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UN & CoE

January

February

March

24 April – The UN Special Rapporteur on the human rights of migrants publishes his findings on the management of the external borders of the EU and its impact on human rights of migrants

25 April – In *Savridin Dzhurayev v. Russia*, the ECtHR reiterates the obligation to comply with interim measures issued by the court under Rule 39 of the Rules of the Court

April

May

June

July

August

5 September – In *I. v. Sweden*, the ECtHR clarifies that the right of a state to intervene in cases lodged by one of its nationals against another state set forth in Article 36 of the ECHR does not apply to cases where the applicant raises fear of being returned to his or her country of nationality

September

October

November

December

EU

17 January – In *Mohamad Zakaria*, the CJEU confirms that border checks have to be carried out with full respect for human dignity

January

28 February – The European Commission proposes the Smart Borders package

February

14 March – Visa Information System (VIS) becomes operational in west and central African countries, 2013/122/EU

21 March – In *Shomadi*, the CJEU clarifies that a holder of a local border traffic permit pursuant to Regulation (EC) No. 1931/2006 has a right to move freely within the border area for a period of three months and to have a new right to a three-month stay each time that his or her stay is interrupted (this duration of stay differs from the normal Schengen rules)

March

9 April – The second-generation Schengen Information System (SIS II) becomes operational

12 April – The European Commission proposes new rules for Frontex-coordinated sea operations

April

May

6 June – VIS becomes operational in east and southern Africa, 2013/266/EU

26 June – Regulation (EU) No. 610/2013 amends parts of the Schengen Borders Code, strengthening its fundamental rights provisions

June

July

August

5 September – VIS becomes operational in South America, 2013/441/EU

30 September – The last set of regions for introducing VIS are determined

September

7 October – Regulation (EU) No. 1053/2013 establishing a new evaluation and monitoring mechanism to verify the application of the Schengen *acquis* is published

17 October – Through its ruling in *Michael Schwarz v. Stadt Bochum*, the CJEU endorses storage of biometric data in passports

22 October – Regulation (EU) No. 1052/2013 establishing Eurosur is published

22 October – Regulation (EU) No. 1051/2013 on temporary reintroduction of border control at internal borders in exceptional circumstances is published

October

14 November – VIS becomes operational in southeast and central Asia, as well as in the occupied Palestinian territories

November

4 December – European Commission *Communication on the work of the Task Force Mediterranean*

19 December – In *Koushkaki*, the CJEU provides guidance on the refusal of Schengen visas

December

2

Border control and visa policy



In 2013, there was a jump in irregular arrivals of third-country nationals at the European Union's (EU) southern sea borders, as well as pressure on the Greek and Bulgarian land borders from Syrians fleeing civil war. These made it all the more urgent for the EU to modernise its border control, also in the light of fundamental rights. As part of the overhaul of its legal framework, the EU adopted important pieces of border control and visa policy legislation and began deliberations on another five proposals. Although these instruments primarily seek to manage access to the EU, they all affect fundamental rights. The EU also continued to deploy modern technologies in the border and visa areas. The risks and benefits, however, that these modern technologies pose for the upholding of fundamental rights remain largely unexplored. The European border surveillance system, originally intended for fighting irregular migration, has the potential, if properly implemented, to save the lives of migrants at sea. The smart borders proposals triggered, for example, fundamental rights concerns over the possibility that the technology might contribute to mislabelling some third-country nationals as overstaying their visas.

2.1. EU adopts and proposes new legislation

The EU reshaped its legislation in this field in 2013. It adopted new regulations and the European Commission proposed another five. In addition, the second generation of the Schengen Information System (SIS II), which holds information on persons and objects wanted or missing in the Schengen area, started operations on 9 April 2013.¹ The application of the Visa Information System (VIS), which stores data on third-country nationals applying for short-term visas, continued to be expanded in Africa,² South America,³ Central Asia⁴ and South-East Asia⁵ and was extended to the occupied Palestinian territories. The remaining regions for VIS roll-out have now also been determined.⁶ By the end of 2013, one quarter of all visa applications, and two thirds of refused visas, were registered in VIS.⁷

Key developments in the area of border control and visa policy

- The EU adopts a regulation on the European border surveillance system, Eurosur, set up to fight irregular immigration, prevent cross-border crime and contribute to the protection of migrants' lives at sea.
- The European Commission tables the smart border package, which suggests the fingerprinting of all short-term visitors to the EU (entry/exit system) and the creation of a programme to facilitate border checks for frequent travellers (Registered Travellers Programme).
- SIS II, an upgraded version of the Schengen Information System which stores biometric data, becomes operational after years of delay.
- The gradual regional roll-out of the Visa Information System (VIS) continues.
- The Schengen rules are amended, introducing a new evaluation and monitoring system, revising rules for the reintroduction of intra-Schengen border controls and strengthening fundamental rights.
- Frontex's Fundamental Rights Officer and Consultative Forum are operational and advise Frontex on fundamental rights issues.
- The European Commission presents a proposal for a regulation establishing rules for Frontex-coordinated sea operations.

The adopted instruments are listed in [Table 2.1](#). Although fundamental rights are normally not at the core of these instruments, they are relevant to fundamental rights.

[Table 2.2](#) lists the new regulations the European Commission proposed in 2013. They include new rules for Frontex-coordinated sea operations, which

Table 2.1: Overview of adopted legislation in 2013

Instrument and subject	Date of adoption	Main issue(s) relating to fundamental rights
<i>Regulations</i>		
Amendments to the Schengen Borders Code Regulation (EU) No. 610/2013	26 June	A new article on fundamental rights is added – Article 3(a); the provision on the need to respect human dignity during border checks now includes an express reference to vulnerable persons – Article 6(1); clear rules have been introduced in the annex to the code on how to deal with asylum applications submitted at border-crossing points shared with third countries
Creation of a European border surveillance system (Eurosur) Regulation (EU) No. 1052/2013	22 October	The purpose of Eurosur is also to contribute to ensuring the protection and saving the lives of migrants, which must be monitored and evaluated; it includes strong data protection safeguards; it is prohibited to share information with third countries which could use them to violate migrants' fundamental rights
Revised system to monitor and evaluate application of the Schengen <i>acquis</i> Regulation (EU) No. 1053/2013	7 October	The system covers the entire Schengen <i>acquis</i> , thus including its fundamental rights provisions, and, although these are not explicitly referred to in the regulation, they will also be assessed during Schengen evaluations
Temporary introduction of controls at internal EU borders in case of serious deficiencies of external border controls Regulation (EU) No. 1051/2013	22 October	The reintroduction of internal border controls is exceptionally allowed if there is a serious threat to public policy or to internal security, circumscribing limitations to the free movement of persons within the Schengen zone
Amendments to visa requirements Regulation (EC) No. 1289/2013	11 December	A mechanism for suspending the visa waiver in emergency situations is introduced. It may make it more difficult for persons in need of protection to leave their countries
<i>Other instruments</i>		
SIS II becomes operational on 9 April Council Decision 2013/158/EU and 2013/157/EU	7 March	SIS II introduced the possibility of storing fingerprints and facial images and exchanging such data. It includes data protection safeguards
Commission implementing decisions on the roll-out of VIS: 2013/122/EU 2013/266/EU 2013/441/EU 2013/642/EU	7 March 5 June 20 August 8 November	Third-country nationals applying for visas will be fingerprinted and information on applicants included in the VIS database. VIS includes data protection safeguards
Commission implementing decision determining the remaining regions for the VIS roll-out: 2013/493/EU	30 September	When VIS becomes operational, third-country nationals applying for visas will be fingerprinted and information on applicants included in the VIS database

Source: <http://eur-lex.europa.eu>

have a substantial bearing on the rights of migrants and refugees intercepted or rescued at sea. The other three legislative proposals are usually referred to as the smart border package, consisting of the entry/exit system, for the electronic recording of the dates of entry and exit of third-country nationals, and the Registered Travellers Programme, facilitating border crossing for bona fide travellers. (For more information on these proposals and their fundamental rights implications, see [Section 2.2](#).)

The new legislation adopted in 2013 and the proposed legislation have a particular impact on the work of Frontex as well as on the EU Agency for Large-Scale IT [information technology] Systems (eu-LISA), which manages VIS and the SIS II central databases, in addition to Eurodac (see [Chapter 1](#) on asylum, immigration and integration). Under the Eurosur Regulation, Frontex is jointly responsible with Member States for maintaining and updating the European Situational Picture and Situational Picture on the area beyond EU frontiers and ensuring the smooth running of the Eurosur coordination network.

Frontex continued its efforts to incorporate fundamental rights into its activities. The Frontex Fundamental Rights Officer and its Consultative Forum – a body of 15 organisations with fundamental rights expertise – contributed substantially to the mainstreaming of fundamental rights into Frontex activities. The Fundamental Rights Officer reviewed and commented on the operational plans of Frontex-coordinated operations. Frontex adopted a Code of Conduct for Joint Return Operations

coordinated by Frontex on 7 October 2013 and published it in November 2013, drawing on input from the Consultative Forum and the Fundamental Rights Officer. The Consultative Forum visited the Frontex operation Poseidon in Greece and Bulgaria to gain a better understanding of the challenges in operationalising fundamental rights. The European Ombudsman issued a report in November 2013 following an inquiry launched on its own initiative seeking to clarify how Frontex implements fundamental rights.⁸ Whereas the European Ombudsman acknowledged that Frontex adequately addressed 12 out of 13 recommendations submitted by her,⁹ little progress was made on introducing a complaints mechanism for fundamental rights infringements in all Frontex-labelled joint operations. By the end of the year, Frontex and its Fundamental Rights Officer were working to establish an effective monitoring mechanism.

2.2. Number of arrivals in southern Europe rises

In 2013, an increasing number of persons undertook a perilous journey by sea, seeking safety from persecution and violence or poverty, or to join their families in Europe. As [Figure 2.1](#) shows, the total number of third-country nationals arriving on Europe's shores increased substantially in 2013, reaching some 57,000 persons. Increases were particularly visible in **Greece** and **Italy**. Arrivals by sea in the eastern and central Mediterranean increasingly include Syrians fleeing domestic conflict. In **Italy** in 2013, the number

Table 2.2: Overview of EU legislation proposed in 2013

Instrument	Status at year end	Commission proposal
New rules for Frontex-coordinated sea operations, dealing with sensitive issues such as where to disembark migrants rescued at sea	Council and European Parliament finalised their position and started negotiations in December 2013	COM(2013) 197 final, 12 April 2013
Regulation to register entry and exit data of third-country nationals (<i>entry/exit system</i>)	Council and European Parliament are still defining their positions	COM(2013) 95 final, 28 February 2013
Amendments to the Schengen Borders Code necessary to introduce an <i>entry/exit system</i> and a <i>registered traveller programme</i>		COM(2013) 96 final, 28 February 2013
Regulation to establish a <i>registered traveller programme</i> allowing simplified border crossing for screened passengers		COM(2013) 97 final, 28 February 2013
Abolishing visa requirements for Moldovans	Proposal tabled	COM(2013) 853 final, 27 November 2013

Source: <http://eur-lex.europa.eu>

of arrivals by sea was the second-highest in the last 10 years, after the 2011 events in Tunisia and the civil war in Libya persuaded over 60,000 persons to make the journey. In 2013, 43,000 persons arrived at Italian coasts. The authorities continued to collaborate with international organisations and NGOs which were part of the Praesidium project, a promising practice identified by the FRA report on Europe’s sea borders.

As indicated in last year’s Annual report, in **Greece**, increased arrivals by sea mirror a substantial reduction of irregular crossings at the Greek land border in the Evros region, after the deployment of some 1,800 additional police officers at the border and the December 2012 construction of a 12-kilometre-long fence along the land border with Turkey. Amnesty International and ProAsyl reported collective expulsions of refugees and migrants in the Aegean Sea.¹⁰ Many of those who cross come from refugee-producing countries, such as Eritrea, Somalia and Syria.¹¹

Irregular land crossings shifted from **Greece to Bulgaria**.¹² In addition, in 2013 the number of irregular migrants increased substantially, including in **Hungary** (25,000 persons). Bulgaria followed Greece’s example by deploying an additional 1,500 police officers on the border and debated the construction of a 30-kilometre-long border fence,¹³ covering some 12 % of its land border with Turkey. As a result of the actions taken, in December 2013 the number of irregular arrivals fell dramatically. Given that a significant number of persons crossing the

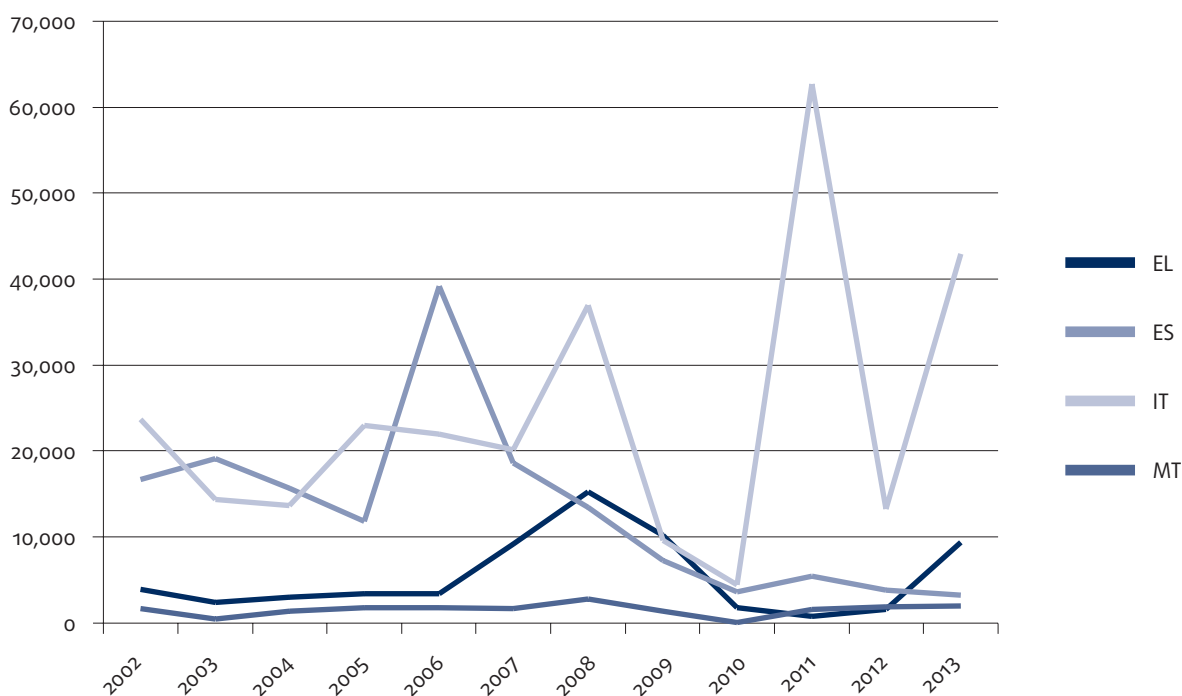
Turkish–Bulgarian land border were Syrians, the question arises whether people who could be in need of international protection are at risk of being denied entry.

In 2013, in line with the five-year trend, **Spain** saw another decrease in sea arrivals, while the borders between Spain and Morocco at the cities of Ceuta and Melilla – the only land borders between Europe and Africa – experienced a considerable increase in pressure by both land and sea. As a result, Spanish authorities introduced additional measures to stop entries over the fences by adding a razor-wire barrier to the Melilla fence and reinforcing surveillance.

According to information provided to FRA by the Spanish NGO CEAR (*Comisión Española de Ayuda al Refugiado*), those who manage to reach Ceuta and Melilla include persons from Syria, Somalia or Mali who may be in need of international protection. Only very few applied for international protection, however, and, of these, citizens of Syria, Côte d’Ivoire, Cameroon and Mali are said to have withdrawn their applications.¹⁴ Institutions such as the Ombudsman and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance recommended a policy review to ensure access to asylum and fair and efficient asylum procedures in the enclaves.¹⁵

Border surveillance policies must be implemented with full respect for fundamental rights, including the principle of *non-refoulement* and the prohibition of collective

Figure 2.1: Arrivals of third-country nationals by sea in four EU Member States, 2003–2013



Source: National police data, 2013

expulsion set forth in Articles 18 and 19 of the Charter of Fundamental Rights. In 2013, the EU strengthened fundamental rights safeguards by introducing a new Article 3a into the Schengen Borders Code. It obliges Member States to apply the code in full compliance with the EU Charter of Fundamental Rights and with “obligations related to access to international protection”. This creates an enhanced opportunity for the EU to monitor and evaluate, through the new Schengen governance system, whether such fundamental rights safeguards are put into practice. It should help to ensure that no EU funds are allocated to policies which undermine such standards. The construction of fences, as undertaken or planned at sections of land borders in Bulgaria, Greece and Spain, limits the ability of persons in need of international protection to seek safety. Many undocumented asylum seekers who would try to use official border-crossing points would be intercepted by third-country authorities before reaching the external EU border.

2.3. Large-scale IT systems in the areas of borders and visas

Important steps were taken in 2013 towards the increased use of modern technologies in the field of asylum (for more information on Eurodac, see also ► Chapter 1 on asylum, immigration and integration), visa and border management, making it possible to collect and store information not only on third-country nationals but also on EU citizens.

The new version of the Schengen Information System, SIS II, which contains information on entry bans, became operational on 9 April. The application of the Visa Information System (VIS), storing personal data and biometric identifiers (fingerprints) of visa applicants, was extended to more than 70 states in Africa, Latin America and Asia. It also includes information on the invitees (sponsors of the visa applicant, often EU citizens) but not their biometric information. The worldwide VIS roll-out will continue in 2014.

At the end of 2013, three existing IT systems were operational.

- SIS II holds data on persons and objects (such as banknotes, cars, vans, firearms and identity documents) wanted or missing in the Schengen area, as well as on persons to be denied entry into Schengen.
- VIS collects data on third-country nationals applying for short-term visas.
- Eurodac primarily tracks persons lodging asylum requests.

Fingerprints can be stored in all three databases. Through the Automated Fingerprint Identification System (AFIS),¹⁶ fingerprints can later be compared with those stored in VIS and Eurodac. The EU Member States will also use SIS II in the same way, once this is possible technically.¹⁷

In addition, the creation of two further IT systems was proposed in 2013 as part of a package on ‘smart borders’. These are:

- an entry/exit system to record entry and exit data of each third-country national at the external border and to record who are entitled to stay in the EU for a period not exceeding three months (short stay) regardless of whether they are exempted from a visa or not;
- a registered travellers programme to allow pre-vetted third-country nationals who are at least 12 years old and travel frequently to pass through a simplified border check with the use of a token.

In spite of the speed of technological and policy developments, risks and benefits for fundamental rights that modern technologies create are not fully known, particularly in the context of VIS and SIS II. FRA recently reported on the difficulties EU citizens face when accessing remedies for data protection violations. One reason is that only a few civil society organisations are available to support victims of data protection violations in complaints procedures.¹⁸ Because most of the data subjects referred to in this chapter are third-country nationals, they can be expected to have even less access to support organisations.

New technologies may also bring with them opportunities for improved fundamental rights protection. Using biometrics minimises mistakes in identification, which may be an advantage for the person concerned. The risk of being mistakenly identified as a wanted criminal should be close to non-existent. Perhaps there are possibilities to optimise SIS II for identification of missing children, for instance.¹⁹ These are topics which are as yet largely unexplored and affect fundamental rights.

The ‘smart borders’ proposal prompted a discussion on its fundamental rights impact. The concerns raised relate to data protection, the right to privacy and whether the proposal meets its objective of counteracting irregular migration, since the EU does not have a clear policy on managing over-stayers.²⁰ Such a policy should not only include the removal option. It should also include measures to ensure that persons who cannot be removed are not left in legal limbo but receive, at a minimum, a certification of postponed removal.²¹ The European Data Protection Supervisor, for example, noted in its opinion that the ‘smart borders’ proposal is costly, unproven and intrusive.²² NGOs have also pointed to

the high costs, and have raised concerns in relation to data protection issues²³ and on the proportionality of collecting large amounts of personal data, including fingerprints. The entry/exit system would collect the fingerprints of third-country nationals who are not required to hold visas, whereas those required to hold a visa are already included in VIS. As the database will provide information only on whether a person has left the EU on time but not on the location of over-stayers, the question arises whether the entry/exit system can contribute to combating irregular migration.²⁴ However, VIS includes information on the inviters, which can be relevant when trying to locate over-stayers.

A few governments have actively consulted civil society on the 'smart borders' proposals. When requested to present its views, the **Danish** Institute for Human Rights (*Institut for Menneskerettigheder*) expressed concern about the necessity of establishing these systems and recommended assessing how the fundamental rights of third-country citizens would be affected. The institute also highlighted the importance of the right to information about the proposal and recommended that this information be made available in the relevant languages.²⁵ In **Finland**, the government invited civil society representatives to its meetings on the smart borders proposal. The representatives expressed concerns about the threshold for access to the database by law enforcement and sought safeguards to ensure that persons granted a right to stay (such as asylum seekers) do not appear as over-stayers.²⁶

Fundamental rights concerns in the context of large systems and biometrics relate to the necessity and proportionality of the information and data protection safeguards in place. Other relevant fundamental rights are non-discrimination, the right to asylum, the right to leave your country, the protection of persons with disabilities, older persons and children, and the right to liberty and security of person (if the person is detained as a consequence of being wrongly entered in SIS II or the entry/exit system, or not entered, in which case the departure of the person from the territory of the EU Member States will not have been registered).²⁷

Table 2.3 illustrates these information technology systems, the categories of persons they cover, the type of biometric data stored and the number of persons they cover.

In addition, VIS (Article 9) and the proposed Registered Travellers Programme (Article 25) include provisions on storing the personal data of the person liable to pay the applicant's subsistence costs during the stay. The inviting person could be either an EU citizen or a third-country national. These articles also provide for storage of information on the main purpose and destination, duration of travel, intended date of arrival and departure, border of first entry, place of residence,

current occupation and employer, and for students the name of the educational establishment.

The processes for taking fingerprints need to respect the dignity of the person. Responding to proposals by civil society, the **Netherlands** also plans to introduce fingerprint-free identity documents.²⁸ Persons whose fingertips are burnt or worn down, or who have been working manually, may be unable to provide fingerprints. In this case, the legitimate fundamental rights concern is if this person will be discriminated against in the context of decisions such as the granting of a visa. In the context of VIS, the principle of non-discrimination is respected, because, according to the Visa Code, "The fact that fingerprinting is physically impossible [...] shall not influence the issuing or refusal of a visa".²⁹ Alternatives for persons unable to register biometric data should not be stigmatising or profiling. It is also possible that technical or human errors cause failures in registering fingerprints. The **German** Federal Commissioner for Data Protection (*Datenschutzbeauftragter*) has raised the concern that travellers could appear in wanted lists by mistake because of technical shortcomings.³⁰ Therefore, data subjects need to be able to challenge a wrong data entry and to access an effective remedy (Article 47 of the Charter of Fundamental Rights of the European Union).

To facilitate return in line with the objective of counteracting irregular migration, the VIS Regulation (Article 31) and the proposed entry/exit system allow for data to be shared for return purposes, if protection safeguards are respected, with countries of origin and three international organisations (the International Organization for Migration, the United Nations High Commissioner for Refugees and the Red Cross). The Article 29 Data Protection Working Party pointed to the need for strong safeguards when data are transferred to third countries where data protection standards are inadequate.³¹ Strong safeguards are indeed necessary, as such data transfers entail risks for the data subject and their family members if, for example, information is passed on to the country of origin that the data subject has applied for asylum in Europe.

EU Member States may outsource the registration of fingerprints to external service providers selected on the private market. The Visa Code makes Member States accountable for ensuring respect of human dignity and non-discrimination against applicants, including in case of outsourcing, and the Member States need to determine how they effectively ensure such accountability.

Large EU IT systems are managed by eu-LISA. Various authorities are allowed to search existing and planned databases. Europol and Eurojust may access certain categories of alerts in SIS, and Europol may also access VIS and Eurodac. At a national level, as illustrated in Table 2.3, such authorities may include law enforcement,



Table 2.3: Current and planned large EU IT databases including biometric data

	SIS II	VIS	Eurodac	Entry/exit system	Registered Travellers Programme (RTP)
Persons included	Third-country nationals to be refused entry; missing children; witnesses and persons required to appear before a judge (Convention implementing the Schengen Agreement, Articles 96–98)	Third-country nationals who apply for a short-stay visa, valid up to three months (VIS Regulation, Article 9; Visa Code, Article 13)	Asylum seekers and apprehended irregular migrants and refugees (Eurodac Regulation, Articles 9 and 14)	Third-country nationals who stay a maximum of three months, visa free or as visa holders (Entry-exit proposal, Articles 11 and 12)	Frequent travellers who benefit from simplified border checks (RTP proposal, Article 13)
Biometric identifier	Fingerprints (SIS II Regulation, Articles 20 and 22)	10 fingerprints if the applicant is at least 12 years old (VIS Regulation, Articles 5 and 9; Visa Code, Article 13)	10 fingerprints of persons who are at least 14 years old (Eurodac Regulation, Articles 9 and 14)	10 fingerprints of third-country nationals who are at least 12 years old (entry/exit proposal, Article 12)	Four fingerprints of persons who are at least 12 years old (RTP proposal, Articles 5 and 8)
Authorities having access	Law enforcement, judicial authorities and authorities responsible for border controls, customs checks and visas (SIS II Regulation, Article 27)	Visa authorities, authorities responsible for border controls and immigration law enforcement, and authorities responsible for investigating serious criminal offences (VIS Regulation, Articles 3, 6 and 15–22)	Asylum authorities, law enforcement authorities after 2015 (Eurodac Regulation, Articles 5 and 46)	Border, visa and immigration authorities (Entry-exit proposal, Article 7). Law enforcement authorities (following an evaluation two years after entry into force, Entry-exit proposal, Article 46)	Visa and border authorities of any Member State (RTP proposal, Articles 3(8) and 23)
Data retention	Depends on the type of alert, maximum three years and possibility to prolong (SIS II Regulation, Article 29)	Maximum five years (VIS Regulation, Article 23)	Asylum seekers maximum 10 years; irregular immigrants maximum 18 months (Eurodac, Articles 12 and 16)	181 days for exiting persons and five years for over-stayers (Entry-exit proposal, Article 20)	Maximum five years (RTP proposal, Article 34)

Source: FRA, 2014

judicial authorities, asylum authorities and authorities responsible for border controls, customs checks and visas. EU Member States are required to specify the individual authorities that have permission to search data and for what purpose.³² Nevertheless, access by law enforcement authorities to Eurodac and to the planned entry/exit system has been contentious, because of possible indirect discrimination against asylum seekers among other reasons. The police have access to fingerprints of all asylum seekers and refugees, but usually

not of all EU citizens or third-country nationals staying in their territory, so asylum seekers and refugees are more likely than other segments of the population to appear in criminal statistics.³³ In the context of the Data Retention Directive, a request for a preliminary ruling has been forwarded to the CJEU. The Advocate General has issued an opinion, saying that the directive itself, not the Member States, needs to define minimum guarantees for accessing data and their use. He also questions the justifications given for keeping the data

- ▶ for up to two years (see also Chapter 3 on information society, respect for private life and data protection).

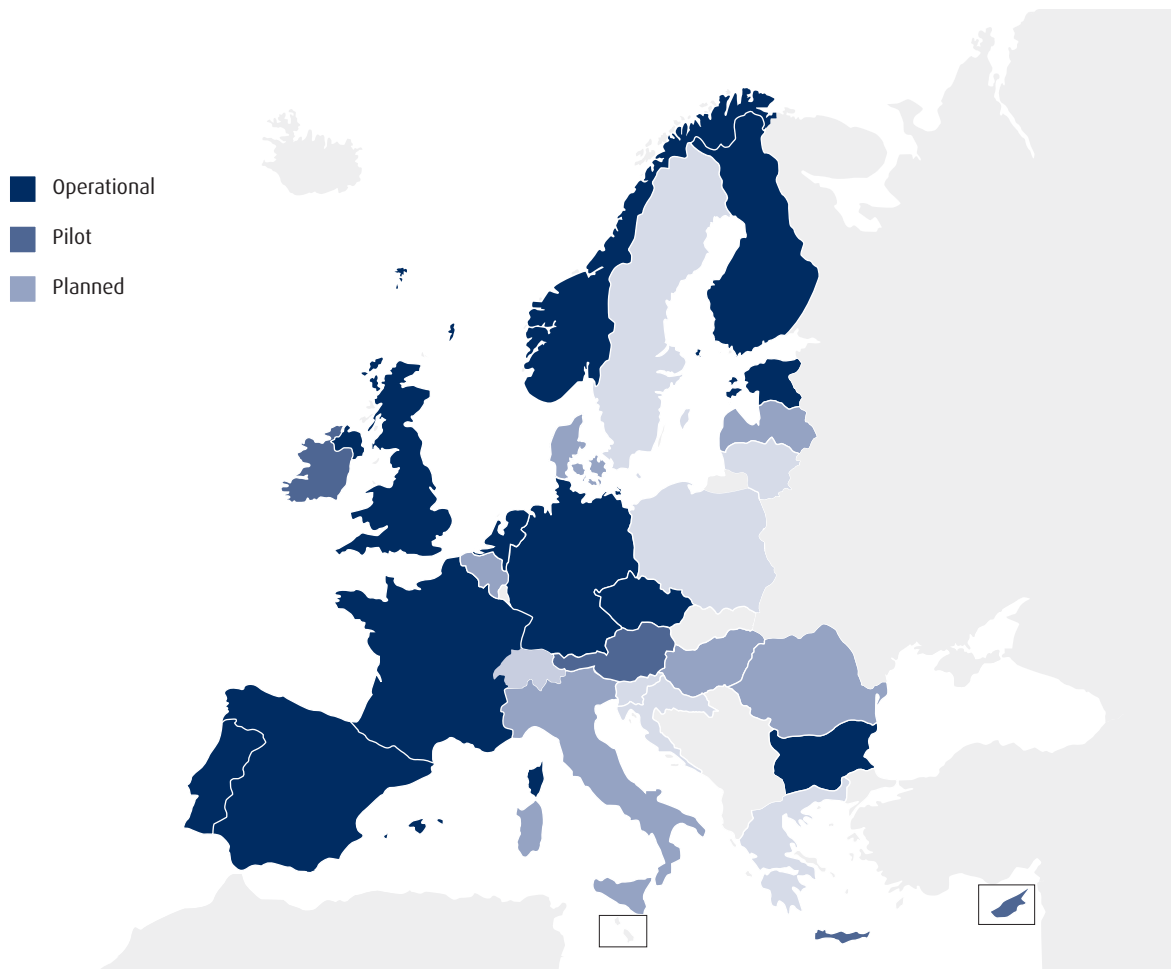
Critical points relating to large-scale databases include:

- Collecting and including information on the data subject – the data subject must have access to information on the biometric enrolment process, including measures in place to control the quality, purpose and content of the personal data stored in addition to fingerprints and how long the information will be kept.
- Storing information on the data subject – it is vital to ensure the lawfulness of data operations and access to information stored, and that information is not kept longer than allowed.
- Authorities’ access to information on the data subject – the access to the databases to undertake searches should be well defined to limit users’ discretion.

The entry/exit system and the Registered Travellers Programme are planned to operate also through automated border controls, usually referred to as ABC-gates. This would speed up the entry process. At the end of 2013, 10 EU Member States had introduced automatic border controls, at least at some of their border crossing points. Another six Member States were piloting these, as Figure 2.2 illustrates. Most ABC systems currently use facial recognition as the main biometric authentication method. ABC-gates are normally available only for EU citizens, with minor exceptions: the Flux programmes in the **Netherlands** and ABG+ GE in **Germany** can be used by United States (US) citizens, and the **United Kingdom** is piloting a Registered Traveller Scheme for selected non-EU citizens (Australia, Canada, Japan, New Zealand and the USA). **Finland** has also piloted the use of e-gates by citizens from Japan, South Korea and the United States.

The automation of border checks affects fundamental rights, both putting them at risk and offering enhanced opportunities to safeguard them. EU citizens who enter

Figure 2.2: Deployment of automated border control gates, by EU Member State



Source: Frontex, 2013

the Schengen area, for example, ought not to be exposed to systematic data checks.³⁴ **Germany** therefore plans to introduce a mechanism that is intended to ensure that passengers are only randomly singled out for further checks, to prevent systematic checks of travellers. Persons whose fingerprints or faces are not recognised by the machine are directed to manual checks, but any assumption that such persons are high-risk migrants should be avoided. The gates may also make it more difficult to identify abducted children, at least if children can use the gates without border guard intervention, or to identify victims of trafficking in human beings, as FRA pointed out in its 2012 Annual report. Substituting machines for human judgment may, however, also reduce the risk that individual border guards discriminate on the basis of ethnic profiling when carrying out manual checks. Civil society is rarely consulted in the planning of ABC gates, but the United Kingdom, for instance, consults disability groups, which was reported as a promising practice in the FRA Annual report 2012.

FRA ACTIVITY

Analysing the fundamental rights aspects of biometric data

FRA will carry out a project analysing the fundamental rights implications of collecting, storing and using biometric data in large databases in the areas of visas, borders and asylum (Eurodac, VIS and SIS II). The project will contribute to the discussions on the effectiveness and weaknesses of these databases from a fundamental rights perspective. The findings will inform the debate on the smart borders proposals.

2.4. Towards a focus that includes the fundamental right aspects of EU visa policy

The European Commission has assessed the compatibility of Member States' legislation on the right to appeal with the EU Charter on Fundamental Rights, its public consultation on the treatment of visa applicants, and the suggestion of exploring possibilities for protected entry, such as guidelines on a common approach to humanitarian permits or visas. The results indicate an increasing trend towards viewing visa policies in a fundamental rights context.

Regulation 539/2001/EC, listing third countries whose nationals need a visa to enter the Schengen countries and those whose nationals are exempted from the

visa requirement, was amended in 2013. Among other objectives, the amendment allowed for the temporary reintroduction of visa requirements in emergency situations. This is when a Member State is faced with a major increase in the number of irregular immigrants and unfounded asylum requests originating from a particular country. The Member State may then ask the European Commission to suspend the visa waiver for that country. When a visa-exempt third country does not reciprocally respect the visa-free regime for the citizens of all Member States, the amendment also introduces a revised reciprocity mechanism with a view to enhancing the credibility of the EU visa policy and to enhance solidarity among Member States.³⁵

The arguments for introducing such an emergency clause have been irregular immigration and the submission of asylum requests by nationals of Western Balkan countries with low recognition rates for asylum or protection claims.³⁶ The Council of Europe Commissioner for Human Rights noted that the authorities of some Western Balkan states are restricting the departure of individuals whom they consider at risk of applying for asylum in an EU Member State. He noted that between 2009 and 2012, in the former Yugoslav Republic of Macedonia (FYROM) alone, about 7,000 citizens were not allowed to leave the country, because authorities confiscated the passports of those returned by an EU Member State.³⁷

Humanitarian visas

The idea of creating a 'humanitarian' visa for persons in need of protection has emerged as a consequence of the Syrian civil war. In principle, such a visa could be a long-term national visa or a short-term entry visa, governed by the EU common visa policy, followed by a permit once the person is in the EU. The Task Force Mediterranean indicates that the European Commission will explore possibilities for protected entry in the EU, possibly including guidelines on a common approach to humanitarian permits or visas.³⁸ Syrian nationals are subject to the short-stay visa requirement to enter the EU. In addition, 10 EU Member States (**Austria, Belgium, the Czech Republic, France, Germany, Greece, Italy, Luxembourg, the Netherlands and Spain**) require Syrian nationals to hold an airport transit visa when passing through the international transit areas of airports situated on their territory.³⁹ In a completely different context, the Visa Code⁴⁰ has developed a specific scheme facilitating the issuing of visas, for instance for members of the Olympic family⁴¹ (Article 49, Annex XI), responding to the particular, exceptional and temporary needs faced by the Schengen countries hosting Olympic Games. In its communication on Syria, the EU High Representative for Foreign Affairs called on Member States to adopt a generous attitude towards the granting of humanitarian visas, or entry permits, to persons displaced by the Syrian crisis who have family

members in the EU. However, some Member States have in contrast tightened their practices; for instance, as of 1 December 2013 **Denmark** will grant Syrians a Schengen visa only in extraordinary situations, for example the life-threatening illness or death of a family member resident in Denmark.⁴²

Treatment of visa applicants

EU Member States' consulates have an obligation to ensure that applicants are received courteously and their dignity is respected, according to Article 39 of the Visa Code. DG Home Affairs of the European Commission launched a public consultation between 25 March 2013 and 17 June 2013 to gather the views and experiences of the "main users" of the common visa policy.⁴³ A third of the 1,084 respondents, representing 17 nationalities, rated consular staff as not friendly. In general, most of the respondents complained that the employees of visa application centres, who are typically external service providers, were poorly informed and that they refused to accept applications for multiple entry visas. The respondents criticised that centres' services did not justify the high service charges, as, for instance, the staff did not take responsibility for the safety of passports entrusted to them. Embassies must ensure that external service providers, just like the embassies themselves, respect human dignity and the principle of non-discrimination.⁴⁴

More than half of the respondents (57 %) said that obtaining all the necessary supporting documents required for a visa is difficult. The aim of the EU visa policy is to facilitate legitimate travel and tackle illegal immigration. Almost half of the respondents said that they would avoid travelling to the Schengen area based upon their experiences with the visa process (46 %), whereas a slight majority (54 %) said that they would not be deterred.

The right to appeal a negative visa decision

From a fundamental rights point of view, a particularly important EU visa *acquis* safeguard is the right to appeal against a visa decision. The following paragraphs describe developments on this matter, building on the overview that FRA provided in its 2012 Annual report.⁴⁵

A visa applicant has the right to appeal if a visa has been refused, revoked or annulled.⁴⁶ After careful analysis of the information provided by EU Member States on the right to appeal against a visa refusal/annulment/revocation, the European Commission concluded that the right to an effective remedy and to a fair trial enshrined in Article 47 of the EU Charter of Fundamental Rights requires that the appeal against a visa refusal, annulment or revocation includes, at least or as the last instance of appeal, access to a judicial body. The Commission

considered that the Czech Republic, Estonia, Finland, Hungary, Poland and Slovakia are not compliant with Article 47 of the Charter combined with the relevant articles of the Visa Code, as these Member States do not provide access to a judicial body. Letters of Formal Notice were sent to these Member States in early 2013. The amending act introducing into Hungarian law the possibility for judicial review as a last instance of appeal against decisions to refuse, revoke or annul a Schengen visa entered into force on 1 July 2013.⁴⁷ The initial replies from the other Member States concerned stated their disagreement with the analysis made by the Commission.

To make the appeal effective, the applicant needs to have sufficient information on the grounds for refusal and the procedures to follow. The timelines, language and other formal requirements for submitting an appeal should not pose unsurmountable obstacles.

Table 2.4 illustrates how a few EU Member States address the right to appeal against a visa decision in practice. It gives examples of timelines for submitting an appeal and related language requirements, two important factors in deciding whether or not the right to appeal can be considered to constitute an effective remedy.

The reason for refusing a visa is often that the EU Member State doubts the applicant's intention to leave the Schengen territory before the visa expires. This was the subject in the *Koushkaki* case,⁵⁰ for which the Administrative Court in Berlin requested a preliminary ruling from the CJEU. The CJEU concluded that the Member State cannot refuse to issue the applicant a Schengen visa unless one of the grounds for refusal of a visa listed in the Visa Code is met.⁵¹ Refusal on other grounds based on national legislation is not allowed. The authorities have wide discretion in the examination of that application within the provision of the Visa Code, with a view to ascertaining if one of those grounds for refusal can be applied to the applicant. When deciding on the application, the authorities must be satisfied that there is no reasonable doubt that the applicant intends to leave the territory of the Member States before the visa expires. This must be determined in the light of the general situation in the applicant's country of residence and of the applicant's individual characteristics.

The Highest Administrative Court in **Austria** has, in three cases,⁵² said that consular staff must explain the concrete reasons why they doubt an applicant intends to return. Specifying the reasons enables applicants to submit counter-evidence, allowing them to benefit from an effective remedy.

The Supreme Administrative Court of **Lithuania** ruled that the conditions for issuing a visa under the Visa Code must be met.⁵³ According to Lithuanian national law, multiple-entry short stay visas may be issued to a foreigner if he or she owns property in the country.



Table 2.4: Schengen short-stay visa data, by EU Member State

EU Member State	Short-term Schengen visas issued	Short-term Schengen visas refused, revoked or annulled	Appeals against refusal, revocation or annulment	Decision reversed/to be re-examined	Language in which the appeal has to be submitted	Timeline for submitting the appeal
DE	1,900,738	162,241	520 judicial appeals ⁴⁸	3, and 30 out-of-court settlements	German	One month
DK ⁴⁹	99,894	6,279	787	82	Any language	No deadline
FR	2,337,231	249,018	2,295	786	French	Two months

Sources: Denmark, *Justitsministeriet*; France, *Ministère de la Justice*; Germany, *Bundesministerium der Justiz und für Verbraucherschutz*

In this case, a visa had been issued on this ground, but the Border Guards later revoked it because they were of the view that the uninhabitable property was being sold by one foreigner to another to abuse the right to enter Lithuania. The court was of the opinion that, under Article 34 (2) of the Visa Code, a visa shall be revoked where it becomes evident that the conditions for issuing it are no longer met. The court therefore considered that the sale of the property registered in Lithuania was sufficient ground to revoke the Schengen visa, because the purpose of the visa had disappeared.

Outlook

The purpose of Eurosur, the European border surveillance system, includes protecting and saving the lives of migrants. The implementation of the Eurosur Regulation, begun in December 2013, will show whether it will serve only to control immigration or operational, technical and financial aspects will be put in place so that it can live up to its life-saving commitments. These would include concrete guidance comprised in the Eurosur handbook, to be adopted by the European Commission. Statistics on persons rescued at sea will help monitor Eurosur's life-saving commitments.

An additional challenge for the upcoming years is developing ways for assessing how the use of modern technologies in border management affects fundamental rights. Victims of data protection violations generally face difficulties in accessing remedies, as the FRA report on *Access to data protection remedies in EU Member*

States referred to in this chapter shows. Because third-country nationals have even less access to legal assistance in complaint processes than EU citizens, they are in a particularly vulnerable situation. Provided they can raise the necessary resources, civil society organisations could be expected to focus increasingly on the implementation of fundamental rights safeguards in VIS and SIS II. They might also be expected to act as intermediaries so that victims of fundamental rights violations can make effective use of complaint mechanisms.

Discussions on the smart border proposals will continue, most likely accompanied by calls for an adequate assessment of their impact on fundamental rights in terms of opportunities and risks. Adequate safeguards to ensure fundamental rights are needed, since all third-country nationals coming for a short-stay visit will be included in the EU's large-scale databases. Through 'privacy by design', improved technologies may address some concerns. To reduce the risk of wrongly labelling somebody in the entry/exit system as an over-stayer, it will be increasingly important that exit registration can function not only at air borders but also at land and sea borders. Safeguards should also ensure that, if the third-country national has legal permission to stay, the system is updated.

EU Member States will increasingly have to consider fundamental rights implications when implementing visa policies. For example, applicants may more and more demand better explanations of why their visas have been refused, so that they can exercise their right to appeal.

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