the object of instrumentalisation. They may also request Frontex's support under the EBCG Regulation.

133. Article 6 of the Return Directive requires the issuance of a return decision, although Article 2(2)(a) entitles Member States to apply different rules for persons apprehended in connection with their irregular border crossing. Most Member States along the external EU border make use of this possibility and apply national laws to them. Under Article 4(4) of the directive, such national laws must respect the core safeguards of the Return Directive,

including the principle of *non-refoulement*. Article 4(6) of Regulation (EU) 2024/1349 (Return Border Procedure Regulation) – which will apply as of mid-2026 – envisages that people rejected in the border asylum procedure may receive a refusal of entry, similar to persons non-admitted at the border crossing points.

134. Under EU law, any removal of a person must be based on an individual assessment of the circumstances, which must be documented in a related decision, and subject to effective judicial remedies.

Applying future return border procedures

135. In recent years, the EU and its Member States have been increasing efforts to make return policies more effective, as FRA described in its 2025 position paper on return hubs.

136. The adoption of the Return Border Procedure Regulation is one such step. As of mid-2026, EU law will enable Member States to carry out returns of asylum applicants rejected at the border through a return border procedure. Pursuant to it, national authorities will have 12 weeks to implement returns. Under Article 5(4) of the regulation, the Return Directive's safeguards to prevent *refoulement*, avoid arbitrary detention, protect the right to family and private life and cater for the rights of children and persons with specific needs remain applicable.

137. The Return Border Procedure Regulation allows Member States to continue to detain individuals who were deprived of liberty during their asylum procedure (Article 5). This rule complements other restrictive measures to prevent absconding and the possibility of detaining those individuals who pose a risk to public policy, public security or national security. Restrictive measures must respect the right to liberty in Article 6 of the Charter, including the substantial and procedural safeguards that protect people from arbitrary detention (see also paragraphs 147 and 148), along with the right to an effective remedy guaranteed by Article 47 of the Charter.

Addressing security and other serious concerns

138. Pursuant to the 2025 European internal security strategy, strengthening the resilience and security of external borders is crucial to countering hybrid threats. This may entail actions to address the security and public order risks emanating from specific individuals being present in Member States' territory. EU law on asylum and migration allows restrictive measures against third-country nationals who pose a security or public order risk. The legal instruments adopted with the pact on migration and asylum put further emphasis on security checks. This section describes possible actions that Member States may take and their related fundamental rights considerations.

Identifying persons who may pose a security threat

139. As of mid-2026, compulsory pre-entry screening will better enable national authorities to identify new arrivals who may pose a security threat. Pursuant to Regulation (EU) 2024/1356, third-country nationals apprehended in connection with an unauthorised crossing of the external border must undergo identification, a health and vulnerability check and a security check. During such checks – which under Article 8(3) of the regulation must be completed within seven days – Member States must take steps to ensure that newly arrived persons remain available to the authorities.

140. Member States may take appropriate measures against persons posing security risks, including the initiation of criminal procedures in cases of persons suspected of having committed a criminal offence, provided they respect applicable safeguards. Any restriction based on security risks identified through preliminary information must be regularly reviewed and maintained only insofar as still necessary and proportionate.

Taking measures against violent individuals

141. Recently, Member States have reported about the presence of violent or armed persons among third-country nationals who crossed into the EU to seek asylum [102]. Possibly, they may have been linked to criminal networks engaged in migrant smuggling or other unlawful activities.

142. Member States can take restrictive measures against armed or violent persons and, where appropriate, initiate criminal procedures. Law enforcement authorities can apply restrictive measures under national law, provided they are in line with European and international human rights law.

Excluding undeserving people from international protection

143. EU asylum law excludes from international protection individuals who are deemed undeserving of such protection on the grounds of their responsibility for certain heinous acts or serious common crimes. Under Articles 12 and 17 of the Qualification Regulation, persons who have committed a crime against peace, a war crime or a crime against humanity, those who – prior to their arrival – have committed a serious non-political crime outside the country of refuge and those who have committed acts contrary to the purposes and principles of the UN, are not entitled to international protection. These exclusion grounds correspond, in large part, to the grounds for exclusion from refugee status under Article 1F of the 1951 Convention relating to the Status of Refugees.

144. Any decision to exclude an asylum applicant from international protection must be based on a thorough individual assessment, which must follow specific steps. The European Union Agency for Asylum and the UNHCR have detailed guidance on how to apply such exclusion clauses in line with international and EU fundamental rights law [103].

Excluding asylum for combatants

145. In situations of large refugee movements triggered by armed conflict, it is not unusual that combatants cross the border together with refugees. The presence of combatants among refugees undermines the civilian and humanitarian nature of asylum [104]. Combatants are not entitled to asylum as long as they do not give up armed activities. The UNHCR has developed guidance on how to maintain the civilian and humanitarian character of asylum. It gives practical advice on how to separate combatants from the refugee population, how to disarm them, how to verify that they have genuinely and permanently given up their armed activities and guides the adjudication of their refugee claim [105].

146. The EU asylum *acquis* does not contain express provisions on the separation of combatants from refugees. Article 20(1) of the Qualification Regulation clarifies that EU law is without prejudice to the rights and obligations laid down in the 1951 Geneva Convention relating to the Status of Refugees. Article 2 of the Convention requires that refugees respect the laws and regulations of the host country. Therefore, Member States are entitled to take measures under national law to separate and disarm combatants and, more generally, to enforce their laws concerning the carrying of weapons and firearms.

Restricting the right to liberty in individual cases

147. When necessary and proportionate in the individual case, EU law allows the restriction of the right to liberty set out in Article 6 of the Charter. For asylum applicants, Directive (EU) 2024/1346 regulates deprivation of liberty in Articles 10 to 13. The protection of national security or public order are grounds for detention allowed by Article 10(3) of the directive. Although the ECHR does not reflect such grounds for detention, in the case of a person who had already received a return decision and an entry ban and subsequently applied for asylum, the CJEU concluded that it can be subsumed under Article 5(1)(f) of the ECHR (detention in view of expulsion) [106]. In other cases, detention to protect national security or public order would need to meet the strict safeguards of Article 5(1)(c) of the ECHR, allowing deprivation of liberty to prevent the commitment of an offence.

148. Deprivation of liberty and other restrictive measures based on EU or national law must be justified by an individual necessity and proportionality assessment. The right to an effective remedy in Article 47 of the Charter and the right to good administration, which is a general principle of EU law, require that such decisions be subject to judicial review and their necessity be regularly reassessed. Article 4 of the Charter prohibits deprivation of liberty under inhuman or degrading conditions. The Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) defined standards for the treatment of persons deprived of liberty (CPT standards).

Conclusion

149. Measures to manage third-country nationals who arrive in the EU in the context of instrumentalisation of migrants and refugees are largely regulated by EU law. This means that the Charter applies to most actions that Member States take in the field of border management, asylum and return.

150. EU law adopted under Title V of the TFEU already allows for certain flexibility to counter the instrumentalisation of migrants and refugees. As of mid-2026, EU rules will be clearer and more comprehensive. Certain fundamental rights may be limited, respecting the requirements set out in Article 52(1) of the Charter. Other rights are absolute and cannot be restricted or derogated from.

151. Without being exhaustive, at least seven fundamental rights safeguards require particular attention when taking measures targeting instrumentalised migrants or asylum applicants. First, the use of force must always remain necessary and proportionate. Second, persons in distress must be rescued and assisted. Third, the principle of *non-refoulement* must always be respected. Fourth, collective expulsions are prohibited. Fifth, denying access to asylum procedures is unlawful. Sixth, deprivation of liberty requires an individual necessity and proportionality assessment. Seventh, authorities must pay due attention to persons with specific needs. These core safeguards relate to Article 2 (right to life), Article 3 (right to the integrity of the person), Article 4 (prohibition of torture and inhuman or degrading treatment or punishment), Article 6 (right to liberty), Article 18 (right to asylum) and Article 19(2) (protection in the event of removal, expulsion or extradition), along with Articles 24 to 26 of the Charter, protecting children, the elderly and persons with disabilities.

Tightening border controls

152. To counter the risks and threats connected with the instrumentalisation of migrants and refugees, border crossing points may be closed or their opening hours limited. Border guards may undertake more thorough checks to verify any security risks. Additional staff and equipment may be deployed for border surveillance and to speedily detect those who cross in an unauthorised manner.

153. When taking such measures, EU fundamental rights law requires that every person be treated with dignity, that no excessive force be used when applying constraint measures or when stopping and apprehending people who circumvent border controls and that persons in distress found in border areas or at sea be rescued and assisted. Any individual seeking asylum must be referred to national procedures. Their immediate return or redirection to the border contradicts Articles 18 and 19 of the Charter.

Prioritising asylum procedures

154. Article 18 of the Charter does not allow the barring of third-country nationals subject to instrumentalisation from accessing asylum procedures. Their asylum applications must be registered and examined in line with procedural safeguards embedded in the EU asylum

acquis and respect the right to an effective judicial remedy, set out in Article 47 of the Charter.

155. At the same time, EU migration and asylum law applicable as of mid-2026 contains flexibility to respond to crisis situations, including those triggered by the instrumentalisation of migrants and refugees. Member States may ask for more time to register applications and may process them in the asylum border procedures, except in some cases concerning children and applicants with specific needs. Meanwhile, they may make use of their administrative autonomy to prioritise asylum claims submitted in situations of instrumentalisation. They may also seek support from the European Union Agency for Asylum and the UNHCR.

Speeding up returns

156. Member States are free to prioritise and accelerate the return of migrants who have been the object of instrumentalisation and may request Frontex's support. As of mid-2026, EU law will allow processing the return of asylum applicants rejected in the border asylum procedure through a 12-week return border procedure. During this time, they can take restrictive measures to prevent absconding and safeguard public policy, public security or national security. Such restrictions must respect the right to liberty in Article 6 of the Charter, respect substantial and procedural safeguards that protect people from arbitrary detention and respect the right to an effective remedy guaranteed by Article 47 of the Charter.

Addressing security and other serious concerns

157. EU law on asylum and migration allows restrictive measures against third-country nationals who pose a security or public order risk. The legal instruments adopted with the pact on migration and asylum put further emphasis on security checks. Under Regulation (EU) 2024/1356, which will apply as of mid-2026, every new irregular arrival must undergo a security check. Law enforcement authorities may take crime-prevention measures or request to initiate criminal proceedings against certain individuals, when appropriate. EU asylum law excludes certain non-deserving individuals from international protection. In justified individual cases, individuals posing a security or public order threat may lawfully be deprived of liberty, provided the authorities respect the substantial and procedural safeguards flowing from Article 6 of the Charter that protect people from arbitrary detention and respect the right to an effective judicial remedy guaranteed by Article 47 of the Charter.

4. Measures tied with the militarisation of borders

158. The Commission's Competence Centre on Foresight describes the trend of militarisation of borders.

159. Pursuant to Article 42 of the TEU, the EU's common defence policy is an integral part of its CFSP. Such policy is defined and implemented by the European Council and the Council of the European Union, acting unanimously. The EU institutions act mainly via Council decisions, and the jurisdiction of CJEU is limited (Article 24(1) of the TEU and Article 275(1) of the TFEU). Member States typically act outside the scope of EU law in defence matters and are therefore not bound by the Charter, which, in accordance with Article 51(1), binds the Member States only when implementing EU law. Still, Member States are bound by international law, including the ECHR and the 1951 Convention relating to the Status of Refugees, and by national constitutional law [107].

160. Border management activities have always been inherently linked to the protection of territorial sovereignty. Cooperation with military actors at borders is not new but has gained increasing importance. The 2025 European internal security strategy considers that 'strengthening the resilience and security of external borders is crucial to counter hybrid threats.' The white paper for European defence readiness 2030 of March 2025 alludes to an increasing interplay between border protection and defence [108].

161. The trend of militarising the borders, however, has brought along a spurious discourse considering people on the move as 'weapons' and 'enemies', a label which contradicts international humanitarian law [109]. Such people are oftentimes vulnerable and victims of rights violations or even crime.

162. Under the concept of European integrated border management in Article 3 of the EBCG Regulation, border guards should cooperate with authorities carrying out other tasks at the border, including the military [110]. Whereas military activities at the border largely fall outside of the scope of EU law, when the military carries out border management functions, their actions are governed by it, and the Charter applies.

163. This chapter deals with measures to counter instrumentalisation as a form of hybrid threat which may blur the lines between border management and defence policies, highlighting potential fundamental rights risks that such blurring may create. It first analyses information exchanges, operational assistance and dual-purpose research and innovation and then describes physical barriers at borders.

Sharing information under the European border surveillance system

164. Under EU law, the European border surveillance system (Eurosur) is the framework for the exchange of information to improve border guards' situational awareness and to increase reaction capability. It should provide border management authorities with better awareness of the situation at the border and contribute to 'ensuring the protection and saving the lives

of migrants' (EBCG Regulation, Article 18).

165. In accordance with Article 25 of the EBCG Regulation, Member States must maintain a national situational picture 'to provide all authorities having responsibility for external border control at national level with effective, accurate and timely information.' Such a situational picture contains an operational layer (Article 24 of the EBCG Regulation) with information on deployment plans, areas of operations and deployed assets. In many border areas this also includes military assets. Acknowledging the sensitivity of such information, Article 25(4) of the EBCG Regulation allows Member States to restrict information on military assets on a need-to-know basis.

166. EU law explicitly acknowledges the need to share information between border management and military authorities, at least insofar as these exercise border management functions. As Eurosur is regulated by EU law, military authorities having access to Eurosur data are bound by its rules, as any other national authority. Article 89(5) of the EBCG Regulation bans sharing data with third countries which 'could be used to identify persons or groups of persons … who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment, or any other violation of fundamental rights'.

167. Under EU law, sharing Eurosur information with military authorities who do not have border management functions is not envisaged but also not prohibited. In any event, this would not impact applicable safeguards. If, for example, information on migrants approaching the border is shared, military authorities are bound to respect the principle of *non-refoulement* and are barred from intercepting and informally returning them across the border.

Cooperating with defence actors at borders

168. Under Article 16 of the Schengen Borders Code, border control functions must be carried out by professional border guards. Member States must ensure that border guards are specialised and properly trained, also based on the Frontex common core curricula for border guards.

169. In line with national legislation, military resources and assets may support border management [111]. At land borders, soldiers have been assisting border guards for decades. For example, in 1990, the Austrian government requested the army to support the police with controls at the border with Hungary [112]. The trend of the militarisation of borders may lead to further entrusting military staff with supporting border control functions. These may include tasks that involve coercive measures.

170. Military personnel may support border management authorities by patrolling the border and detecting unauthorised border crossings. When they do so, they carry out their task under the instructions of the responsible national border management authority. Whereas military activities at the border largely fall outside of the scope of EU law, when the military carries out border management functions, their actions are governed by it, and the Charter applies. In case military personnel violate the law when exercising such support tasks – for example by using excessive force during apprehensions – they remain accountable for fundamental

rights violations.

171. EU border management standards require that staff have a high degree of specialisation and professionalism, and a diverse skill set. At the EU's external land border, FRA noted that in some Member States, low-ranking staff without full border guard training and military personnel engage in border patrol and apprehensions of new arrivals [113]. This poses fundamental rights risks.

Avoid circumventing safeguards for research and innovation

172. Research and innovation is another area where more synergies between border management and defence policies are likely to occur.

173. Under the concept of European integrated border management, Member States and Frontex should make the best use of modern technology. They should reduce dependencies on third countries as regards critical technologies. The Observatory on Critical Technologies should monitor and analyse these [114].

174. When describing the trend of the militarisation of borders, the Commission's Competence Centre on Foresight refers to 'an increase in the use of military technologies, hardware and personnel, and in some cases even the transfer of this responsibility to military forces.' From a defence policy angle, in October 2021, European leaders affirmed their commitment to strengthening Europe's defence technological and industrial base and fostering synergies between civil, defence and space industries [115].

175. This may lead to dual-purpose technologies being developed and deployed at land and sea borders. Under EU law, dual-use items are those which can be used for civil and military purposes [116].

176. The example of high-altitude pseudo-satellites (HAPS) illustrates this. HAPS are unmanned aircraft positioned for longer periods in the stratosphere. According to the European Space Agency, HAPS may support a diverse range of activities ranging from telecommunications to environmental monitoring. Defence-related research is exploring how to use them to improve their intelligence, surveillance and reconnaissance capabilities [117]. In 2022 and 2023, Frontex studied the use of HAPS for border management purposes, focusing on three use cases: earth observation, navigation and communication [118]. The Frontex study also included a preliminary assessment of the impact on fundamental rights, drafted with FRA's support, looking at the fundamental rights implication of the specific use cases envisaged [119].

177. In January 2024, the Commission presented options to support research and development involving technologies with dual-use potential. It notes that the integration of new technologies developed through defence funding into the civil sector is limited. Increasing the EU's resilience is a priority for both defence and internal security needs, including to deter border-related security threats. One of the options the Commission presents is a new dedicated instrument with a specific focus on research and development with dual-use

potential. It lists 'EU autonomous vehicles' in support of defence and border control, as an example of a flagship project for which the EU could be the lead customer [120].

178. Efforts to enhance the dual use of research and innovation may result in circumventing the fundamental rights safeguards that EU law provides for border management. Pursuant to Article 3(2) of the EBCG Regulation, research and innovation in border management is a horizontal component of European integrated border management and, as such, must contribute to managing external borders in full compliance with fundamental rights (EBCG Regulation, Article 1). When carried out by Member States, defence-related research is not subject to requirements flowing from the Charter nor to safeguards embedded in secondary EU law, such as those set out in the Artificial Intelligence Act (Regulation (EU) 2024/1689) for high-risk AI. Even where research is funded through the European Defence Fund, in accordance with Article 7 of Regulation (EU) 2021/697, the scrutiny focuses on ethical issues rather than fundamental rights as legal obligations.

Assessing the impact of physical barriers

179. Several Member States at the external EU border have erected fences or other physical barriers. By the end of 2022, the total length of such border fences amounted to some 2 000 km [121]. Although such fences have primarily been erected to counter irregular immigration, according to the white paper for European defence readiness 2030, physical barriers may also serve to counter military and hybrid threats. The white paper mentions explicitly the Eastern Border Shield, a defence system along the land border with Belarus and the Russian Federation [122].

180. Erecting fences, although in themselves not contrary to EU law, may interfere with various fundamental rights, as FRA described in its 2024 fundamental rights report (pages 95–96) when analysing fences in support of border management.

181. EU law requires that border management must respect the right to seek asylum [123]. Border fences without gates at reasonable distances and which are not also reachable by people with vulnerabilities limit the ability of people in need of international protection to seek safety. Fences without gates undermine the essence of the right to asylum that Article 18 of the Charter guarantees.

182. Features such as coil-shaped blades or wires giving high electric shocks put people's lives at risk or create a risk of disproportionate harm. In Poland, for example, MSF reported that many of the patients it treated at the Belarus border had injuries caused by a razor wire fence [124]. Spain removed the blades from its fences in Ceuta and Melilla in 2020 [125]. High-security features, which may be justified to protect critical infrastructure, are not proportionate when used on border fences that people may be forced to cross in the absence of alternatives to seek safety.

183. Fences may also pose obstacles to offering life-saving assistance, such as emergency medical assistance, along with food, water and other essential items, to people stranded in between borders.

184. In some cases, border fences may also have an impact on local communities' livelihoods, for example if the fence impedes access to a border lake or river used for economic activities (e.g. tourism and transport). Border fences could thus potentially affect the freedom to conduct a business, provided by Article 16 of the Charter.

185. Additionally, should fences be funded by the EU, this may also raise issues under Article 37 of the Charter (environmental protection), when constructed in or near a special area of conservation, as defined in Article 1(l) of Directive 92/43/EEC, such as national parks. Like other linear infrastructure such as roads or railways, border fences hinder or harm wildlife, according to scientists [126]. For example, a country road upgrade fragmented the habitat of the Iberian lynx, according to the CJEU [127]. Under Article 6(3) of the directive, infrastructure projects require a prior impact assessment. For projects needed for imperative reasons of overriding public interest, under Article 6(4), Member States must take the necessary compensatory measures.

186. The trend to militarise borders may lead to erecting more or stronger physical barriers at the EU's external land border. EU law applies when fences are constructed for border management. In such cases, it requires that they be designed in a way that respects the essence of the right to asylum, enables life-saving assistance to people stranded at borders, and does not disproportionately interfere with other fundamental rights, such as the right to physical integrity in Article 3 of the Charter.

Conclusion

187. The trend to militarise borders risks blurring the line between border management and defence policies.

Sharing information under Eurosur

188. Border management authorities may share certain operational information with the military. Such sharing of information is regulated by Eurosur, which is the framework for information exchange to improve border guards' situational awareness and to increase reaction capability. Eurosur is regulated by EU law and information exchanges under this framework must be implemented in full compliance with the Charter. Military authorities that would receive Eurosur information, for example, on the detection of a group of migrants at the border, are bound by the duty to respect fundamental rights, including the principle of *non-refoulement*. They must also respect the safeguard in Article 89(5) of the EBCG Regulation, which bans sharing data with third countries that 'could be used to identify persons or groups of persons … who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment, or any other violation of fundamental rights'.

Operational cooperation

189. The trend of the militarisation of borders may lead to further entrusting military staff with supporting border control functions. These may include tasks that involve the use of coercive measures. The exercise of these tasks falls under EU law on border management and any actor involved must respect the rights set out in the Charter. This requires that any person carrying out border management functions must be sufficiently trained on fundamental rights. They must receive clear and unambiguous instructions on the limits of the use of force, the prohibition of ill-treatment and the need to refer any apprehended third-country national to the responsible border management authority.

Dual-purpose research

190. Infrastructure and technology may serve a dual purpose – civilian and military. Border management, as part of Title V of the TFEU (area of freedom, security and justice), falls under the scope of EU law and the Charter applies. In defence matters, Member States typically act outside the scope of EU law and therefore they will mostly not be bound by EU fundamental rights law and the Charter. Dual-purpose technologies may be designed by defence actors and subsequently deployed at borders. Efforts to enhance the dual use of research and innovation risk circumventing the fundamental rights safeguards that EU law provides in the field of border management and discourage the carrying out of fundamental rights impact assessments.

Physical barriers

191. The trend to militarise borders may lead to erecting more or stronger physical barriers at the EU's external land border. EU law applies when fences are constructed for border management. In such cases, EU law requires that they be designed in a way that respects the essence of the right to asylum, enables life-saving assistance to people stranded at borders and does not disproportionately interfere with other fundamental rights, such as the right to physical integrity in Article 3 of the Charter. When Member States erect fences to defend their territory, they normally act outside the scope of EU law and the fundamental rights safeguards in the Charter do not apply, although obligations that Member States have under international human rights and refugee law remain unaffected.

Annex: Developments at the EU's external border related to instrumentalisation

1. This annex presents four situations at the EU's external borders, which have been viewed as the instrumentalisation of migrants and refugees, and the key legal and policy actions by the affected Member States. The annex does not cover responses to arrivals which were not triggered by instrumentalisation.

The Greece–Türkiye border

2. In February 2020, Türkiye announced it would no longer prevent migrants from crossing into the EU and, according to testimonies, took measures to facilitate the entry of persons into Greece [128]. As a result, thousands of people headed towards the Greek–Turkish land border in Kastanies in the Evros River region [129]. Greek border guards responded with summary returns and the use of force [130]. Some allegations – though denied by the authorities [131] – refer to the use of live ammunition, which reportedly resulted in the death of two persons and several injuries [132].
3. In March 2020, Greece suspended the submission of asylum applications for one month for those entering Greece in an irregular manner. The measures adopted provided for the return of newly arrived persons to their country of origin or transit without registering their asylum claim [133]. The one-month suspension was not extended and asylum applications of those who entered Greece were subsequently registered. Many of those who entered were charged for irregular entry. As an illustration, the judicial authorities in Orestiada sentenced 103 persons to imprisonment [134]. Criminal procedures concerned men, women and unaccompanied children, and led to the separation of families [135].
4. Shortly after the events, the number of arrivals decreased, also due to the COVID-19 pandemic.

Ceuta and Melilla in Spain

5. In 2015, Spain enacted legislation allowing for the immediate return of migrants without individual assessment if detected trying to cross the border into its North African exclaves, Ceuta and Melilla [136]. This provision, referred to as hot returns (*devoluciones en caliente*), remains in force. FRA commented on its application in several fundamental rights reports, describing the practice of apprehension of migrants by Spanish authorities and the handover to the Moroccan authorities through the gates in the border fence without assessing whether there are bars to removal flowing from the principle of *non-refoulement* [137].
6. In May 2021, some 8 000 migrants attempted to enter the Spanish town of Ceuta from

Morocco. Morocco's actions were seen as an attempt to pressure Spain after a diplomatic dispute over treating a Western Saharan rebel leader in a Spanish hospital [138]. In response, Spain applied its hot returns provision in the amended Aliens Act [139]. It was debated – mainly among academics – whether this incident could be considered as the instrumentalisation of migrants and refugees [140].

The EU land border with Belarus

7. In 2021, Latvia, Lithuania and Poland saw a sharp increase in unauthorised border crossings by Middle Eastern and African nationals, orchestrated by the Belarusian regime that issued visas and facilitated their travel to the EU external border. As of 16 November 2021, Lithuania recorded 4 222 such unauthorised crossings from Belarus, Poland recorded 3 062 and Latvia recorded 414. These may include multiple attempts to cross by the same individuals. The three Member States registered 9 985 asylum applications and prevented 42 741 attempts to cross the EU's external border by circumventing border controls as of 21 November 2021 [141].
8. All three Member States declared states of emergency in 2021 [142], refusing to register asylum requests of people intercepted at the green border, except for narrow humanitarian exceptions. Access to certain border areas became restricted [143]. FRA noted in its 2024 fundamental rights report that safeguards to uphold the right to asylum – such as humanitarian or *refoulement*-related exceptions – were weak [144].
9. Latvia's measures, repeatedly prolonged, now run to 31 December 2025 [145]. Lithuania continues to operate under a July 2021 'state-level emergency' [146]. Poland reverted to ordinary law, enacting legal changes that allow the suspension of the right to asylum due to the instrumentalisation of migrants at the state border for up to 60 days [147], but also still applies a 2020 COVID-19 regulation [148] and 2021 rules allowing summary returns to Belarus of people apprehended after their irregular crossing [149].
10. The CJEU found Lithuania's legislation [150] banning asylum applications by third-country nationals who had crossed the border in an unauthorised manner and their automatic detention to be in breach of EU law [151]. While Lithuania changed the Aliens Act [152], a clause that facilitates the 're-direction' to the border in the law on the state border remains in force, though there are exceptions for humanitarian reasons [153]. In sum, Latvian [154], Lithuanian [155] and Polish [156] laws allow border guards to escort intercepted migrants having crossed the border irregularly back to Belarus, although legislation envisages some limited checks for *non-refoulement* risks. Courts in Poland have overturned some of these removals [157]. Three cases against Latvia, Lithuania and Poland concerning alleged unlawful summary returns are pending before the Grand Chamber of the ECtHR, alleging breaches of Articles 2, 3 and 13 of the ECHR and Article 4 of Protocol No 4 to the ECHR [158]. The three cases are among over 30 such cases pending before the ECtHR against Latvia, Lithuania and Poland [159].
11. Migrants and asylum applicants intercepted at the Belarus border were reportedly exposed

to excessive use of force, ill-treatment and abandonment in the forest and swamps without food and protection, according to UN, Council of Europe and civil-society sources [160]. At the same time, procedures exist requiring border guards to assess individual needs, offer medical aid and observe safeguards like *non-refoulement* and child protection.

12. Latvia [161] maintained, whereas Lithuania [162] and Poland [163] introduced, 'no-go' border strips that prevent without prior permission non-governmental organisations, journalists and humanitarian workers from reaching people stranded in border forests. Only for a limited number of people, such as national ombudspersons, does the law not envisage any restrictions to monitor the border area.
13. All three Member States restricted traffic at the border crossing points with Belarus [164].
14. Poland's July 2024 'Homeland Defence Act' broadens soldiers' and police officers' rights to use firearms at the border [165].

Finland's eastern land border

15. In late 2023, Finland saw a sudden rise in arrivals from Somalia, Syria and Yemen via Russia, with suspicions that Russian authorities were facilitating access to the Finnish border. While small compared to Poland and Lithuania, the number of irregular crossings rose from single digits to hundreds per week [166].
16. In response, Finland closed most and subsequently all land border crossing points with Russia by the end of 2023 [167]. After this action, the number of asylum applicants at the Finnish land border dropped significantly. Incidents of ill-treatment have not been reported from the Finnish border.
17. Finland enacted the Act on Temporary Measures to Combat Instrumentalised Migration, commonly known as the Border Security Act, which came into force in July 2024, for a one-year period [168]. It empowers the government to restrict the reception of asylum applications, except for certain vulnerable individuals, at specific border areas if there is a justified suspicion that a foreign state is attempting to influence Finland in a way that poses a serious threat to national security [169]. So far, the Border Security Act, which was initially valid for one year, has not been activated. On 4 June 2025, the Parliament approved the extension of the validity of the Border Security Act until the end of 2026 [170].

Endnotes

[1] See, for example, judgment of the Fourth Section of the ECtHR of 11 December 2018, M.A. and Others v Lithuania, No 59793/17, paragraph 115; judgment of the First Section of the ECtHR of 23 July 2020, M.K. and Others v Poland, Nos 40503/17, 42902/17 and 43643/17, paragraphs 183–186; judgment of the First Section of the ECtHR of 8 July 2021, D.A. and Others v Poland, No 51246/17, paragraphs 69–70; judgment of the First Section of the ECtHR of 30 June 2022, A.B. and Others v Poland, No 42907/17, paragraphs 38–43; and judgment of the First Section of the ECtHR of 30 June 2022, A.I. and Others v Poland, No 39028/17, paragraphs 40–46.

[2] Relinquishment in favour of the Grand Chamber of the ECtHR of 25 June 2024, R.A. and Others v Poland, No 42120/21; relinquishment in favour of the Grand Chamber of the ECtHR of 2 July 2024, H.M.M. and Others v Latvia, No 42165/21; and relinquishment in favour of the Grand Chamber of the ECtHR of 16 April 2024, C.O.C.G. and Others v Lithuania, No 17764/22.

[3] See, for example, Greenhill, K. M., Weapons of Mass Migration: Forced displacement, coercion, and foreign policy, Cornell University Press, 2010; and Greenhill, K. M., 'Migration as a weapon in theory and in practice', Military Review, November–December 2016; and The European Centre of Excellence for Countering Hybrid Threats, Fakhry, A., Rácz, A. and Parkes, R., 'Migration instrumentalization: A taxonomy for an efficient response', Hybrid CoE Working Papers, No 14, March 2022.

[4] See, for example, Eighth progress report on the implementation of the 2016 joint framework on countering hybrid threats and the 2018 joint communication on increasing resilience and bolstering capabilities to address hybrid threats, SWD(2024) 233 final of 10 October 2024, p. 10; and Bachmann, S. D. and Paphiti, A., 'Mass migration as a hybrid threat? A legal perspective', Polish Political Science Yearbook, Vol. 50, No 1, 2021, pp. 119–145.

[5] For an EU description of hybrid threats, see European Commission, 'Hybrid threats', European Commission – Defence Industry and Space website.

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[13] See judgment of the Court of Justice of 17 December 2020, Commission v Hungary, C-808/18, ECLI:EU:C:2020:1029; judgment of the Court of Justice of 22 June 2023, Commission v Hungary, C-823/21, ECLI:EU:C:2020:1029; and judgment of the Court of Justice of 13 June 2024, Commission v Hungary, C-123/22, ECLI:EU:C:2024:493 (CJEU ordering record amount of lump sum and periodic penalty payment due to non-compliance with its ruling in case C-808/18).

[14] See judgment of the Court of Justice of 17 January 2013, Mohamad Zakaria, Case C-23/12, ECLI:EU:C:2013:24, paragraph 41.

[15] See Regulation (EU) 2024/1348 (Asylum Procedure Regulation), Articles 4(1) and 4(2); Regulation (EU) 2024/1347 (Qualification Regulation), Article 7(2); Regulation (EU) 2024/1356, Article 3; and Regulation (EU) 2024/1351, Article 4(1)(d).

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[39] See Council of the European Union, Letter to the Chair of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), 24 June 2025, 10739/25, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1806 as regards the revision of the suspension mechanism, final compromise text, Recital 5 and Article 8a.

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[70] Judgment of the Former First Section of the ECtHR of 18 June 2002, Öneryildiz v Turkey, No 48939/99, paragraphs 62–63.

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[79] See Schengen Borders Code, Article 4; and Directive 2008/115/EC (Return Directive), Recital 6.

[80] Judgment of the Third Section of the ECtHR of 24 March 2020, Asady and Others v Slovakia, No 24917/15, paragraph 60; judgment of the Grand Chamber of the ECtHR of 13 February 2020, N.D. and N.T. v Spain, Nos 8675/15 and 8697/15, paragraphs 185 and 187; judgment of the First Section of the ECtHR of 23 July 2020, M.K. and Others v Poland, Nos 40503/17, 42902/17 and 43643/17, paragraphs 200 and 204; and judgment of the Grand Chamber of the ECtHR of 23 February 2012, Hirsi Jamaa and Others v Italy, No 27765/09, paragraph 180.

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[82] Judgment of the First Section of the ECtHR of 8 July 2021, Shahzad v Hungary, No 12625/17, paragraphs 42–52.

[83] Judgment of the Fifth Section of the ECtHR of 25 June 2020, Moustahi v France, No 9347/14, paragraph 136; and judgment of the Third Section of the ECtHR of 24 March 2020, Asady and Others v Slovakia, No 24917/15, paragraphs 62–71.

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[87] Judgment of the Court of Justice of 30 June 2022, M.A. v Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505, paragraphs 63–75.

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[90] See Commission, 'Schengen evaluation and monitoring mechanism' European Commission – Migration and Home Affairs website, 21 November 2024, in particular: 'Schengen evaluation of Lithuania: executive summary and recommendations', May–June 2023, priority No 2 and recommendations 3, 4, 15 and 16; 'Schengen evaluation of Latvia: executive summary and recommendations', October–November 2023, priority No 1 and recommendations 6, 10 and 63; 'Schengen evaluation of Poland: executive summary and recommendations', March–April 2024, priority areas and recommendations 10 and 13–15. These reports can be accessed through the interactive map under "Schengen Country reports".

[91] See, in this context, judgment of the Court of Justice of 17 January 2013, Mohamad Zakaria, Case C-23/12,ECLI:EU:C:2013:24, paragraph 40.

[92] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17, which states that ' … none of the rights laid down in this Charter may be used to harm the dignity of another person … It must therefore be respected, even where a right is restricted.'

[93] Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L, 2024/1717, 20.6.2024, ELI: http://data.europa.eu/eli/reg/2024/1717/oj, Article 5(4)(a) to (c) and Recital 14.

[94] Judgment of the Court of Justice of 14 June 2012, ANAFE, C-606/10, ECLI:EU:C:2012:348, paragraph 40.

[95] In this context, the ECtHR case Đorović and Others v Serbia (No 8904/25) on which the ECtHR issued an interim measure on 29 April 2025, will analyse the use of a sonic weapon for crowd control.

[96] The Asylum Procedure Regulation will apply as of mid-2026. In the interim, similar rules in Directive 2013/32/EU apply.

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[98] See Commission, 'Schengen Evaluation and Monitoring Mechanism', European Commission – Migration and Home Affairs website, 21 November 2024, in particular: 'Schengen evaluation of Lithuania: executive summary and recommendations', May–June 2023, recommendation 15; 'Schengen evaluation of Latvia: executive summary and recommendations', October–November 2023, recommendation 10; 'Schengen evaluation of Poland: executive summary and recommendations', March–April 2024, recommendation 13. These reports can be accessed through the interactive map under "Schengen Country reports".

[99] UNHCR, 'Legal considerations on asylum and non-refoulement in the context of "instrumentalization"', Refworld website, 26 September 2024.

[100] Proposal for a regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC, COM(2025) 101 final of 11 March 2025.

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