

# 2

## Border control and visa policy



*At the EU level, there was an increased trend in 2012 towards the use of databases and information technology tools for border management and visa processing purposes. Negotiations on the Eurosur Regulation advanced substantially and Visa Information System (VIS) continues to be rolled out. The Frontex Fundamental Rights Officer and the Frontex Consultative Forum both began work in 2012. Council Decision 2010/252/EU, containing guidance for Frontex operations at sea that are relevant from a fundamental rights perspective, was annulled but will remain in force until it is replaced. During the first half of 2012, the land border between Greece and Turkey continued to be one of the main entry points for persons crossing the external EU land border in an irregular manner. Visa applicants increasingly made use of the right to appeal a negative Schengen visa decision.*

### 2.1. Border control

The activities of Frontex – the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – continued to be scrutinised from a fundamental rights perspective in 2012, as was the case with the European Ombudsman’s own-initiative inquiry into how Frontex implements its fundamental rights obligations.<sup>1</sup> At the end of the reporting period the inquiry had not yet been closed.

Frontex’s Consultative Forum held its inaugural meeting on 16 October 2012. Through this forum, external partners will assist Frontex and its Management Board with fundamental rights expertise. The forum is composed of 15 organisations:

- four international organisations: the United Nations High Commissioner for Refugees (UNHCR); the International Organisation for Migration; the Council of Europe; and the Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR);

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

- Negotiations on the Eurosur Regulation, introducing a European surveillance system, advance quickly and 18 Member States are connected to the network by year-end.
- The Court of Justice of the European Union (CJEU) annuls Council Decision 2010/252/EU, containing guidance for Frontex operations at sea, because the decision does not respect the ordinary legislative procedure under which the European Parliament acts as co-legislator. The guidelines will remain in force until they are replaced.
- The Frontex Fundamental Rights Officer and the Frontex Consultative Forum start their work in the second half of 2012.
- Irregular border crossings by sea in the Central Mediterranean drop to some 15,000 persons in 2012 from almost 65,000 in 2011 while in the eastern Aegean they increase substantially.
- Visa applicants increasingly make use of the right to appeal a negative Schengen visa decision.
- The European Commission highlights the role of cooperation, not just in preventing irregular migration but also in supporting the fair and equal treatment of visa applicants.
- The VIS is launched in the Near East and in the Gulf regions.

<sup>1</sup> European Ombudsman (2012).

- two EU Agencies: the European Asylum Support Office (EASO) and the European Union Agency for Fundamental Rights (FRA); and
- nine civil society organisations: Amnesty International European Institutions Office; Caritas Europa; Churches' Commission for Migrants in Europe; European Council for Refugees and Exiles (ECRE); International Catholic Migration Commission; International Commission of Jurists; Jesuit Refugee Service; Platform for International Cooperation on Undocumented Migrants and the Red Cross EU Office.

The FRA representative and Jesuit Refugee Service representative were elected as co-chairs of the Consultative Forum.

In addition, the Frontex Fundamental Rights Officer began her work on 15 December 2012, as envisaged in Article 26 of the revised regulation (Regulation 1168/2011). Her tasks include monitoring and reporting on a regular basis to the Consultative Forum, as well as to the Frontex Management Board and the Executive Director of the Agency.

The increased attention to fundamental rights is mirrored in operational plans governing operations coordinated by Frontex. In 2010, operational plans started to contain some language regarding fundamental rights. It was only in 2012, however, that more concrete references to fundamental rights were made. For example, host Member States are obliged to provide the appropriate disciplinary, or other measures, when fundamental rights or international protection obligations are violated. The operational plans contain a clear duty to report, via the appropriate chain of command, all observations of fundamental rights violations.

In September 2012, the CJEU annulled Council Decision 2010/252/EU, which contained guidance for Frontex operations at sea. The CJEU nevertheless stated that the guidelines should remain in force until they are replaced.<sup>2</sup>

The CJEU pointed out that the adopted rules contained essential elements of external maritime border surveillance, thus entailing political choices that must be reached through the ordinary legislative procedure with the European Parliament as co-legislator. It also noted that the new measures contained in the contested decision were likely to affect individuals' personal freedoms and fundamental rights and therefore again required the ordinary procedure.

The surveillance of maritime borders was also the subject of a landmark European Court of Human Rights (ECtHR)

ruling in February 2012. In *Hirsi Jamaa and Others v. Italy*<sup>3</sup> the ECtHR found that Italy was violating Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment, by handing over migrants intercepted at sea to the Libyan authorities. The applicants in *Hirsi* were 11 Somali and 13 Eritrean nationals, part of a group of about 200 migrants, including asylum seekers and others, which the Italian authorities intercepted on the high seas in 2009.

Italy summarily returned the migrants to Libya, without giving them an opportunity to apply for asylum. The ECtHR contended that whenever state agents exercise control and authority over an individual, that state is obliged to safeguard the individual's rights and freedoms, protected under the ECHR, even if the state is operating outside its own territory.<sup>4</sup> In this case, the ECtHR found that the Italian authorities exercised full control over the persons who were on board the Italian ships.<sup>5</sup> It also clarified that a state "cannot circumvent its 'jurisdiction' under the ECHR by describing the events at issue as rescue operations at high seas".<sup>6</sup>

During the first half of 2012, the land border between Greece and Turkey continued to be one of the main entry points for persons crossing the external EU land border in an irregular manner. Between January and September 2012, authorities detected approximately 59,000 irregular border crossings at the external EU border. Three out of four (some 44,000 persons) were at the land border.<sup>7</sup>

In the late summer of 2012, Greece deployed an additional 1,800 police officers to that border as part of operation *Xenios Zeus*. Subsequently, the number of land crossings dropped to fewer than 100 in the last week of August from some 2,100 during the first week of the month, according to Frontex.

Greece completed the construction of a border fence along 12 kilometres of land border with Turkey in December 2012, with a view to stopping irregular border crossings despite concerns about its appropriateness.<sup>8</sup> National funds covered the estimated €3 million in costs.<sup>9</sup> As the following pictures illustrate, the fence can be compared to the two Spain constructed in Ceuta

<sup>2</sup> CJEU, C-355/10 [2012], *European Parliament v. Council*, 5 September 2012, paras. 63-85.

<sup>3</sup> ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

<sup>4</sup> *Ibid.*, paras. 74, 75, 180 and 181.

<sup>5</sup> *Ibid.*, para. 81.

<sup>6</sup> *Ibid.*, para. 79.

<sup>7</sup> Frontex (2012a), *FRAN Quarterly*, Issue 3, July-September 2012, p. 56.

<sup>8</sup> Pro Asyl (2012); UN Special Rapporteur on the Rights of Migrants (2012); Council of Europe, Parliamentary Assembly (PACE), Committee on Migration, Refugees and Displaced Persons (2013), para. 21.

<sup>9</sup> Council of Europe, PACE, Committee on Migration, Refugees and Displaced Persons (2013), para. 21.





Fence in Evros (Greece)  
Source: Hellenic Police



Fence in Ceuta (Spain)  
Source: FRA

and Melilla. They are a few metres high and equipped with barbed wire.

In Greece, irregular crossings at the land border declined but arrivals by sea increased. Deadly incidents continued to take place in the Eastern Aegean Sea. On 6 September 2012, 61 persons including children died when a boat with Syrians and other nationals capsized near Izmir on the Turkish coast.<sup>10</sup> In the central Mediterranean, a boat with 130 passengers coming from Sfax in Tunisia sank about 12 nautical miles away from Lampedusa on 7 September 2012. The Italian Coast Guard, the Italian tax and financial police (*Guardia di Finanza*) and North Atlantic Treaty Organization (NATO) vessels responded, rescuing 56 migrants, but at least one died and several dozen remained missing.<sup>11</sup> Figure 2.1 shows trends concerning arrivals by sea to southern Europe over the past five years in the four Member States affected, namely **Greece, Italy, Malta and Spain**.

To improve the sharing of operational and analytical information on the EU's external maritime and land border among EU Member States, the EU is creating a European Border Surveillance System (Eurosur). It will serve as a platform to exchange border management information among Member States and with Frontex. Eurosur will not extend to Ireland and the United Kingdom, while Denmark must decide whether to apply the Eurosur Regulation within six months of its adoption.<sup>12</sup> Over time, and in conjunction with other available information, Eurosur will enhance knowledge of smuggling patterns and enable a more targeted deployment of assets. In 2012, negotiations on its legal basis, as tabled by the European Commission in late 2011,<sup>13</sup> progressed considerably. The creation of Eurosur runs in parallel with the negotiation of its legal basis. By the end of 2012, 18 EU Member States had connected to Eurosur by signing a Memorandum of Understanding with Frontex.

<sup>10</sup> Euronews (2012).

<sup>11</sup> Amnesty International (2012); La Repubblica (2012); BBC News (2012); Council of Europe, PACE (2012).

<sup>12</sup> See: European Commission (2011a), preambles 10–11.

<sup>13</sup> European Commission (2012a).

Eurosur potentially raises two main fundamental rights concerns: that information on migrants shared with third countries might expose them to the risk of, for example, *refoulement* or inhuman treatment, and that personal data might be used inappropriately.

#### FRA ACTIVITY

### Researching fundamental rights conditions at Europe's southern sea borders

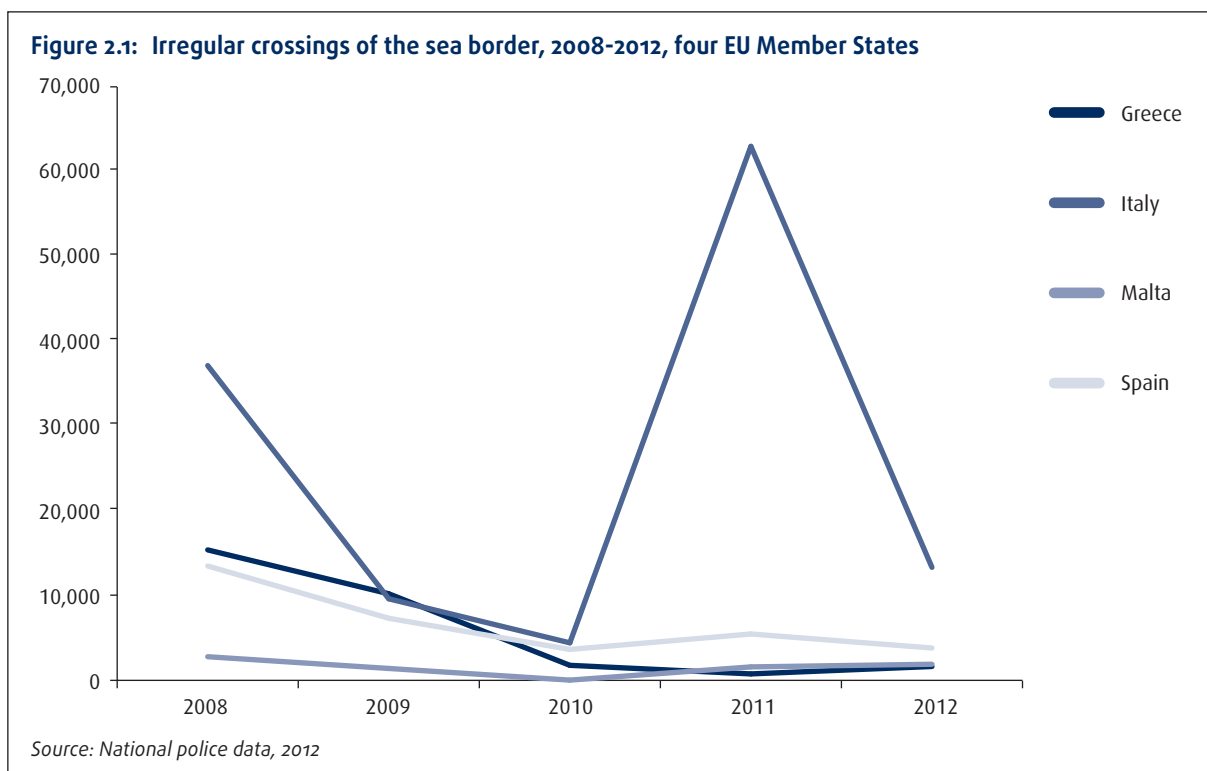
The first component of a FRA project on the treatment of third-country nationals at the EU's external borders examined fundamental rights challenges in the context of maritime border surveillance and immediately upon the disembarkation of intercepted or rescued migrants and refugees.

To that end, interviews were conducted in Cyprus, Greece, Italy, Malta and Spain with authorities, migrants, fishermen, international organisations, NGOs and other persons dealing with migrants arriving at sea. Interviews were also conducted in three countries with boat departures: Morocco, Tunisia and Turkey.

In addition, the FRA visited Frontex-coordinated sea operations in Greece and Spain, where FRA observed maritime patrols and the processing of rescued persons upon disembarkation. The research results, which will be published in March 2013, show that Council Decision 2010/252/EU, containing guidance for Frontex operations at sea, improved the fundamental rights adherence of Frontex-coordinated operations at sea.

*For more information, see: FRA (2013), Fundamental rights at Europe's southern sea borders, Luxembourg, Publications Office*

While the proposal for the Eurosur Regulation foresees the prohibition of the exchange of information with third countries when such information could be used to expose third-country nationals to a possible risk of inhuman or degrading treatment or punishment



(Article 18 (2)) the implementation of this safeguard, in practice, may be challenging. Although, Eurosur is in principle not intended to exchange personal data, practical steps need to be taken to avoid personal data being stored and shared unintentionally. Finally, it also remains to be seen whether the life-saving potential of the system will be fully utilised.

The EU inaugurated the new EU agency for managing large-scale EU information systems in March 2012 and in December it became operational.<sup>14</sup> Located in Tallinn, Estonia, the agency will manage large-scale IT systems in the area of freedom, security and justice, including the Schengen Information System (SIS), its successor SIS II, the VIS and Eurodac. The agency's core task is to ensure continuous, uninterrupted service of these IT systems.<sup>15</sup>

Discussions continued in 2012 in the Council of the European Union and at the European Parliament, on developing new EU funding instruments for home affairs.<sup>16</sup> The proposed Internal Security Fund for 2014–2020 (€4.65 billion) will include two instruments: one on external borders and visas (€1.13 billion) and another on police cooperation (€3.52 billion). This represents an almost 40 % overall budget increase compared to the previous period of 2007–2013.

<sup>14</sup> European Commission (2012b); European Commission (2012c).

<sup>15</sup> Regulation (EU) No. 1077/2011.

<sup>16</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2011).

The Committee of the Regions and the Social Committee issued opinions proposing the inclusion of more fundamental rights language in the regulation establishing the instrument on borders and visa.<sup>17</sup> They suggested including references to rescue obligations, the right to access asylum at borders and victim identification should be included, and it highlighted the need to evaluate whether policies and actions funded by the EU are compatible with fundamental rights.

Outside the scope of the Internal Security Fund, a separate amount of €822 million has been set aside for the management of SIS II, VIS and Eurodac. The instrument on borders and visa should support a common visa policy to facilitate legitimate travel, ensure the equal treatment of third-country nationals and tackle irregular migration (Article 3 (2) (a)). It should also support a high level of protection of external borders and contribute to the smooth crossing of these in conformity with the Schengen *acquis* (Article 3 (2) (a)).

### 2.1.1. Schengen evaluations

Efforts to revise the current Schengen evaluation system – under which a Member State's ability to join the Schengen area or, for Schengen States, its implementation of Schengen rules is assessed – continued without agreement in 2012. The system increasingly factors in fundamental rights considerations.

<sup>17</sup> European Union, Committee of the Regions (2012).

The European Parliament and the Council of the European Union could not reach an agreement on the revision of the evaluation mechanism in 2012. This revision has been pending since September 2011. This process of revision followed intense discussions on Schengen governance kick-started against the backdrop of the 2011 Arab Spring and the resulting migration flows, the severe challenges faced by Greece's asylum protection systems and issues concerning Schengen governance in general.<sup>18</sup> The Commission subsequently amended its proposal on the Schengen Evaluation Mechanism<sup>19</sup> and, as part of the same legislative package, introduced the possibility of temporarily reintroducing border controls at internal borders as a last resort in exceptional circumstances.<sup>20</sup>

The key roadblock in discussions was a lack of consensus on the legal basis foreseen for the evaluation mechanism and consequently the different future roles for the European Parliament, the European Commission and the Council of the European Union. The Cyprus Presidency proposed a revised compromise text, but the Parliament had not accepted it by year-end.

The European Parliament has suspended its cooperation pending agreement on the new evaluation mechanism. The dispute has paralysed new legislation on cyber-crime, air passenger name records and other issues, and hindered the final vote on a file introducing a basis for joint border checks on road traffic and other technical amendments to the Schengen Borders Code.<sup>21</sup>

A team of border police officers from Member States currently carry out evaluations using a peer-to-peer review system managed by the Schengen Evaluation Working Party within the Council of the European Union.<sup>22</sup> According to the current mandate, all aspects of the Schengen *acquis* may be covered. Specific attention is placed on: external borders; police cooperation; data protection; visa regulations; the Schengen Information System (SIS), a shared database containing entries on wanted and missing persons; lost and stolen property and entry bans; and Sirene, which allows Schengen states to exchange additional information on alerts.

Teams of EU Member State experts, the General Secretariat of the Council of the European Union and the European Commission carried out 21 evaluations in 17 Member States regarding sea and air borders, police cooperation, data protection, SIS and visas.<sup>23</sup> The Council

followed up on the shortcomings detected in Greece during evaluations at the external land and sea borders in 2010 and 2011, while the Commission and EASO drew up an action plan to deal with shortcomings in the field of asylum and migration.

The Council also continued to closely follow a number of Romanian and Bulgarian measures, including those on fighting smuggling and trafficking in human beings, which are expected to facilitate the inclusion of these two Member States in the Schengen area.<sup>24</sup>

Schengen evaluations include fundamental rights aspects, which also affect other practical issues. According to information provided to FRA by the Council General Secretariat, some issues covered in 2012 that implicitly relate to fundamental rights include:

- verification of adequate infrastructure allowing for sufficient privacy of persons undergoing further checks;
- availability of information on further checks (Article 7 of the Schengen Borders Code) in the necessary languages;
- inter-agency cooperation among national border agencies, asylum and migration offices and human rights agencies;
- conditions in holding facilities;
- risk analysis that does not resort to ethnic profiling;
- dignity and clarity in communication with passengers;
- knowledge of procedures related to victims of trafficking, asylum seekers and children, as well as in relation to body searches, data handling and visas;
- cooperation with countries of origin in case of refused entry;
- fundamental rights training and compliance with the Frontex Common Core Curriculum.

Evaluations increasingly took fundamental rights concerns into account in 2012 following the development of an indicators list, with FRA expertise, as a supplementary tool for evaluators. The tool helps evaluators to consider fundamental rights consistently and during various tasks of border management. Evaluations foreseen for 2013 are expected to consider these issues.

18 European Commission (2010).

19 European Commission (2011a).

20 European Commission (2006).

21 European Commission (2011b); EU, European Economic and Social Committee (2012).

22 EU (1998).

23 European Commission (2012d); European Commission (2012e).

24 Council of the European Union (2012a).



## FRA ACTIVITY

### Framing fundamental rights in Schengen evaluations

FRA helped develop a list of fundamental rights indicators and good practices to raise awareness among evaluators and facilitate a more systematic approach to fundamental rights in the application of the Schengen *acquis*.

The indicators and good practices, put together in collaboration with the Frontex Board of Experts for the Training of Schengen evaluators, the General Secretariat of the Council of the European Union and the European Commission, provide evaluators with fundamental rights guidance to use during their work, paying particular attention to the following tasks:

- first- and second-line border checks at border crossing points;
- border surveillance patrols;
- apprehensions and placement in waiting areas and holding facilities;
- receiving asylum applications;
- readmission, removal and return measures.

In the context of controls and procedures, the indicators refer to issues related to human dignity, the use of force, *non-refoulement*, the identification of vulnerable persons and refusal and handling of personal data. Other practices and indicators refer to staff and training, cooperation with protection services, cooperation with third countries, risk analysis, infrastructure, the needs of passengers stranded in transit zones, the conditions in holding facilities, and expulsion and re-admission.

The list also outlines specific issues to be observed during border surveillance, for example the prohibition on push-back operations, the existence of systems catering for the humanitarian needs of persons apprehended after the border crossing and the interviewing procedure.

*For more information, see: FRA project on border control and fundamental rights (2012) available at: <http://fra.europa.eu/en/project/2011/treatment-third-country-nationals-eus-external-borders-surveying-border-checks-selected>*

#### 2.1.2. Persons held in airport transit zones – access to food, water and a place to rest

FRA research carried out in 2012, at selected airports, highlighted the plight of passengers stranded in airport transit zones. Every year, a number of persons remain confined for days and sometimes weeks in the international transit zones of airports in EU Member States.

As an illustration, a citizen of the Democratic Republic of Congo refused entry at Tallinn airport in **Estonia** stayed in the airport guest room for two weeks in April 2012, as Russia refused to take the person back.<sup>25</sup>

Passengers may become stranded at airports when they do not fulfil entry requirements, for example, when border guards identify problems with travel documents, visas or proof of means of subsistence, or their return is delayed because there is not an immediate return flight. Persons seeking asylum at airports may also have to remain in a transit zone.

Passengers must have regular access to food, water and a place to rest during their stay in transit, especially if they lack sufficient means to acquire them, to ensure that their fundamental rights to life and human dignity are respected. Despite the critical significance of the rights at stake, information on passengers held in transit zones is limited.<sup>26</sup>

Carriers, airport companies and authorities at many airports set up specific mechanisms to provide food and water. FRA research on the treatment of third-country nationals found that in practice these mechanisms are not always sufficient.

In some cases, border guards may not know the passenger's arrival airline as the passengers either conceal it or do not know how they arrived. Airline reimbursements to airport companies or authorities may take a long time, especially when the carriers are not based in the destination country. In other cases, responsibility for the passengers' stay while in transit falls outside the airline's responsibility and lies with different authorities, such as when passengers are eventually admitted or pending transfer to reception, detention or protection facilities.

Cooperation between airport companies and immigration authorities is another factor determining whether facilities to rest and access food and water are effectively provided or are reserved for paying passengers only. As a result, passengers held in transit may face difficulties in getting food and water unless they have sufficient means to sustain themselves while in transit.

#### Passengers denied entry

For persons who are denied entry, the carrier responsible for transport must cover the costs of the departure

<sup>25</sup> Estonia, *Postimees* (2012).

<sup>26</sup> For information on temporary holding facilities at airports, see the reports on the visits carried out by the Council of Europe, European Committee for the Prevention of Torture or Degrading Treatment or Punishment (CPT) as well as the 7<sup>th</sup> (1996) and 19<sup>th</sup> (2008–2009) General Reports on the CPT's Activities, see: <http://www.cpt.coe.int/en/default.htm>.

and, if this is not possible within a reasonable time, the carrier must also cover any costs related to the passenger's stay, including the provision of food and water, according to various international aviation agreements.<sup>27</sup> This means that airports rather than states usually set up the mechanisms to provide for stranded passengers, and that varying airlines may provide different supplies.

Many airport operating companies set up specific agreements obliging carriers to cover the costs for passengers who are refused entry, either directly or by reimbursing the airport company later on. Such agreements, however, only work if the immigration authorities are able to identify the airline that transported the passenger denied entry. When this is not the case, the authorities are ultimately responsible for ensuring basic subsistence.

At airports in **Austria**, for example, if the agreements between airport companies and carriers do not function, the police try to provide food and water through their canteen or through *ad hoc* purchases via the Red Cross or the municipality and then claim the costs back from the carrier.<sup>28</sup> In addition, the social services of Caritas provide basic services, such as food, healthcare and clothes to persons in need, as well as help in contacting embassies, airlines and family members.<sup>29</sup>

At Frankfurt airport in **Germany**, border guards can purchase food in the canteen for passengers without resources, either upon passenger request or, after two to three hours, upon offer by the police, which is then later charged to the airline.<sup>30</sup> In **Portugal**, the Aliens Service (*Serviço de Estrangeiros e Fronteiras*) acquires supplies and distributes them to passengers.

At airports in at least eight Member States (**Bulgaria, Cyprus, Denmark, France, Italy,<sup>31</sup> Lithuania, Poland and Romania**) alternative systems do not appear to exist if carriers fail to comply with their obligation to take care of passengers' basic needs. Destitute passengers depend on *ad hoc* solutions or do not receive food and water at all while in transit, unless they are detained.

At airports in **Bulgaria**, for example, detained persons receive food based on general daily nutrition needs

determined for a 24-hour arrest regime,<sup>32</sup> however NGOs consider this insufficient.<sup>33</sup> Beyond the initial 24 hours, food and water are not provided and border guards refer passengers to NGOs such as the Red Cross or Caritas.

In general terms, facilities and mechanisms to provide basic necessities to persons staying in the transit zone are usually limited compared to those in special holding facilities at airports. As FRA observed at Fiumicino airport in Rome, **Italy**, for example, the general transit area serves a primarily commercial purpose and provides only limited facilities beyond bars. Only two windowless rooms are available in the international arrivals area for non-admitted passengers: one for families and another for large groups.

Other airports may, if necessary, adopt *ad hoc* solutions to cope with special situations. In Frankfurt, **Germany**, for example, the police may at times provide field beds to inadmissible passengers waiting for their return flight.

## Further checks

Further border control inspections may last from 15 minutes to a number of days, depending on the number and complexity of issues to be verified, such as confirmation of nationalities. Persons undergoing a further check usually fall under the responsibility of the immigration or police authorities. Officers may, however, have a limited or no specific budget for providing food and water. The time span after which authorities must make food and water available varies considerably: two to three hours in **Germany** and **Latvia**;<sup>34</sup> four to five hours in **Slovenia**,<sup>35</sup> six hours in **Lithuania**<sup>36</sup> and **Slovakia**<sup>37</sup> and 12 hours in **Finland**.<sup>38</sup> In other cases, such as in **Bulgaria** and the **Czech Republic**, the police provide food and water only if the person is considered to be detained.

The provision of adequate food to passengers undergoing further checks at the border also emerged as an issue in interviews carried out for the FRA project on the treatment of third-country nationals at external borders. At Fiumicino airport in Rome, **Italy**, for example, passengers said that they did not get food regularly while awaiting the outcome of further checks. Meal vouchers for sandwiches and a beverage were distributed but not to all persons who were entitled to receive them. This can be particularly problematic at times of increased numbers of arrivals, such as during the Arab

27 United Nations (UN), International Civil Aviation Organisation (1944), Convention on International Civil Aviation, Annex 9, Chapter 5 'Inadmissible persons and deportees', with subsequent IATA agreements; Regulation (EC) No. 261/2004.

28 Austria, Alien Police Act, 113 (4).

29 Caritas (2013).

30 Some of the information supplied in this chapter is based on the FRA project on the treatment of third-country nationals at the EU's external borders, which involved fieldwork and desk research.

31 *LasciatCIEntrare* promoted in parallel with the European campaign 'Open Access Now', *Il Manifesto* (2012).

32 Bulgaria, Ministry of Interior, Table 1.

33 Bulgaria, Jesuit Refugee Service Europe (2010), para. 3-12.

34 Latvia, State Border Guard.

35 Slovenia, Ministry of Interior (2013).

36 Lithuania, Ministry of Interior (2012).

37 Slovakia, Act on Residence of Foreigners, Art. 91.

38 Finland, Government bill to the Act on Treatment of Persons in Police Custody, Chapter 3, Section 4.

Spring, and can lead to extended waiting times and overcrowded waiting facilities.

At Charles de Gaulle airport in Paris, **France**, interviews with passengers held pending the outcome of further checks made clear that they were very dissatisfied with the quality of food provided. In one case, a consul had to negotiate for the provision of vegetarian food.

### 2.1.3. Automated Border Control (ABC) gates and smart borders

The increasing trend in the use of new technologies for border control purposes and the possible related fundamental rights implications, which the 2011 FRA Annual report noted, continued in 2012. The European Commission had not presented the smart border package announced in 2011<sup>39</sup> by year-end 2012.

The package includes an 'Entry/Exit System', which is designed to record the time, place of entry and exit, and the length of authorised stay, as well as the 'Registered Travellers Programme'. The latter should allow certain groups of frequent travellers to enter the EU using simplified border checks at Automated Border Control (ABC) gates. Travellers registered within the programme are expected to still have access to booths attended by border guards.

ABC gates verify whether a travel document is authentic and whether the passenger is the rightful holder of the document by comparing the biometric information stored in the passport with the actual holder of the passport. Most ABC systems currently use facial recognition as the main biometric authentication method. The second-generation e-passports, however, carry both facial and fingerprint data. The system queries border control records stored in databases and automatically determines eligibility for border crossing.<sup>40</sup>

EU institutions continued to assess and evaluate the smart borders concept in 2012. A European Parliament study thus analysed its fundamental rights implications, given that large amounts of information are generated, retained and used but remain largely hidden from view.<sup>41</sup> This study also refers to concerns expressed by the European Data Protection Supervisor (EDPS) about the necessity and proportionality of a smart borders proposal.<sup>42</sup> Preparations are under way for two large-scale EU-funded ABC demonstration projects, namely Fastpass and ABC4EU.

Frontex organised the First Global Conference and Exhibition on future ABC developments in 2012. It coordinated an exchange of experiences and lessons learned on ABC-related issues. Frontex has also elaborated operational and technical best practice documents to provide guidance to Member States using ABC gates.<sup>43</sup> With respect to fundamental rights, the operational guidelines mention that "if a traveller is unable, for any reason, to use the ABC, and is redirected to a manual border control booth, due attention MUST be paid to ensure that the ensuing procedures are in full compliance with fundamental rights".<sup>44</sup>

The Schengen Borders Code already permits EU Member States to introduce ABC gates and a number have done so, primarily for EU/European Economic Area and Swiss passport holders, in order to cope with increasing passenger flows without major staff increases.

Nine EU Member States have introduced ABC gates, primarily at airports: **Bulgaria**, the **Czech Republic**, **Finland**, **France**, **Germany**, the **Netherlands**, **Portugal**, **Spain** and the **United Kingdom**.<sup>45</sup> **Austria**, **Belgium**, **Denmark**, **Estonia**, **Hungary**, **Latvia** and **Romania** plan to introduce ABC gates at the airports in their respective capitals.<sup>46</sup> Figure 2.1 provides an overview of EU Member States that have introduced ABC gates.

ABC gates raise a number of fundamental rights issues. When querying border control records stored in databases, due diligence by the responsible administration needs to be respected and privacy by design reflected in the development of the systems. There are also concerns regarding the identification of victims of trafficking, the protection of the rights of the child, the rights of persons with disabilities, and those of elderly persons.

According to the Frontex Operational Guidelines, a border guard should always be present to monitor the functioning of the ABC gates.<sup>47</sup> The ABC gates themselves cannot identify potential victims of trafficking or persons seeking asylum. The challenge for the border guard is how to identify persons in need of protection. ABC gates are not (yet) in use for citizens from countries of origin from which asylum seekers usually originate.

In the case of children, a challenge for the border guard is to confirm the genuineness of the relationship with the accompanying adult, as required by Annex VII, paragraph 6 of the Schengen Borders Code. According to the Frontex Operational Guidelines, the operator must be alerted when a minor is using the ABC gates. The border

39 European Commission (2011c).

40 Frontex (2012b), p. 7.

41 European Parliament, DG for internal policies, Policy Department C (2012).

42 European Data Protection Supervisor (EDPS) (2008), p. 3.

43 Frontex (2012b); Frontex (2012c).

44 Frontex (2012b), p. 11.

45 Information provided by Frontex.

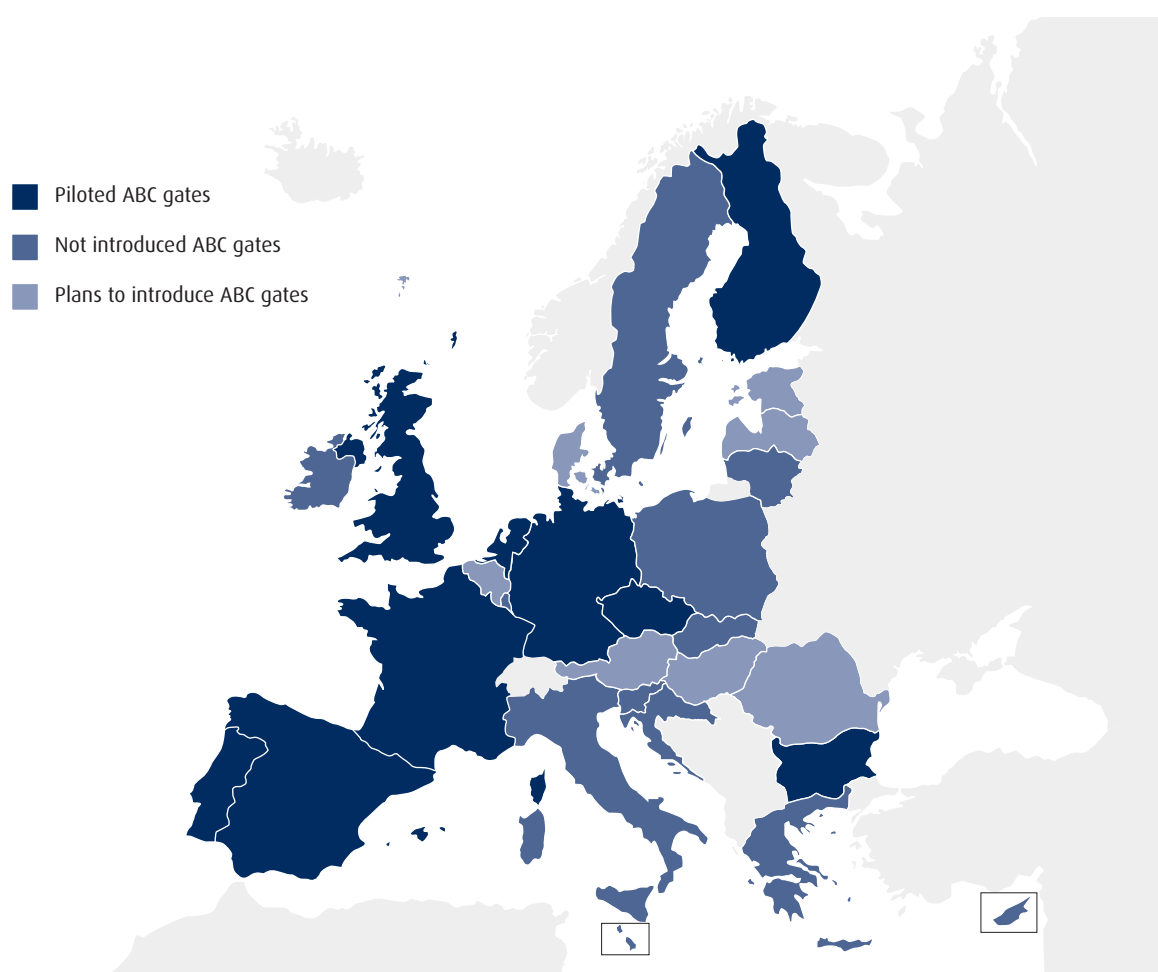
46 Information provided by Frontex.

47 Frontex (2012b), p. 23.





Figure 2.2: Automatic Border Control (ABC) gates in EU Member States and Croatia, as at the end of 2012



Source: Frontex data, provided in 2013

guard must carry out a further investigation in order to detect any inconsistencies or contradictions in the information where there are serious grounds for suspecting that minors may have been unlawfully removed from the custody of the person(s) legally exercising parental care over them.<sup>48</sup>

Most EU Member States do not allow children who are younger than 18 years old, or families with children, to use the gates. Finland allows children under 18 to use the gates, but the gates cannot accommodate persons under 120 centimetres high. If a child uses the gates, the birth date triggers an automatic alert and border guards can undertake a manual inspection if they deem it necessary.

ABC gates are designed in such a way that they are generally unsuitable for persons in wheelchairs, having implications for the rights of persons with disabilities.

<sup>48</sup> *Ibid.*, p. 24.

Sometimes narrow wheelchairs can fit through. Some persons with disabilities may, however, have difficulty raising their heads to the required height for the ABC gate to scan their faces and compare that image to their passports' biometric information, according to disability groups in the **United Kingdom**.<sup>49</sup> The Frontex Operational Guidelines recognises that ABC gates do not provide full access for all travellers with disabilities. It recommends adapting ABC systems to cater for them. E-Gates, for example, should be made wider or lower to enable wheelchair users to access the system. **Germany** plans to test ABC gates that have been designed for wheelchairs.<sup>50</sup>

<sup>49</sup> Information provided by the United Kingdom Border Force.

<sup>50</sup> Information provided by the German Federal Ministry of Justice.

Promising practice

**Consulting with disability groups in designing ABC gates**

The United Kingdom Border Force consulted disability groups when introducing ABC gates. The Border Force will continue to consult with disability groups and advisory bodies when designing the next generation of ABC gates. Equality impact assessments will be undertaken during the development as part of the design and assurance process.

*Source: Information provided by the United Kingdom Border Force*

Designing ABC gates with respect for the rights of the elderly<sup>51</sup> would mean taking into account their needs, by, for example, providing for slower reaction times and using large font size for text or signs.

Border guards should, in the performance of their duties, fully respect human dignity and not discriminate on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation according to Article 6 of the Schengen Borders Code. When ABC gates replace manual border checks, the risk of a border guard treating a traveller in a discourteous, undignified or discriminatory manner is no longer an issue. A certain number of passengers who have passed through the ABC gates may, however, still be singled out for further checks, a procedure which is not immune to the risk of discriminatory ethnic profiling.

ABC gates may refuse to allow a passenger through for a number of reasons, such as the way the traveller uses the gate, variable lighting conditions depending on how the ABC gate is positioned, the quality of the travel document and the biometric information it includes, or differences between the traveller's appearance and the biometric information, such as due to aging. In these cases the check should be exactly the same as for other travellers and the border guard needs to be aware of the potential for discriminatory treatment.

In addition, national courts in Germany and the Netherlands submitted preliminary questions to the CJEU in 2012 on the proportionality of the central storage of biometric data in passports and travel documents at the national level and their use for purposes other than border control<sup>52</sup> (see **Chapter 3** on biometric passports for further details).

51 European Union, Council and European Commission (2000), Charter of Fundamental Rights of the European Union, Art. 25.

52 CJEU, C-448/12; CJEU, C-291/12.

**2.1.4. Immigration liaison officers (ILOs)**

The FRA Annual Report 2011 highlighted efforts to move border control activities beyond the external borders of the EU. In 2012 the Immigration Liaison Officers (ILOs) acted upon a reinforced mandate under the amended ILO Network Regulation (Regulation 493/2011). The immigration services or other competent authorities of EU Member States post ILOs abroad to cooperate with the host country on irregular immigration, returns and the management of legal migration. Such externalisation of border control has fundamental rights implications. In cases where ILOs, involved in pre-departure document checks in third-country airports, stop a passenger, for example, they may prevent a person in need of international protection from reaching a safe place.

In 2004, the EU set up an ILO network to enhance coordination among ILOs posted by EU Member States to the same third country.<sup>53</sup> Some of the changes introduced through the 2011 amendment are important from a fundamental rights point of view.<sup>54</sup> First, ILOs deployed in the same host country are now asked to exchange information on asylum seekers' access to protection in the host country (Article 4). Second, each semester, the ILO networks must report to the European Parliament, the Council of the European Union and the European Commission on their activities in specific countries and/or regions of particular interest to the EU, taking into consideration all relevant aspects, including human rights (Article 6). The reporting template, however, remains security oriented, only mentioning asylum seekers under the heading of risks and threats at the host country borders.<sup>55</sup> Third, EASO, Frontex and UNHCR may be invited to participate in ILO network meetings held in the host country (Recital 5 and Article 4 (2)).

In line with its work programme, Frontex reinforced its links to the ILO network in 2012 to enhance risk analysis and facilitate operational cooperation between EU Member States and third countries.<sup>56</sup> Frontex staff participated in relevant ILO meetings and conferences held in some third countries and Member States, while ILOs also took part in Frontex activities.

Frontex can exchange information on irregular migration and other related issues with the ILOs via ICONet, a secure website where early warnings on irregular migration and facilitator networks, as well as information on the use of visas, borders and travel documents

53 Council Regulation (EC) No. 377/2004.

54 Council Regulation (EC) No. 493/2011.

55 Reporting in accordance with the model established by European Commission Decision 2005/687/EC (European Commission (2005)).

56 Frontex (2012d), p. 14.



is shared.<sup>57</sup> Frontex can post ILOs to third countries in which border management practices comply with minimum human rights standards, according to its revised Regulation (Regulation 1168/2011, Article 14 (3)). Frontex has not yet used this option, primarily due to a lack of human and financial resources.

By 2012, approximately two thirds of EU Member States as well as **Croatia** had posted immigration liaison officers abroad: **Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, the Netherlands, Poland, Portugal, Spain, Sweden** and the **United Kingdom**.

Others, such as **Bulgaria**, have been looking for an experienced Member State partner agency to advise it on establishing an ILO network and arrangements, regulations and training. The ILOs of **Germany, the Netherlands, and the United Kingdom**, for example, may provide advice and training on the security features of travel and identity documents and on visas and document examination to airline companies and EU consular staff.<sup>58</sup> They also perform pre-boarding document checks on persons in cooperation with local authorities and/or airline staff and they may also take part in in-depth interviews at the borders. In such cases, their decisions affect whether a person may travel to the EU; in practice there are only limited remedies if they prevent a person's departure.

An important fundamental rights question emerges concerning the potential of an ILO in preventing the departure of a person seeking asylum. In the context of air borders, the IATA Code of Conduct for Immigration Liaison Officers<sup>59</sup> explicitly states that ILOs may advise airline staff but cannot compel compliance. It also states that airline staff should direct persons requesting asylum to UNHCR, to the appropriate diplomatic mission(s) or to an appropriate local NGO.

Only a few EU Member States have instructed ILOs on how to handle requests for asylum. The **Austrian** ILOs, for instance, are instructed in regular trainings to refer all people requesting asylum to the Austrian Embassy for further information.<sup>60</sup> The **Dutch** ILO must refer a request for asylum to headquarters to get further instructions on how to proceed.<sup>61</sup> A possible

instruction in such an event is to refer the person to the UNHCR office in the host country. In 2012, persons who said they were in need of protection approached the **United Kingdom** ILO in Kuala Lumpur who referred them to UNHCR.<sup>62</sup>

## 2.2. A common visa policy

The common visa policy has the dual aim of preventing irregular migration and facilitating legitimate travel. During 2012, the focus on the need to facilitate travel and for the transparent, fair and equal treatment of visa applicants was heightened in the European Commission report on local Schengen cooperation<sup>63</sup> and the report on facilitating travel for nationals from emerging markets.<sup>64</sup> Discussions continued about suspending the visa waiver for the western Balkan countries. Changes were made to the rules on airport transit visas.

The Visa Code lays down rules for short-term visas and airport transit visas. By doing so, it also sets standards linked to fundamental rights: reception arrangements for visa applicants in consulates should have due respect for human dignity and the processing of visa applications should be conducted in a professional and respectful manner and be proportionate to the objectives pursued (Recital 6). Staff conduct should be courteous, respect human dignity and be proportionate to the objectives pursued – both to facilitate legitimate travel and counteract irregular immigration (Recital 3). Staff should not discriminate against persons on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 39 (3)).

To understand the scope and implications of EU visa policies, it should be noted that the nationals of 125 states, entities and territorial authorities require a visa if they wish to come to the EU. Figure 2.3 provides an overview of nationals who require a visa. Nationals from some 12 countries require an airport transit visa to transit through an airport in any Schengen country. In individual Member States, however, citizens of additional third countries are also subject to airport transit requirements.<sup>65</sup>

The Visa Code was amended on 15 February 2012 as regards airport transit visas.<sup>66</sup> EU Member States have drawn up lists of third-country nationals who are required to hold an airport transit visa<sup>67</sup> to reduce the

57 European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' rights and constitutional affairs (2011), p. 21.

58 Information provided by the German Federal Ministry of Interior; European Migration Network (EMN) (2012), p. 57; Information provided by the United Kingdom Border Agency.

59 The International Air Transport Association (IATA), Control Authorities Working Group (CAWG) (2002).

60 Information provided by the Austrian Federal Ministry of Interior.

61 Information provided by the Dutch Ministry of Interior and Kingdom Relations.

62 Information provided by the United Kingdom Border Agency.

63 European Commission (2012f).

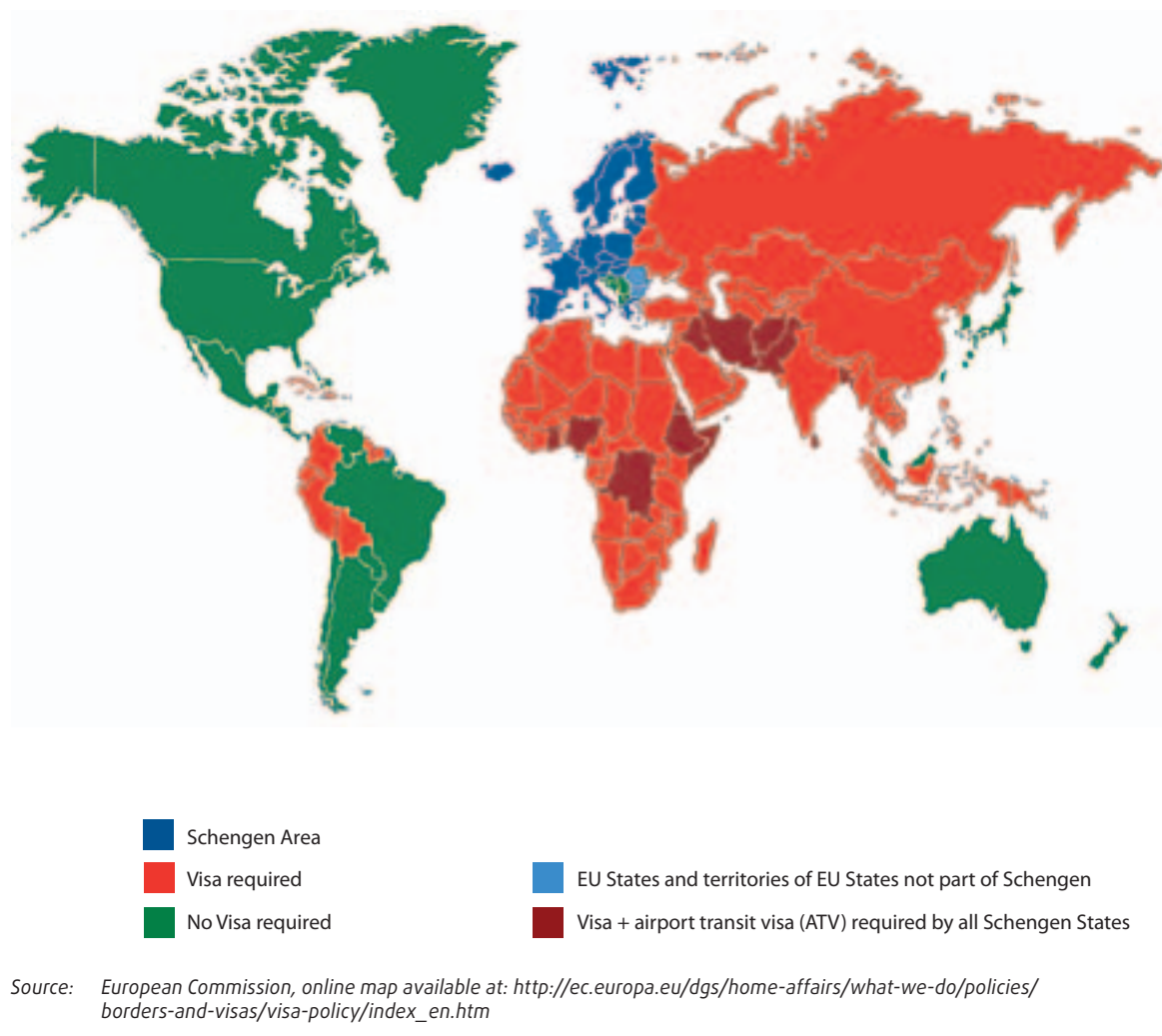
64 European Commission (2012g).

65 European Commission (2013).

66 Regulation (EU) No. 154/2012.

67 Regulation (EU) No. 810/2009, Annex IV.

**Figure 2.3: Nationals requiring a visa to enter or transit through the EU**



risk that they may remain in the country through which they are transiting.

The amended regulation exempts third-country nationals from an airport transit visa if they hold a valid residence permit, or a visa, issued by an EU Member State that is not (**Ireland** and the **United Kingdom**) or not yet fully part (**Bulgaria**, **Cyprus** and **Romania**) of Schengen. The likelihood that third-country nationals resident in one of these EU Member States pose an immigration risk appears limited.

In addition, this amendment is in the interest of free movement within the EU as reflected in the Schengen Borders Code, which entitles a third-country national in possession of a residence permit or a visa to enter the EU (Article 5). The amendment will also facilitate legitimate travel.

Discussions continued on legal possibilities for individual EU Member States to suspend the visa waiver

for countries whose citizens Member States believed were “abus[ing] the visa liberalisation”, by amending the Visa Regulation 539/2001.<sup>68</sup> An increase in irregular migration through a rise in over-stayers and asylum applications – mostly with a low recognition rate<sup>69</sup> – in some EU Member States after the visa liberalisation for the western Balkan countries triggered the visa reintroduction debate. In 2011, 8,295 Serbian nationals applied for asylum in Belgium, Germany and Sweden and this number increased to 17,815 in 2012. During 2012, Austria, Belgium, France, Germany, Italy and Sweden registered a total of 38,080 applications lodged by citizens of Albania (5,635), Bosnia and Herzegovina (5,300), the Former Yugoslav Republic of Macedonia (9,330) and Serbia (17,815).<sup>70</sup>

<sup>68</sup> European Commission (2011d).

<sup>69</sup> European Commission (2012h).

<sup>70</sup> Eurostat (2013).

The 2012 *EU Action on Migratory Pressures – A Strategic Response* also focuses on visa liberalisation, which it claims has contributed to an increase in irregular migration.<sup>71</sup> In 2012, the European Commission published its report on the post-visa liberalisation monitoring of the western Balkan countries.<sup>72</sup> The report said that poor community integration, in particular for persons of Roma origin, continues to be a push factor behind the vast majority of asylum applications. It recommends substantially increasing assistance to minority populations, in particular Roma communities, and targeting assistance to the countries of origin.

The report also confirms that the large majority of persons from the visa-free western Balkan countries travelling to the EU are bona fide travellers. Thus, the ultimate purpose of visa liberalisation – to facilitate people-to-people contacts, enhance business opportunities and cultural exchanges and enable the people of the region to get better acquainted with the EU – continues to be achieved.

The European Commission monitoring report calls for further strengthening of exit controls in western Balkan countries and entry controls at EU borders, in line with the Schengen *acquis*.<sup>73</sup> When border guards assess the extent to which citizens from western Balkan countries fulfil the entry conditions under the Schengen Border Code (Article 5), they must remain vigilant against the risks of discriminatory profiling and of preventing access to asylum procedures (Article 6).

The conclusions of the Balkans Ministerial Forum on Justice and Home Affairs held on 5–6 November 2012 reflect the need for closer cooperation between western Balkan countries and EU Member States to control the external border, in compliance with the fundamental rights of western Balkan citizens. The fundamental rights concerns related to exit controls include the right to leave any country, including one's own,<sup>74</sup> and the risk of discriminatory profiling.<sup>75</sup>

The recent ECtHR *Stamose*<sup>76</sup> judgment concluded that **Bulgarian** exit controls had violated the right to leave one's country. Bulgaria had imposed a two-year travel ban on one of its nationals and seized the applicant's passport for violating US immigration laws. The ECtHR noted that these measures had been adopted in the course of negotiations with the EU on visa liberalisation in the 1990s and aimed at restricting the abuse of visa-free travel.

71 Council of the European Union (2012b), p. 17.

72 European Commission (2012h).

73 *Ibid.*

74 Council of Europe, European Convention on Human Rights (ECHR), Art. 2, Protocol No. 4.

75 Regulation (EC) No. 562/2006, Art. 6.

76 ECtHR, No. 29713/05, *Stamose v. Bulgaria*, 27 November 2012.

In 2012, the European Commission issued a report assessing the functioning of cooperation among the Schengen embassies/consulates at a specific duty station – usually referred to as local Schengen cooperation – during the first two years of the Visa Code's application.<sup>77</sup> The aim of local Schengen cooperation is to ensure a harmonised application of the Visa Code, in light of the local circumstances, to prevent visa shopping and different treatment for visa applicants (Recital 18, Visa Code). The report notes that the "EU is often perceived negatively by third countries because of its arcane and non-transparent visa issuing procedures". Equality in treatment will be promoted through harmonised lists of supporting documents.<sup>78</sup>

Knowledge in EU Member States and at the European Commission on how the Visa Code is actually implemented remains spotty and complaints from third countries cannot be properly assessed, the report says. It therefore suggests that EU delegations in third countries should collect information from third-country nationals on how the Visa Code is implemented by opening, for example, a 'complaint mail box'. The results of such an initiative, if properly analysed, would yield an increased awareness among Member States and the European Commission of the fundamental rights implications of the common EU visa policy. The report also suggests that Member States' diplomatic missions organise information events with host country authorities on the regional roll-out of the Visa Information System (VIS), to prevent or clarify possible misconceptions about it.

To promote EU growth as outlined in the Europe 2020 strategy, a European Commission Communication issued in November 2012 suggests facilitating travel for nationals from emerging markets, such as China, India and Russia. Nationals from these countries are required to hold a visa when entering the Schengen area.<sup>79</sup> The tourism industry identified several measures needed, such as facilitating visa-issuing procedures, clear deadlines for granting an appointment for lodging the visa application and application forms available in the host-country language.

### 2.2.1. Visa Information System (VIS)

The VIS stores visa applicants' personal data, including biometric data, and allows Schengen states to exchange data on issued visas.

In October 2011, the VIS<sup>80</sup> became operational in North Africa (Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia), as reported last year. On 10 May 2012,

77 European Commission (2012f).

78 *Ibid.*, p. 9.

79 European Commission (2012g).

80 Regulation (EC) No. 767/2008.



Schengen-participating countries<sup>81</sup> introduced VIS in the near East (Israel, Jordan, Lebanon and Syria)<sup>82</sup> and on 2 October 2012 in the Gulf region (Afghanistan, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen). The VIS will be rolled out to all third countries, in future.<sup>83</sup>

By 4 November 2012, the VIS had recorded about 1,800,000 visa applications, of which more than 1,500,000 were issued and about 220,000 refused.<sup>84</sup> Table 2.1 provides an overview of the visas with biometric identifiers (fingerprints) issued in 2012 in five Member States. As part of the consular representation, Member States may also cooperate on the collection of biometric identifiers.<sup>85</sup> In Istanbul, for instance – the Member States of Estonia, Portugal and Slovenia as well as Norway are represented by the Hungarian embassy, which collects the biometric identifiers on behalf of these countries.<sup>86</sup> This explains the relatively high numbers of visas with biometric identifiers issued by Hungary in Istanbul.

The main fundamental rights challenges are gauging whether the interference with data protection and privacy is necessary and proportionate, and if the personal data are collected for a specified, explicit and legitimate purpose.<sup>87</sup> In relation to this, in 2012 the

European Commission published a list of authorities who have access to VIS, as required by Article 6 of the VIS Regulation.<sup>88</sup> Authorities responsible for external and internal border controls as well as asylum and visa authorities have access to VIS.

In addition, authorities responsible “for the prevention, detection or investigation of terrorist offences or of other serious criminal offences” have access to VIS data, if there are reasonable grounds to consider that consulting VIS data will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question.<sup>89</sup> Once the decision applies the European Police Office (Europol) would also be allowed access to VIS data (Articles 5, 6 and 7). For an analysis of data protection issues, see **Chapter 3** of this Annual report.

Each EU Member State must, according to the VIS Regulation, request its National Supervisory Authority to monitor the lawfulness of its personal data processing, including VIS data.<sup>90</sup> This means independently monitoring the lawfulness of the processing of personal data, including their transmission to and from the VIS (Article 41). The European Data Protection Supervisor will monitor VIS-related activities at the EU level (Article 42). Therefore, in practice, the activities

**Table 2.1: Schengen visas issued with biometric identifiers (2012), by EU Member State**

EU Member State	Total number of short-term Schengen visas (C) issued with biometric identifiers	Short-term Schengen visas (C) with biometric identifiers issued per diplomatic mission or consular post
DK	2,670	Cairo 1,774; Tehran 427; Dubai 283; other 186
EE	90	Cairo 84; Tel Aviv 6
HU	32,139	Kiev 16,505; Istanbul 8,191; Cairo 2,357; other 5,086
LV	95	Egypt 77; Israel 18
SI	630	Cairo 361; Tehran 168; Tel Aviv 11; other 90

Note: The table only includes EU Member States from which FRA could obtain reliable statistics when this report was drafted.

Source: FRA, 2013

81 Twenty-six countries, i.e. all the EU Member States except Bulgaria, Cyprus, Ireland, Romania and the United Kingdom, and the non-EU countries Iceland, Liechtenstein, Norway and Switzerland.

82 VIS was first deployed in the North African region (Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia) on 11 October 2011.

83 Council of the European Union (2012c).

84 European Commission (2012i).

85 Regulation (EC) No 801/2009, Art. 8.

86 Hungary, Consular services (2012).

87 Council Directive 95/46/EC Art. 6 (1) (b); Council of Europe; Convention 108, Art. 5 (b).

88 European Commission (2012j).

89 Council of the European Union (2008), Art. 3 (4).

90 Council Regulation (EC) No. 767/2008, Art. 41.



of the EU agency for large-scale IT-systems in Tallinn will also be monitored.

The VIS stores the fingerprints of all 10 digits collected for each applicant, with the exception of children under 12 and people who cannot physically provide finger scans. Once finger scans are stored in VIS, they can be reused for additional visa applications over a five-year period.<sup>91</sup>

The quality of the fingerprints stored remains important as they will be matched against the visa holder's finger scans at the border when entering EU territory.<sup>92</sup> Although a mismatch does not mean that entry will automatically be refused, it will lead to further traveller identity checks.<sup>93</sup>

EU Member States have a duty under Article 38 (3) of the Visa Code to train their relevant staff in visa processing. EU Member States must ensure that appropriate procedures guaranteeing the dignity of the applicant are in place when there are difficulties in taking the fingerprints, according to Article 13 (7) (b) of the Visa Code. The texture of the skin, hardened skin or mistakes in collecting the fingerprints could cause such difficulties. In some cases, difficulties could affect different groups of people, as certain professions might cause more wear and tear on finger tips.

#### Promising practice

### Creating awareness among staff, as well as applicants, on the process for collecting biometric identifiers

#### Training consular staff in collecting biometric identifiers

In **Germany** detailed training materials as well as a training video are provided to consular staff and service providers collecting biometric identifiers. The training materials explicitly refer to how to guarantee the dignity of the applicant, particularly persons with physical constraints. (Federal Foreign Office (*Auswärtiges Amt*), FRA 2012))

#### Information video on the biometric data-taking process

In the waiting areas at the **Hungarian** consulates a short film is shown to the applicants on how pictures and fingerprints will be taken. It informs the applicants step-by-step on the procedure to ensure a smooth biometric data collection process. The project was financed by the External Border Fund. (FRA National Liaison Officer, Hungary)

<sup>91</sup> European Commission (2012k).

<sup>92</sup> European Commission (2012e).

<sup>93</sup> European Commission (2012k).

The right to be informed at decisive moments in a process is an important element of procedural fairness and is included in Article 37 of the VIS Regulation.<sup>94</sup> Procedures adopted in **Estonia** illustrate how this can be done effectively in practice. Estonian embassies make available information material on VIS. When registering an application, the consular officer explains to the applicant why fingerprinting is a requirement. The officer ensures that it is possible to take all 10 fingerprints. The prints and their quality are then shown on the computer screen to both the official and the applicant. If the quality is poor, then the applicant is asked for another imprint.<sup>95</sup>

The Charter of Fundamental Rights of the European Union guarantees everyone the right to an effective remedy and to a fair trial. In each EU Member State all persons must have the right to bring an action or a complaint before the competent authorities or the courts of the Member State that refused either the right of access to or the right of correction or deletion of their data as per the VIS (Article 38 (1) and (2)). EU Member States did not register any formal complaints during 2012 on the inclusion of biometric identifiers in the VIS.<sup>96</sup>

### 2.2.2. The right to appeal a negative visa decision

This section provides information on visa appeals for 2012 for selected EU Member States (see Table 2.2), updating and adding to information given in the FRA Annual report 2011.

In **Slovenia** the appeals body is, in the first instance, the embassy or the consulate. In the second instance an appeal is automatically forwarded to the Slovenian Ministry of Foreign Affairs. The decision of the Ministry of Foreign Affairs is final, but a complaint can be filed at the Administrative Court.

In the **Netherlands** the purpose of the visa determines the appeals body. The Immigration and Naturalisation Service of the Ministry of Interior and Kingdom Relations is the appeals body for visas issued for tourism and family visits and to artists with work permits, trainees and fellows. The Consular Affairs and Migration Policy Department of the Ministry of Foreign Affairs is the appeals body for visas issued for business visits, work visits by installation and service technicians, academic or political visits, participation in conferences or sporting events, and by holders of diplomatic passports.

Family members of EU, EEA or Swiss citizens may in some EU Member States turn to other appeals bodies.

<sup>94</sup> Regulation (EC) No. 767/2008.

<sup>95</sup> European Commission (2012f).

<sup>96</sup> *Ibid.*

**Table 2.2: Number of visas issued, visa appeals lodged and decisions not upheld in 2012, 11 EU Member States**

EU Member State	Number of short-term Schengen visas (C) issued	Appeals body	Number of visas appealed	Decision reversed/to be re-examined
BE	190,635	Council for Alien Law Litigation	303	2
CZ	582,531	The Appeals Commission on Residence of Foreign Nationals	500	116
EE	173,448	Ministry of Foreign Affairs	160	32
FI	1,377,664	Ministry of Foreign Affairs	160	about 45
HU	315,489	Ministry of Foreign Affairs	341	58
LT	229,948	Administrative Courts	11	0
LU	10,436	Administrative Tribunal and further to the Administrative Court	1	0
LV	180,981	Ministry of Foreign Affairs and, in case of a further appeal to the next instance, the Administrative Court	61	9
NL	277,484	Ministry of Foreign Affairs	463	39
SI	40,421	Embassy/Consulate/Ministry of Foreign Affairs and, in case of a further appeal to the next instance, the Administrative Court	1	0
SK	70,927	Remonstrance Commission	55	35

Note: The table only includes EU Member States from which the FRA could obtain reliable statistics when this report was drafted.

Source: FRA, 2013

In **Austria**, for instance, any citizen may file a complaint with one of the nine Independent Administration Tribunals (*Unabhängige Verwaltungssenate*, UVS) and in **Finland** with the Administrative Court of Helsinki.

According to the European Commission, appeals bodies should be judicial bodies which respect Article 47 of the Charter of Fundamental Rights of the EU on the right to an effective remedy and to a fair trial. The Commission has also informed the Member States on its interpretation.

The applicant may appeal against a decision that was refused, annulled or revoked (Visa Code, Articles 32 and 34). The Visa Code includes a standard form requesting information on why a visa was refused, annulled or revoked. The form includes 11 categories of broadly formulated reasons.<sup>97</sup>

Examples of such categories are the presentation of a false, counterfeit or forged document; failure to provide justification for the purpose and conditions of

the intended stay; presence of an SIS alert; absence of travel medical insurance (see also Visa Code, Article 32). The Visa Code requires states to inform the applicant by means of this standard form (Article 32 (2)).

In February 2012, the Berlin Administrative Court (*Verwaltungsgericht*) submitted a set of questions to the CJEU on the scope of discretion that Member States have to refuse a visa when the applicant fulfils the necessary requirements.<sup>98</sup> More specifically, the CJEU was asked whether the national court must satisfy itself that the applicant intends to leave before the expiry of the visa for which he or she is applying, or whether it suffices that the court does not have doubts on that account; and perhaps most importantly, whether the Visa Code establishes a non-discretionary right to the issue of a Schengen visa if the entry conditions are satisfied and there are no grounds for refusing the visa under the Code.

<sup>97</sup> Regulation (EC) No 801/2009, Annex VI 'Standard Form for Notifying and motivating refusal, annulment or revocation of a visa', p. 35.

<sup>98</sup> CJEU, C-84/12 [2012], *Ezatollah Rahmani Koushaki v. Federal Republic of Germany*, reference for a preliminary ruling from the Administrative Court (*Verwaltungsgericht*, Berlin, Germany), lodged on 17 February 2012.

## Appeals against refusal of visa

Several national appeals against refusal of visas have concerned doubts precisely with regard to the applicants' intention to leave the territory of the Member States (Visa Code, Article 32 (1) (b)).

In a Lithuanian case, for instance, the embassy initially refused a visa, claiming that the purpose and conditions for the intended stay were not justified, as the applicants could not clarify their relationship to the persons they intended to visit in **Lithuania**, their subsistence during their stay there, their legal status in Armenia where they applied for the visa and their intention to return to Armenia.<sup>99</sup>

The Vilnius Regional Administrative Court (first instance) and the Administrative Court of Lithuania (second instance) concluded that although the applicants could not prove their means of subsistence during their stay in Lithuania, they were not asked for additional documents proving their income. Other circumstances that raised suspicions could also have been clarified during the examination of the visa application. Moreover, inconsistencies of information submitted by the applicants could be attributable to or influenced by their use of a foreign language, Russian.

In contrast, appeals bodies in **Germany** and **Italy** upheld visa refusals, sharing the embassies' conclusions that the applicant might not leave the territory of those Member States before visa expiry.

The case in Germany concerned the application for a visa by a Pakistani national whose father and brother were living in Germany but whose mother and another brother still lived in Pakistan. The Administrative Court in Berlin (*Verwaltungsgericht*) upheld the embassy's decision, sharing doubts as to the applicant's intention to return. The Court made reference to Article 7 of the EU Charter of Fundamental Rights on the respect for private and family life and argued that the applicant could stay in touch with his family members in Germany, as they can visit him in Pakistan, as well as through other means. The fact that the applicant and the brother had reached the age of majority impacted on the decision as well.<sup>100</sup>

Similarly, the Lazio Regional Administrative Court in **Italy** said that the applicant must demonstrate that circumstances exist that would make it reasonable to presume that the foreigner has an interest in returning to his or her country of origin and/or if there is a risk of

irregular stay.<sup>101</sup> The applicant had not submitted any documents proving income, employment or property in the country of origin that would support the visa application and prove that the centre of the applicant's interests was in the country of origin.

Appeals against visa refusal have also concerned the right to be heard. The **Austrian** embassy, for instance, refused a visa, because the information submitted regarding the stay's intended purpose – to take part in his divorce proceedings – and its conditions, was not reliable. The Austrian appeals body, the Administrative Court (*Verwaltungsgerichtshof*) ruled that not granting the applicant the right to be heard before the visa is refused constitutes a violation of procedural rules.<sup>102</sup>

However, in a **Dutch** case, the District Court of The Hague (second instance) upheld the embassy's refusal, confirmed in the first instance by the Ministry for Foreign Affairs, saying that the embassy can refrain from hearing an applicant if he does not attempt to provide further evidence on the purpose and conditions of the intended stay during the appeals phase.<sup>103</sup> The embassy had refused the visa doubting that the applicant would leave the Netherlands before the visa expired because his social and economic ties with Morocco were insufficient.

## Appeals against a revoked or annulled visa

According to the Visa Code, a visa can be: revoked if it becomes evident that the conditions for issuing it are no longer met (Article 34 (2)); or, annulled if it becomes evident that the conditions for issuing it were not met at the time when it was issued, in particular if there are serious grounds for believing that the visa was fraudulently obtained (Article 34 (1)).

A visa shall, in principle, be revoked or annulled by the competent authorities of the Member State which issued it. A visa may be revoked or annulled by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such revocation or annulment (Article 34 (1) and (2)).

In a first case, the **Lithuanian** embassy revoked a visa because the property that the applicant owned in Lithuania, and which was the justification for travel, had become uninhabitable. The Supreme Administrative Court in Lithuania decided in favour of the applicant stating that even if the embassy used the standard form when revoking its previous decision to grant a visa, it is

<sup>99</sup> Lithuania, Supreme Administrative Court of Lithuania, No. A662-372/2012, *K. M., H. M., L. M. and S. M. v. Ministry of Foreign Affairs of the Republic of Lithuania*.

<sup>100</sup> Germany, Administrative Court Berlin, 35<sup>th</sup> Chamber, 35 K 468.10 V.

<sup>101</sup> Italy (2012), *TAR Lazio* 3223/2012.

<sup>102</sup> Austria, High Administrative Court, 2011/21/0232.

<sup>103</sup> Netherlands, District Court The Hague, LJN: BW6771, No. 12/118.

obliged to have a proper and clear basis for such a decision, as the applicant was prevented from realising his right to an effective remedy.<sup>104</sup>

In another case, **German** authorities annulled a visa issued to a Ukrainian citizen by Polish authorities. The visa holder entered Germany to buy a car, which he needed to do business in Poland. The German authorities annulled the visa as they had doubts about his business needs. The Ukrainian citizen appealed against the decision to the Administrative Court (*Verwaltungsgericht*) in Dresden, which decided in his favour. The state then brought the case to the Higher Administrative Court of Saxony, which said that an initial suspicion that the visa was fraudulently obtained was in this case insufficient to reach the required degree of probability of 'serious grounds' for visa annulment, according to Article 34 (1) of the Visa Code.<sup>105</sup>

## Outlook

Several legislative proposals on borders or visa matters will be negotiated and possibly adopted during 2013. The proposals relate to the Schengen evaluation process, the temporary reintroduction of internal border controls, suspending the visa waiver, the Internal Security Funds, Eurosur and amendments to the Schengen Borders Code. They also include Council Decision 2010/252/EU containing guidance for Frontex operations at sea, which the CJEU annulled and which is expected to be replaced. All these proposals entail important fundamental rights aspects. The same is true for the announced European Commission proposal on the smart border package, tabled for early 2013.

The trend towards increased use and reliance on databases and IT tools for border management and visa processing procedures is expected to continue, as illustrated by several of the proposals in this chapter.

The smart borders package will send alerts on visa over-stayers. There are also data protection challenges, such as purpose limitation, which need to be carefully evaluated, particularly as some EU Member States consider an irregular stay an administrative offence, but others criminalise it.

Considering the data protection concerns involved, the CJEU is expected to provide legal guidance on the proportionality of the storage of biometric data in passports and travel documents and their use for purposes other than border control.

<sup>104</sup> Lithuania, Supreme Administrative Court of Lithuania, *D. V. v. Ministry of Foreign Affairs of the Republic of Lithuania*.

<sup>105</sup> Germany, Higher Administrative Court of Saxony, 3<sup>rd</sup> Senate, 3 B 151/12t, OVG Saxony; Administrative Court Dresden, 3<sup>rd</sup> Chamber, 3 K 168/11.

It remains to be seen how the design and usage of ABC gates will evolve with experience and the exchange of good practices to address challenges relating to protecting victims of trafficking in human beings, as well as concerns related to the rights of children and persons with disabilities.

Due to the civil war in Syria and the unstable situation in North Africa, the EU must be prepared for a continued flow of arrivals via Turkey, Greece and throughout the Mediterranean. The fundamental rights aspects of this situation are subject to further analysis, with 2013 seeing studies launched on the EU's southern border.

The UN Special Rapporteur on the human rights of migrants is expected to present his report on the management of the external borders, including findings made during his visits to Greece, Italy, Tunisia and Turkey. FRA will issue a report on the fundamental rights at Europe's southern sea borders in March 2013.

In 2012, Frontex appointed a Fundamental Rights Officer as well as the members of the Consultative Forum, and the European Ombudsmen had an on-going inquiry into Frontex and its human rights obligations. This increased focus in 2012 on fundamental rights in Frontex activities has raised expectations that fundamental rights be reflected in the day-to-day running of operational activities.

In the Schengen cooperation on external border control, fundamental rights concerns are expected to be mainstreamed within the evaluations foreseen for 2013, in light of the increased attention to fundamental rights in the training of Schengen evaluators.

The fundamental rights of passengers who are held in airport transit zones have largely remained off the fundamental rights radar. As FRA research, forthcoming in 2013, indicates not enough attention is paid to their situation and possible violations of their right to human dignity.

To spur economic growth, the EU has increasingly begun to view migrants, as well as visitors, including those required to hold visas, as potential contributors to the EU economy. The common visa policy will therefore continue not only to focus on migration control but also to facilitate legitimate travel. As indicated above, a detailed analysis could be done on issues related to applicants' dignity and their fair and professional treatment – also within the context of the harmonisation of visa issuing procedures. The proposed complaint mail boxes could, if properly used, inform the EU in greater detail about the situation of visa applicants, including VIS.

Visa applicants are making increasing use of their right to appeal a refused, revoked or annulled visa and this trend is expected to continue. CJEU legal guidance on this issue is also expected.





## References

All hyperlinks were accessed on 2 May 2013.

Amnesty International (2012), 'Italy: Lampedusa shipwreck a grim reminder of EU's failure to protect migrants at risk', 7 September 2012, available at: [www.amnesty.org/en/news/italy-lampedusa-shipwreck-grim-reminder-eu-migrant-crisis-not-over-2012-09-07](http://www.amnesty.org/en/news/italy-lampedusa-shipwreck-grim-reminder-eu-migrant-crisis-not-over-2012-09-07).

Austria, Alien Police Act (*Fremdenpolizeigesetz*, FPG).

Austria, High Administrative Court (*Verwaltungsgerichtshof*, VwGH), 2011/21/0232.

BBC News (2012), 'Migrants missing after boat sinks near Lampedusa', 7 September 2012, available at: [www.bbc.co.uk/news/world-europe-19515804](http://www.bbc.co.uk/news/world-europe-19515804).

Bulgaria (2007), Ministry of Interior, Table 1, based on Order ref. № 13-1221 on nutrition provided in the Ministry of Interior units in peace time (*Таблица 1, Заповед реп. №13-1221/04.7.2007 относно хранене в структурните звена на МВР в мирно време, издадена от Министерството на вътрешните работи*), 4 July 2007.

Bulgaria, Jesuit Refugee Service Europe (2010), 'National Report: Bulgaria', in: *Becoming vulnerable in detention – the DEVAS project*, 9 July 2010, available at: [www.jrseurope.org/publications/JRS-Europe\\_Becoming%20Vulnerable%20In%20Detention\\_June%202010\\_PUBLIC\\_28Jun10.pdf](http://www.jrseurope.org/publications/JRS-Europe_Becoming%20Vulnerable%20In%20Detention_June%202010_PUBLIC_28Jun10.pdf).

Caritas (2012), 'Flughafen Wien- Social Service', available at: [www.caritas.at/hilfe-einrichtungen/fluechtlinge/beratung-und-vertretung/flughafen-wien-social-service](http://www.caritas.at/hilfe-einrichtungen/fluechtlinge/beratung-und-vertretung/flughafen-wien-social-service).

Council Directive 95/46/EC of the EU Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Council of Europe, Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

Council of Europe, European Convention on Human Rights, available at: [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf).

Council of Europe, Parliamentary Assembly (PACE) (2012), 'Recent boat tragedy off Lampedusa – a strong reminder to Europe on plight of migrants' Press release, 12 October 2012, available at: [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=8099](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8099).

Council of Europe, PACE, Committee on Migration, Refugees and Displaced Persons (2013), 'Explanatory

memorandum by Ms Strik, Rapporteur', *Migration and asylum: mounting tensions in the Eastern Mediterranean*, 21 January 2013, available at: <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19349&lang=en>.

Council of the European Union (2008), Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

Council of the European Union (2012a), Implementation of measures identified as contributing to the successful enlargements for the Schengen area to include Romania and Bulgaria, 15063/12, Brussels 18 October 2012.

Council of the European Union (2012b), *EU Action on Migratory Pressures – A Strategic Response*, 8714/1/12, Brussels, 23 April 2012.

Council of the European Union (2012c), *VIS – state of play; Strategic Committee on Immigration, Frontiers and Asylum/Mixed Committee*; 14505/12 Brussels, 3 October 2012.

Court of Justice of the European Union (CJEU), C-355/10 [2012], *European Parliament v. Council of the EU*, 5 September 2012.

CJEU, C-84/12 [2012], *Ezatollah Rahmanian Koushkaki v. Federal Republic of Germany*, 17 February 2012.

CJEU, C-291/12, *Schwarz v. Stadt Bochum*, submitted by *Verwaltungsgericht Gelsenkirchen*, 15 May 2012.

CJEU, C-448/12, *M. Roest v. Burgemeester van Amsterdam*, submitted by *Raad van State*, 8 October 2012.

Council Regulation (EC) No. 377/2004 of 19 February 2004 on the creation of an immigration liaison officers (ILOs) network, OJ 2004 L 64, 2 March 2004.

Council Regulation (EC) No. 493/2011 of 5 April 2011 amending Council Regulation (EC) No. 377/2004 on the creation of an immigration liaison officers network, OJ 2011 L 141/13, 27 May 2011.

Council Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81/1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:081:0001:0007:EN:PDF>.

European Court of Human Rights (ECtHR), No. 27765/09, *Hirsi Jamaa and Others v. Italy* [GC], 23 February 2012.

ECtHR, No. 29713/05, *Stamose v. Bulgaria*, 27 November 2012.

Euronews (2012), 'Migrant boat capsizes off Turkey killing 61 people', 6 September 2012, available at: [www.euronews.com/2012/09/06/migrant-boat-capsizes-off-turkey-killing-61-people/](http://www.euronews.com/2012/09/06/migrant-boat-capsizes-off-turkey-killing-61-people/).

European Commission (2005) Decision 2005/687/EC of 29 September 2005 on the format for the report on the activities of immigration liaison officers networks and on the situation in the host country in matters relating to illegal immigration, OJ 2005 L 264/8.

European Commission (2006), Proposal for a Regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011) 560, Brussels, 16 September 2011.

European Commission (2010), Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2010) 624 final, Brussels, 16 November 2010.

European Commission (2011a), Proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, COM(2011) 559, Brussels, 16 September 2011.

European Commission (2011b) Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Border Code) and the Convention implementing the Schengen agreement, COM(2011) 118 final, Brussels, 10 March 2011.

European Commission (2011c), Communication from the Commission to the European Parliament and the Council Smart borders – options and the way ahead, COM(2011) 680 final, Brussels, 25 October 2011.

European Commission (2011d), Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2011) 290 final, Brussels, 24 May 2011, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0290:FIN:EN:PDF>.

European Commission (2012a), Proposal for a regulation establishing the European Border Surveillance System (Eurosir), COM(2011) 873 final, 12 December 2012.

European Commission (2012b), 'Inauguration of the new EU Agency for large-scale IT systems', Press release, 21 March 2012.

European Commission (2012c), 'Start of operations of the new European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice', 29 November 2012.

European Commission (2012d), *Communication from the Commission to the European Parliament and the Council*, Biannual reports on the functioning of the Schengen area, 1 November 2011 – 30 April 2012, COM(2012) 230 final, Brussels, 16 May 2012.

European Commission (2012e), *Report from the Commission to the European Parliament and the Council*, Second biannual report on the functioning of the Schengen area, 1 May 2012–31 October 2012, COM(2012) 686 final, Brussels, 23 November 2012.

European Commission (2012f), *Report from the Commission to the Council and the European Parliament on the functioning of Local Schengen Cooperation during the first two years of implementation of the Visa Code*, COM(2012) 648 final, 7 November 2012.

European Commission (2012g), *Communication from the Commission to the Council and the European Parliament: Implementation and development of the common visa policy to spur growth in the EU*, COM(2012) 649 final, 7 November 2012, available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/communication\\_on\\_visa\\_policy\\_to\\_spur\\_growth\\_com\\_2012\\_649\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/communication_on_visa_policy_to_spur_growth_com_2012_649_en.pdf).

European Commission (2012h), *Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010*, COM(2012) 472 final, Brussels, 28 August 2012, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0472:FIN:EN:PDF>.

European Commission (2012i), 'Second Commission report on the state of the Schengen area', Press release, IP/12/1256, 23 November 2012, available at: [http://europa.eu/rapid/press-release\\_IP-12-1256\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1256_en.htm).

European Commission (2012j), Notices from Member States; List of competent authorities the duly authorised staff of which shall have access to enter, amend, delete or consult data in the Visa Information System (VIS), OJ 2012 C 79/5, 17 March 2012.

European Commission (2012k), 'Visa Information System', 11 October 2012, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm).

European Commission (2013), 'List of third countries whose nationals are required to be in possession of an airport transit visa when passing through the international transit area of airports situated on the territory of one/some Member States' 15 January 2013, available at:



[http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/annex\\_7b\\_atv-national\\_lists.en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/annex_7b_atv-national_lists.en.pdf).

European Data Protection Supervisor (EDPS) (2008), *Preliminary Comments on the proposed border package*, 3 March 2008.

European Migration Network (EMN) (2012), *Visa Policy as Migration Channel in the Netherlands*, Rijswijk, EMN.

European Ombudsman (2012), 'Letter from the European Ombudsman opening own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations', 6 March 2012, available at: [www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark](http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark).

European Parliament, Committee on Civil Liberties, Justice and Home affairs (2011), *Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa*, Rapporteur: Marian-Jean Marinescu, 2011/0365(COD).

European Parliament, Council and European Commission (2000), Charter of Fundamental Rights of the European Union, 2000/C 364/01, OJ 2000 C 364/1, available at: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

European Parliament, DG for internal policies, Policy department C – Citizen's Rights and Constitutional Affairs (2011), *Implementation of the EU Charter of Fundamental Rights and its implications on EU home affairs agencies – Frontex, Europol and the European Asylum Support Office*, Brussels, available at: [www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/o2\\_study\\_fundamental\\_rights\\_/o2\\_study\\_fundamental\\_rights\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/o2_study_fundamental_rights_/o2_study_fundamental_rights_en.pdf).

European Parliament, DG for internal policies, Policy department C – Citizens Rights and Constitutional Affairs (2012), *Evaluating current and forthcoming proposals on JHA databases and a smart borders system at the EU external borders*, Brussels, available at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=79693>.

European Union, Committee of the Regions (2012), *EU Financial Instruments in Home Affairs*, CIVEX-V-030, 18 and 19 July 2012.

European Union, European Economic and Social Committee (2012), Opinion of the European Economic and Social Committee on the 'Proposal for a regulation of the European Parliament and of the Council establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa', COM(2011) 750 final, OJ 2012 C 299/108, 4 October 2012.

Eurostat (2013), 'Migration and migrant population statistics', migr\_asyappctzm, data extracted on 14 March 2013.

Finland, Government bill (*hallituksen esitys/regeringens proposition*) to the Act on Treatment of Persons in Police Custody, 29 September 2006.

Frontex (2012a), *FRAN Quarterly*, Issue 3 – July-September 2012.

Frontex (2012b), Best Practice Operational Guidelines for Automated Border Control Systems (ABC), Warsaw, Frontex available at: [http://www.frontex.europa.eu/assets/Publications/Research/Best\\_Practice\\_Operational\\_Guidelines\\_for\\_Automated\\_Border\\_Control.pdf](http://www.frontex.europa.eu/assets/Publications/Research/Best_Practice_Operational_Guidelines_for_Automated_Border_Control.pdf).

Frontex (2012c), Best Practice Technical Guidelines for Automated Border Control Systems, Warsaw, Frontex.

Frontex (2012d), Programme of Work 2012, Warsaw, Frontex, available at: [www.frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Work\\_programme/2012/frontex\\_pow\\_2012.pdf](http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Work_programme/2012/frontex_pow_2012.pdf).

Germany, Administrative Court Berlin, 35<sup>th</sup> Chamber, 35 K 468.10 V (*Verwaltungsgericht Berlin, 35. Kammer, VG Berlin*).

Germany, Higher Administrative Court of Saxony, 3<sup>rd</sup> Senate, 3 B 151/12 (*Sächsisches Oberverwaltungsgericht, 3. Senat*), OVG Saxony.

Germany, Administrative Court Dresden, 3<sup>rd</sup> Chamber, 3 K 168/11 (*Verwaltungsgericht Dresden, 3. Kammer*), VG Dresden.

Hungary, Consular services (2012), 'List of third countries, where Hungary issues visas on behalf of other Schengen states' available at: <http://konzuliszolgalat.kormany.hu/hungary-issues-visas-on-behalf-of-other-countries>.

Il Manifesto (2012), 'Quel buco nero a Fiumicino', 27 April 2012, available at: <http://blog.ilmanifesto.it/babel/tag/lasciatecientrare-fiumicino/>.

Italy (2012), TAR Lazio 3223/2012.

La Repubblica (2012), 'Naufragio a Lampedusa, un morto la paura di una strage del mare', 7 September 2012.

Lithuania, Supreme Administrative Court of Lithuania, No. A662-372/2012, *K. M., H. M., L. M. and S. M. v. Ministry of Foreign Affairs of the Republic of Lithuania*.

Lithuania, Supreme Administrative Court of Lithuania, No. A756-35/2012, *D. V. v. Ministry of Foreign Affairs of the Republic of Lithuania*.

Netherlands, District Court The Hague (*Rechtbank's-Gravenhage*), LJN: BW6771, No. 12/118, 29 May 2012.

Postimees (2012), *'Kongolanna elas pea kaks nädalat Tallinna lennujaamas'*, 5 April 2012.

Pro Asyl (2012), *Walls of Shame, Accounts from the inside: the detention centres in Evros, Frankfurt, Pro Asyl*.

Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in case of denied boarding and cancellation or long delays, and national carriers' liability legislation OJ 2004 L 046/1, 17 February 2004.

Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Regulation (EC) No. 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ 2008 L 218/60.

Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas to the Community Code on Visas (Visa Code), OJ 2009 L 243/1.

Regulation (EU) No. 1077/2011 of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ 2011 L 286/1.

Regulation (EU) No. 154/2012 of the European Parliament and of the Council of 15 February 2012 amending Regulation (EC) No. 810/2009 establishing a Community Code on Visas (Visa Code); OJ 2012 L 58/3 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:058:0003:0004:EN:PDF>.

Slovakia, Act on Residence of Foreigners.

Slovenia, Ministry of Interior (2013), *Handbook for police detentions*, revised, February 2013 (*Priročnik za izvajanje policijskega pridržanja, Ministrstvo za notranje zadeve, spremenjeno februarja 2013*).

The International Air Transport Association (IATA), Control Authorities Working Group (CAWG) (2002), *A Code of Conduct for Immigration Liaison Officers*, Montreal, International Air Transport Association Control Authorities Working Group.

United Nations (UN), International Civil Aviation Organisation (1944), 'Inadmissible persons and deportees', in: *Chicago Convention on International Civil Aviation*, Annex 9, Chapter 5.

UN Special Rapporteur on the Rights of Migrants (2012), 'UN Special Rapporteur on the human rights of migrants concludes the fourth and last country visit in his regional study on the human rights of migrants at the borders of the European Union: Greece', 3 December 2012.



3	INFORMATION SOCIETY AND DATA PROTECTION .....	101
3.1.	Reform of EU data protection legislation .....	101
3.2.	Complete independence of Data Protection Authorities .....	105
3.3.	Data retention .....	105
3.4.	Passenger Name Record (PNR) data .....	106
3.5.	Biometric passports .....	107
3.6.	The protection of intellectual property rights .....	108
3.6.1.	Anti-Counterfeiting Trade Agreement (ACTA) .	108
3.6.2.	CJEU analyses the limits of the protection of intellectual property rights .....	109
3.7.	Social media and internet-based services .....	109
3.7.1.	Facebook .....	109
3.7.2.	Google .....	110
	Outlook .....	111
	References .....	112



## UN & CoE

18 January – Council of Europe publishes the first proposal for the modernisation of Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data

January

February

15 March – Council of Europe adopts an internet governance strategy

March

4 April – Council of Europe adopts the Recommendation to member states on the protection of human rights with regard to search engines

April

May

June

July

August

September

23 October – UN Office on Drugs and Crime issues a report on *The use of the Internet for terrorist purposes* arguing for more surveillance and retention of data on all communications

October

29 November – Consultative committee adopts the modernisation proposals for Convention 108, which will be examined by an inter-governmental Council of Europe committee in 2013 in view of their submission for adoption to the Committee of Ministers

November

December

## EU

6 January – Article 29 Data Protection Working Party publishes a letter to the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee about the new draft agreement on the transfer and use of Passenger Name Records (PNR), initialled by the European Commission and the United States (US)

25 January – European Commission proposes a comprehensive reform of data protection rules

January

16 February – Court of Justice of the European Union (CJEU) rules in *Sabam v. Netlog (C-360/10)* that a social network cannot be obliged to install a general filtering system covering all its users in order to prevent the unlawful use of musical and audiovisual work.

February

7 March – European Data Protection Supervisor issues an opinion on the European Commission's data protection reform package

19 March – European Commission Vice-President Viviane Reding and US Secretary of Commerce John Bryson issue a joint European Union (EU)-US statement on data protection at the High Level EU Conference on privacy and protection of personal data

23 March – Article 29 Data Protection Working Party adopts its opinion on the data protection reform proposals of the European Commission

March

19 April – CJEU rules in *Bonnier Audio AB and Others v. Perfect Communication Sweden AB* on the lack of applicability of the EU Data Retention Directive in the enforcement of intellectual property rights

April

3-4 May – Spring Conference of the European Data Protection Commissioners issues a resolution on European data protection reform

10 May – European Commission submits a request to the CJEU for an opinion on the Anti-Counterfeiting Trade Agreement (ACTA)

23 May – European Economic and Social Committee issues an opinion on the General Data Protection Regulation

29 May – Body of European Regulators for Electronic Communications releases net neutrality findings

May

8 June – European Commission brings Hungary before the CJEU, requesting the court to declare that Hungary failed to fulfil its obligations under the Data Protection Directive (1995/46/EC) by prematurely removing the data protection supervisor from office

June

4 July – European Parliament rejects ACTA

11 July – European Commission brings Germany before the CJEU for non-transposition of the Data Retention Directive (2006/24/EC)

July

August

September

1 October – FRA (European Union Agency for Fundamental Rights) issues an opinion on the proposed data protection reform package

5 October – Article 29 Data Protection Working Party issues its opinion on the data protection reform package, providing further input to the discussions

10 October – Committee of the Regions adopts its opinion on the data protection reform package at the October plenary session

16 October – CJEU rules that the Austrian Data Protection Authority does not fulfil the requirements of independence as outlined in the Data Protection Directive

October

November

20 December – European Commission withdraws its request to the CJEU for an opinion on ACTA

December