January
26 January – Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2147 (2017) on the Need to reform European migration policies

February

March
3 March – Council of Europe Lanzarote Committee adopts the Special Report on Protecting Children affected by the Refugee Crisis from Sexual Exploitation and Abuse
14 March – In Ilias and Ahmed v. Hungary (No. 47287/15), the ECHR holds that Hungary violated the right to liberty and security (Article 5 (1) and (4) of the ECHR) and the right to an effective remedy (Article 13 – read in conjunction with Article 3 of the ECHR) of two asylum seekers by confining them without any legal basis in the transit zones, and violated Article 3 of the ECHR by expelling them to Serbia and exposing them to a risk of inhuman and degrading treatment (case referred to the Grand Chamber)
16 March – European Commission against Racism and Intolerance (ECRI) adopts General Policy Recommendation (GPR) No. 16 on safeguarding irregularly present migrants from discrimination
22 March – Special Representative of the Secretary General of the Council of Europe on Migration and Refugees publishes a thematic report on migrant and refugee children
30 March – In Chowdury and Others v. Greece (No. 21884/15), the ECHR condemns Greece for not preventing the trafficking and forced labour of 42 Bangladeshi migrants in an irregular situation, for not protecting them as victims and for not conducting an effective investigation

April

May

June
19 June – CoE Commissioner for Human Rights publishes an issue paper and recommendations on realising the right to family reunification of refugees in Europe
17 June – PACE adopts Resolution 2174 (2017) on the Human rights implications of the European response to transit migration across the Mediterranean as well as Resolution 2173 and Recommendation 2108 (2017) on a Comprehensive humanitarian and political response to the migration and refugee crisis

July

August

September
26 September – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment publishes its report on immigration detention in Greece

October
3 October – In N. D. and N. T. v. Spain (Nos. 8675/15 and 8697/15), the ECHR holds that the immediate return of migrants who were trying to enter Spain irregularly in Melilla constitutes a violation of the prohibition of collective expulsions of aliens (Article 4 of Protocol No. 4) and the right to an effective remedy (Article 13 of the ECHR taken together with Article 4 of Protocol No. 4) (case was referred to the Grand Chamber)
5 October – UN Security Council renews the enforcement powers of UN member states to fight migrant smuggling and human trafficking off the cost of Libya (S/RES/2380 (2017))
11 October – PACE publishes a guide on monitoring places where children are deprived of their liberty for immigration purposes and presents a study on immigration detention practices and the use of alternatives to immigration detention of children, calling on states to end immigration detention of children
19 October – CoE Special Representative of the Secretary General on Migration and Refugees publishes a report on the fact-finding mission to Serbia and the situation in the two transit zones in Hungary
26 October – Drafting Group on Migration and Human Rights (CDDH-MIG), CoE, adopts an analysis of the legal and practical aspects of effective alternatives to detention in the context of migration

November

December
6 December – Committee against Torture (CAT) adopts its revised General Comment (now No. 4) on the implementation of Article 3 of the Convention against Torture in the context of Article 22 (on the application of the principle of non-refoulement)
7 December – In S.F. and Others v. Bulgaria (No. 8318/16), the ECHR holds that Bulgaria violated the prohibition of inhumane and degrading treatment (Article 3 of the ECHR) by detaining three accompanied minor children for a brief time period in a border police detention facility unsuitable for children
30 March – In Confining them without any legal basis in the transit zones, and violated Article 3 of the ECHR by expelling them to Serbia and exposing them to
and (4) of the ECHR) and the right to an effective remedy (Article 13 – read in conjunction with Article 3 of the ECHR) of two asylum seekers by

22 March – Special Representative of the Secretary General of the Council of Europe on Migration and Refugees publishes a thematic report on

3 March – Council of Europe Lanzarote Committee adopts the Special Report on Protecting Children affected by the Refugee Crisis from Sexual

14 March – In

19 May – Committee of Ministers of the Council of Europe (CoE) adopts Action Plan on protecting refugee and migrant children (2017-2019)

6 December – Committee against Torture (CAT) adopts its revised General Comment (now No 4) on the implementation of Article 3 of the

Convention against Torture in the context of Article 22 (on the application of the principle of non-refoulement

7 December – In

Convention

9 February – In M. v. Minister for Justice and Equality, Ireland and the Attorney General (C-560/14), the CJEU rules that the right to be heard as
applicable in the context of the Qualification Directive does not require that an applicant for subsidiary protection has the right to an interview and the
right to call or cross-examine witnesses where two separate and successive procedures for examining applications - first for refugee status
and then for subsidiary protection - are prescribed in national legislation; an interview must nevertheless be held in certain specific circumstances
to examine the application with full knowledge of the facts

16 February – In C. K., H. F., A. S. v. Slovenia (C-578/16), the CJEU holds that the discretionary clause in the Dublin Regulation concerns the
interpretation of EU law; a Dublin transfer could constitute inhuman or degrading treatment in certain circumstances and national authorities need
to eliminate any serious doubts; they may choose to conduct the examination of the application instead, by using the discretionary clause

March

2 March – European Commission presents a renewed EU Action Plan on returns

7 March – European Commission issues recommendation on making returns more effective

7 March – In X. and X. v. Etat belge (C-638/16 PPU) the CJEU holds that the issuance of humanitarian visas to third-country nationals to enable them
to apply for international protection after their arrival to the Member State is outside the scope of EU law

15 March – In Salah Al Chehar and Others v. Czech Republic (C-528/15), the CJEU holds that an applicant for international protection can be detained
under the Dublin Regulation only if national law provides for objective criteria to determine if there is a risk of absconding

15 March – European Parliament (EP) and Council adopt Regulation (EU) 2017/458 obliging Member States to check all people, including EU
nationals, in relevant databases when they cross the external border

April

12 April – European Commission issues a communication on the protection of children in migration

May

June

8 June – Council of the EU and the representatives of the governments of the Member States issue Conclusions on the protection of children in
migration

21 June – In A. (C-9/16), the CJEU holds that identity or travel document checks near an internal EU border (for example, on trains) are only allowed
if in practice they do not have an equivalent effect to border checks

July


25 July – Council decision (CFSP) 2017/1385 extends the mandate of EUNAVFOR MED operation SOPHIA until 31 December 2018

26 July – In Tsegezab Mengisteab v. Bundesrepublik Deutschland (C-670/16), the CJEU holds that an applicant for international protection may
rely in legal proceedings on the fact that the three-month period for a take charge request (two-month in case of a Eurodac hit) under the Dublin
Regulation expired, even if the requested Member State is willing to take charge of the application

26 July – In A.S. v. Republic of Slovenia (C-490/16) and Khadija Jafari and Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl (C-646/16), the
CJEU confirms that the Dublin Regulation also applies in situations where an unusually high number of third-country nationals transit through
a Member State to seek asylum in another Member State, as occurred in 2015 and 2016

26 July – In Ouhrami (C-225/16), the CJEU holds that the period of the application of an entry ban starts when a person has actually left the territory
of the Member States

August

September

6 September – In Slovak Republic and Hungary v. Council of the European Union (joined cases C-643/15 and C-647/15), the CJEU dismisses the
actions brought by Hungary and Slovakia against a mandatory relocation mechanism of asylum seekers from Greece and Italy

13 September – In Mohammad Khir Amayry v. Migrationsverket (C-60/16), the CJEU explains how the time limits for detention in Dublin transfer
cases must be interpreted, and to what extent time limits enshrined in national law are precluded by the Dublin Regulation

14 September – In K. v. Staatssecretaris van Veiligheid en Justitie (C-18/16), the CJEU holds that the detention of an applicant for international
protection to determine or verify his or her identity or nationality can be compatible with the right to liberty, if compliant with a series of conditions


27 September – European Commission publishes progress report on the delivery of the European Agenda on Migration recommending to increase
legal pathways for persons in need of international protection

October

12 October – Bulgaria and Romania gain passive access to the Visa Information System but are still not allowed to enter, alter or delete data

25 October – In Majid Shiri v. Bundesamt für Fremdenwesen und Asyl (C-201/16), the CJEU rules that an applicant for international protection must
be able to challenge a Dublin transfer if this is not implemented within the six months set in the Regulation

residence permits for third-country nationals

November

30 November – EP and Council adopt Regulations (EU) 2017/2226 and (EU) 2017/2225 on the registration of entry and exit data of third-country
nationals at border crossing points (EU Entry/Exit System)

December

12 December – European Commission presents its proposals on interoperability of EU information systems in the field of police and judicial
cooperation, asylum and migration, and in the field of borders and visa

13 December – CJEU rules in Soufiane El Hassani v. Minister Spraw Zagranicznych (C-423/16) that Member States must provide for appeal
procedures when authorities issue a decision refusing a visa under the Visa Code, including the possibility for a judicial appeal at a certain stage of
proceedings
Irregular arrivals by sea halved compared to 2016, totalling some 187,000 in 2017. However, more than 3,100 people died while crossing the sea to reach Europe. Along the Western Balkan route, allegations of police mistreating migrants increased. Some EU Member States still struggled with the reception of asylum applicants. Migration and security challenges were increasingly linked, with large-scale EU information systems serving to both manage immigration and strengthen security. Meanwhile, the push to address irregular migration more effectively exacerbated existing fundamental rights risks.

6.1. Fundamental rights challenges persist as arrivals drop

Migration continued to be largely associated with people trying to reach Europe by sea in an irregular manner in 2017, with pictures of unseaworthy and crowded boats dominating media coverage. In terms of numbers, however, as Figure 6.1 illustrates, persons who come to the EU for study, research, or work purposes outweigh those who have received some form of international protection. In 2016, some 855,000 third-country nationals came to the EU for work, as did almost 700,000 students. The number of first residence permits granted to third-country nationals for family reasons amounted to 780,000 people. Meanwhile, in 2015, some 180,000 persons received residence permits based on being granted international protection, and some 465,000 did so in 2016. (Data for 2017 were not available at the time this report went to print.)

Globally, the number of displaced persons remained at a record, but arrivals in the EU dropped significantly. According to the European Border and Coast Guard Agency (Frontex), some 204,300 people entered EU territory irregularly in 2017 (compared to some 500,000 in 2016). Nigerians and Syrians formed the largest shares. Most crossed the Mediterranean Sea to reach Italy (some 119,000 people) or Spain (nearly 22,900); or crossed the land or sea borders into Greece (some 45,600 people). The number of people detected after entering the EU through the Eastern land borders and the Western Balkans remained limited (with some 10,500 people crossing the Croatian and Hungarian land borders irregularly in 2017).1

The main change in 2017 concerned Italy. Bilateral cooperation with the Libyan authorities resulted in a significant drop in the number of arrivals to Italy in the second half of the year, as Figure 6.2 shows.

Several measures contributed to the drop in arrivals. First, in February, Italy signed a Memorandum of Understanding with the Libyan Government of National Accord covering various areas, including the fight against irregular migration and trafficking in human beings.2 In early August, following a Libyan request, the Italian Parliament gave the green light to deploying military assets inside Libyan territorial waters.3 Financial support to enhance Libyan border and migration management followed.4 Meanwhile, the Libyan Coast Guard increased their search and rescue capacities. According to data reported to the Italian National Coordination Centre established under the European Border Surveillance System (Eurosur), the Libyan Coast Guard rescued 6,118 people in 2017, compared to some 2,490 in 2016.5

Although primarily implemented as part of bilateral initiatives, the cooperation with Libya reflects a more general EU approach.6 In this spirit, in July 2017, the
EU Trust Fund for Africa adopted a programme of work with € 46.3 million in funding “to reinforce the integrated migration and border management capacities of the Libyan authorities”. Operationally, the developments in Italy reflect the approach taken by Spain, where the Spanish authorities cooperate with states on the West African coast and Morocco. Amnesty International commented that “Italy and other European governments have substituted clearly prohibited push-back measures with subsidised, or subcontracted, pull-back measures”. Indeed, the enhanced cooperation between Italy and Libya raises the question of whether Italy’s assistance to Libya complies with the EU Charter of Fundamental Rights and in particular with the principle of non-refoulement.
Could, for example, the real-time sharing with Libyan authorities of co-ordinates of locations where migrants are embarking or found at sea engage Italy’s responsibility, if as a result the intercepted migrants are brought back to Libya, detained, and subjected to ill-treatment? In the absence of case law, this remains an open question.

The possible legal consequences for EU Member States supporting operationally third countries to prevent the departure of migrants towards the EU depend on the individual circumstances of each operation. It is presumably for this reason that the Council of Europe’s Commissioner for Human Rights requested clarification about the details of Italy’s bilateral cooperation. FRA developed practical guidance on preventive steps EU Member States can take to avoid refoulement; in 2017, it translated this into several official EU languages, including Greek, Italian and Spanish. Frontex used the guidance, inserting it as an important reference document on fundamental rights in the document regulating their operation off the West African coast.

In practice, these new policies resulted in many refugees and migrants on their way to Europe being stranded in Libya, often detained in inhuman conditions and subjected to serious forms of ill-treatment. Efforts to address their plight prompted discussions on new opportunities for legal entry into the EU. These resulted in a first group of 162 vulnerable refugees being directly evacuated from Libya to Italy at the end of the year. Other vulnerable refugees, including unaccompanied children, women at risk, victims of torture or severe ill-treatment, and persons with serious medical conditions, were temporarily transferred from Libya to an Emergency Transit Mechanism UNHCR established in Niger, with a view to identifying solutions for them. UNHCR also issued an urgent call for an additional 40,000 resettlement places for refugees (on top of states’ regular pledges) from the 15 countries hosting refugees along the Central Mediterranean route. Fewer than one third of the requested resettlement places had been pledged by the end of 2017.

6.1.1. Death at sea

Continuing fatalities at sea served as a stark reminder that the emergency is not over. The International Organization for Migration (IOM) estimates that some 3,139 migrants died or went missing at sea in 2017 – against some 172,000 arrivals recorded by IOM. Most fatalities occurred in the Central Mediterranean in the first six months of the year. Fatalities did drop in absolute numbers compared to 2016, when they were estimated to total 5,143 people. However, calculated in proportion to the number of arrivals, the death rate increased from 1.41 % to 1.75 %, as Figure 6.3 illustrates.

Most fatalities occurred near the North African coast, mainly off the shores of Libya or near the Tunisian coast, with incidents increasing on the Alboran Sea and near the Strait of Gibraltar in the last months of the year.

6.1.2. Mistreatment of migrants

Reports of the mistreatment of migrants who crossed borders by circumventing border controls increased significantly in 2017, particularly on the Western Balkan route. Allegations include heavy beatings, such as kicking or hitting people with batons (sometimes on the head or the genitals); throwing sand in people’s eyes; forcing people to take off their clothes or shoes; attacks by police dogs; and other humiliating practices, such as taking photos or video of the injured individuals. Médecins Sans Frontières (MSF) reported that most migrants who visited their mental health clinics in
Serbia in the first half of 2017 and had experienced physical violence identified police or border authorities in Bulgaria, Hungary and Croatia as the perpetrators. Between January and June of 2017, MSF treated and documented 62 cases of intentional violence against people returned from the Serbian–Hungarian border. These mainly involved beatings (95% / 59 cases), dog bites (24% / 15 cases), and the use of irritant spray (16% / 10 cases). Similar allegations were reported in Croatia. In April 2017, Oxfam published a briefing paper alleging mistreatment by police or border guards in these same three EU Member States.

As of late 2017, a dedicated webpage documents allegations of violence and ill-treatment inflicted on migrants by EU Member State. For 2017, it lists some 110 alleged incidents, mainly concerning people claiming mistreatment in Croatia and Hungary. Volunteers working for various organisations in Serbia who meet the migrants as part of their daily work collect the data. The seriousness of the mistreatment allegations is also illustrated by the demarches taken by UNHCR. The UN Refugee Agency referred some 145 alleged incidents of ill-treatment (affecting some 1,300 individuals) to the responsible authorities in Croatia, and 11 cases (affecting some 110 people) in Hungary.

Despite the significant number of allegations, some of which were brought to the attention of the Public Prosecutor, to FRA’s knowledge, none of the investigations resulted in formal court proceedings. FRA also could not identify a single 2017 court case in which police or border guards were convicted of mistreating migrants. However, a case was brought before the European Court of Human Rights against Hungary concerning police violence and brutality against a Syrian man; this case was still pending at year’s end. In this context, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) returned to Hungary in October 2017 to review the treatment and conditions of detention in the transit zones and border police holding facilities, and held interviews with foreign nationals who had recently been escorted by border police officers to the other side of the fence.

The issue of mistreatment is not limited to the Western Balkan route. Refugees and migrants trying to reach the United Kingdom often temporarily stay in Calais and Dunkirk, France. A joint investigation by the General Inspectorates of the Administration, the National Police and the National Gendarmerie noted plausible arguments to conclude that officers had breached rules on the use of force. For example, they referred to violence and the disproportionate use of tear gas, particularly in the makeshift camp in Calais.

Although not border-specific, a recent FRA survey shows that, amongst people with migrant backgrounds, experiences with violence by police or border guards are not insignificant. FRA’s EU-MIDIS II survey interviewed selected groups of immigrants and ethnic minorities in the EU between September 2015 and November 2016. Of the over 12,700 first-generation immigrants included in the survey, 3% experienced violence because of their ethnic or immigrant background in the five years before the survey interview. Violence against first-generation migrants was especially high among immigrants from Southeast Asia in Greece, at 17%. When asked about the perpetrator of the most recent incident of hate-motivated violence, of those having experienced such violence, some 12% indicated that this was a police officer or a border guard (see Figure 6.4).

### Figure 6.4: Perpetrators of hate-motivated violence against migrants, as identified in EU-MIDIS II (%)

<table>
<thead>
<tr>
<th>Perpetrator</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member of a right-wing extremist/racist group</td>
<td>10%</td>
</tr>
<tr>
<td>Police officer(s) or border guard(s)</td>
<td>15%</td>
</tr>
<tr>
<td>At work / in education or training</td>
<td>20%</td>
</tr>
<tr>
<td>Neighbour(s)</td>
<td>30%</td>
</tr>
<tr>
<td>Someone I didn’t know</td>
<td>40%</td>
</tr>
</tbody>
</table>

Note: Based on all first-generation migrants included in EU-MIDIS II who experienced any violence because of their ethnic or immigrant origin in the five years before the survey (N = 657).

Source: FRA EU-MIDIS II, 2016
6.1.3. Reception conditions

In most EU Member States, dropping arrivals allowed reception of applicants for international protection to largely normalise. Many temporary shelters were closed down. For example, in mainland Greece, 13 camps were closed in 2017. This included Elleniko, the site at the former Athens airport described as unsafe, after asylum seekers and refugees received support for moving to flats. The container facility in Mauer/Amstetten in Austria also closed in November. However, reception conditions remained critical in some locations. Among the EU Member States hosting larger numbers of asylum applicants, France, Greece and Italy continued to face emergency situations, with overcrowded facilities and/or homeless asylum applicants. In France, at year’s end, the reception capacity of 70,000–80,000 places remained inadequate, with some 100,000 asylum applicants in need of housing. In informal camps reappeared, against which authorities tried to take evacuation measures.

In Greece, on the Eastern Aegean islands, the Reception and Identification Centres – generally referred to as ‘hotspots’ – remained overcrowded, exposing people hosted there to heightened protection risks, including the risk of sexual and gender-based violence. In December 2017, the three hotspots in Lesvos, Chios and Samos hosted over twice as many people as their maximum capacities. Many – including pregnant women and children – lived in unheated and non-waterproof tents as winter approached. In some cases, tents were put up in extended areas of the camps, which were not properly guarded or lit; during heavy rain, access roads became muddy and unpassable, making it difficult to reach sanitary facilities, for example. Some hotspots lacked non-food items, such as clothing or shoes. Although a number of steps were taken to enable asylum-seeking children to attend school on the mainland, significant gaps in access to formal education remained on the Greek islands.

Italy faced massive challenges in providing adequate housing to an ever-increasing number of asylum applicants, as the following two examples illustrate. In June, a parliamentary commission published a report on the largest Italian reception facility in Mineo (Sicily), noting disrespect of hygienic standards, serious gaps in medical and psychosocial services, as well as security issues. In May, at the reception centre in Sant’Anna in Isola di Capo Rizzuto (Calabria), the police arrested 67 people accused of having embezzled €36 million from funds allocated to the reception of asylum applicants over the years. In response, the Ministry of Interior established the Permanent Observatory for the Reception of Asylum Seekers to organise the oversight and discuss the findings of inspections, and announced the closure of all large reception facilities. It also implemented an EU-funded project on “Monitoring and improvement of reception conditions (MIRECO)”. Auditors coordinated by the ministry have carried out inspection missions since May 2017, visiting a significant number of reception facilities by year’s end. Plans exist to make the oversight work more permanent (and not project-based), but – at the time of writing – little information was available on follow-up measures taken to address situations where serious disrespect of standards persists.

6.1.4. Temporary restrictions on family reunification


The Dublin Regulation (Regulation (EU) No 604/2013), which determines which Member State is responsible for examining an application for international protection, contains rules to facilitate keeping or bringing together family members. Applicants in Greece – including many unaccompanied children – faced significant delays in joining their family members in Germany, after the German authorities asked Greece to better coordinate the number of persons to be transferred. Combined with the administrative delays, applicants on average had to wait for 13-16 months from the date of registration (and significantly longer from the time of arrival in Greece) until their transfer. The time after formal acceptance ranged between 8-9 months, instead of the six months set by Article 29 of the Dublin Regulation. As of mid-August 2017, only 221 of the 4,560 applicants accepted by Germany in 2017 had been transferred. Over 60% of those awaiting a transfer were children, some of whom were unaccompanied. After one of these cases was brought to court, in September, the Administrative Tribunal in Wiesbaden clarified that the applicant has a right to be transferred within the six-month period set by the Dublin Regulation.

6.1.5. Relocation comes to an end

In response to the large number of arrivals, the Council of the EU in 2015 established a temporary relocation scheme in support of Greece and Italy. It foresaw transferring to another Member State some 160,000 persons in clear need of international
protection over a two-year period. This number was subsequently reduced, as Member States were given the option of resettling 54,000 people directly from Turkey. By 10 November 2017, Member States had resettled 11,354 people from Turkey (data for 31 December not available).

The two-year period for processing applications for relocation expired on 26 September 2017. According to data provided by the Greek and Italian authorities, by year’s end, only 21,704 asylum applicants had been relocated from Greece (primarily Syrians), and 11,464 from Italy (mostly Eritreans). Under the scheme, almost 600 unaccompanied children were relocated – 492 from Greece and 99 from Italy. The relocation requests of some 300 applicants in Greece and 1770 applicants in Italy were still pending. Although overall only a small portion of the originally envisaged number of applicants benefitted from relocation, this temporary scheme helped significantly reduce the pressure on the Greek and Italian reception systems, which, as noted in Section 6.1.4., remained challenging throughout the year.

A mandatory intra-EU relocation scheme remained politically controversial and subject to litigation. In September, the CJEU dismissed the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers. In December, the European Commission referred Hungary and Poland (the two EU Member States which did not relocate anyone) as well as the Czech Republic (which relocated only a few) to the CJEU for non-compliance with their EU law obligations on relocation. In December 2017, the European Council debated the question of mandatory quotas. Summarising the discussions, its president noted that mandatory quotas did not prove effective, and suggested abandoning this approach in the revision of the Dublin Regulation.

6.1.6. Border checks within the Schengen area

The significant number of people who crossed the EU’s external border and moved onwards without authorisation, together with threats to internal security, prompted Member States to reintroduce internal border controls within the Schengen area in recent years. As shown in Figure 6.5, at the end of 2017, internal border controls within the Schengen area were in place at some sections of the borders of five EU Member States (Austria, Denmark, France, Germany and Sweden) as well as Norway. These temporary controls have not yet been lifted and will continue at the same border sections as in the past – with the exception of Germany, where flight connections from Greece are now also subject to controls – until 12 May 2018 (30 April in France).

Such controls adversely affect one of the main achievements of the EU: the right of EU citizens to move freely within the common area without being subject to border checks.

6.2. Information systems multiply

The management of asylum, borders and visa policies heavily relies on information technology.

Three large-scale EU information technology systems (IT systems) in the field of migration and security are operational:

- the Schengen Information System (SIS II), to aid police and border checks;
- Eurodac (standing for European Dactyloscopy), to identify the Member State responsible for examining an asylum application submitted in the EU;
- the Visa Information System (VIS), for visa processing.

Changes to all three are either planned or underway. A fourth system – the Entry-Exit System (EES) for registering travel of all third-country nationals admitted for a short stay in and out of the EU – was set up in November 2017 and will become operational in 2020-2021.

Two new IT systems are planned, including:

- the European Travel Information and Authorisation System (ETIAS), for conducting pre-border checks for visa-free travellers;
- the extension of the European Criminal Records Information System to third-country nationals (ECRIS-TCN).

In addition, the proposed Interoperability Regulations will establish:

- a European search portal – ESP, to allow competent authorities to search multiple IT systems simultaneously, using both biographical and biometric data;
- a shared biometric matching service – BMS, to enable the searching and comparing of biometric data (fingerprints and facial images) from several IT systems;
- a common identity repository – CIR, containing biographical and biometric identity data of third-country nationals available in existing EU IT systems.
• a **Multiple-Identity Detector – MID**, to check whether the biographical identity data contained in a search exists in other IT systems to enable the detection of multiple identities.

Most of the existing and planned systems store biometric data, such as fingerprints and/or facial images. Biometrics are unique to the person in question and considered the most reliable method to identify a person. The large-scale processing of personal data, including sensitive biometric data, affects people’s fundamental rights in different ways, as FRA’s opinions on ECRIS-TCN, Eurodac and ETIAS underline.15

The European Commission estimates that the number of people whose data will be stored in the different IT systems that will be made interoperable amounts to close to 218 million.16 Once pending legislative reforms are completed, data – including biometrics – on most third-country nationals coming to or staying in the EU will be stored. Taken together with national databases, these systems will give authorities access to data on a large number of persons, presenting an attractive tool also for law enforcement.

### 6.2.1. Swift adoption of legislation leaves little time to assess fundamental rights implications

The EU gave high priority to reforming and improving its large-scale IT systems in the field of migration and security in 2017. Initially created for specific purposes, most IT systems are being redesigned to also fulfil two horizontal purposes: to help Member States enforce immigration law and to fight terrorism and serious crime. This has important consequences for fundamental rights.

![Figure 6.5: Border controls within the Schengen area on 31 December 2017](image-url)
### Table 6.1: Large-scale EU IT systems in the field of migration and security

<table>
<thead>
<tr>
<th>IT system</th>
<th>Main purpose</th>
<th>Persons covered</th>
<th>Applicability</th>
<th>Biometric identifiers</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>European dactylography (Eurodac)</strong></td>
<td>Determine the Member State responsible to examine an application for international protection. Assist with the control of irregular immigration and secondary movements.</td>
<td>Applicants and beneficiaries of international protection, migrants in an irregular situation</td>
<td>all EUMS + SAC</td>
<td>![Fingerprints], ![Palm prints], ![Facial image]</td>
</tr>
<tr>
<td><strong>Visa Information System (VIS)</strong></td>
<td>Facilitate the exchange of data between Schengen Member States on visa applications</td>
<td>Visa applicants and sponsors</td>
<td>24 EUMS (not CY, HR, IE, UK) + SAC</td>
<td>![Palm prints]</td>
</tr>
<tr>
<td><strong>Schengen Information System (SIS II) - police</strong></td>
<td>Safeguard security in the EU and Schengen Member States</td>
<td>Missing or wanted persons</td>
<td>26 EUMS (not CY, IE) + SAC</td>
<td>![Facial image], ![DNA profile]</td>
</tr>
<tr>
<td><strong>Schengen Information System (SIS II) - borders</strong></td>
<td>Enter and process alerts for the purpose of refusing entry into or stay in the Schengen Member States</td>
<td>Migrants in an irregular situation</td>
<td>25 EUMS (not CY, IE, UK) + SAC</td>
<td>![Facial image], ![DNA profile]</td>
</tr>
<tr>
<td><strong>Schengen Information System (SIS II) - return</strong></td>
<td>Enter and process alerts for third-country nationals subject to a return decision</td>
<td>Migrants in an irregular situation</td>
<td>25 EUMS (not CY, IE, UK) + SAC</td>
<td>![Facial image], ![DNA profile]</td>
</tr>
<tr>
<td><strong>Entry-Exit System (EES)</strong></td>
<td>Calculating and monitoring the duration of authorised stay of third-country nationals admitted and identify over-stayers</td>
<td>Travellers coming for a short-term stay</td>
<td>22 EUMS (not BG, CY, HR, IE, RO, UK) + SAC</td>
<td>![Facial image], ![DNA profile]</td>
</tr>
<tr>
<td><strong>European Travel Information and Authorisation System (ETIAS)</strong></td>
<td>Assess if a third-country national who does not need a visa poses a security, irregular migration or public health risk</td>
<td>Visa free travellers</td>
<td>26 EUMS (not IE, UK) + SAC</td>
<td>None</td>
</tr>
<tr>
<td><strong>European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN)</strong></td>
<td>Share information on previous convictions of third-country nationals</td>
<td>Third-country nationals with a criminal record</td>
<td>27 EUMS (not DK)</td>
<td>![Facial image], ![DNA profile]</td>
</tr>
<tr>
<td><strong>Interoperability – Common Identity Repository</strong></td>
<td>Establish a framework for interoperability between EES, VIS, ETIAS, Eurodac, SIS II and ECRIS-TCN</td>
<td>Third-country nationals covered by Eurodac, VIS, SIS II, EES, ETIAS, and ECRIS-TCN</td>
<td>28 EUMS + SAC</td>
<td>![Facial image], ![DNA profile]</td>
</tr>
</tbody>
</table>

**Notes:** Planned systems and planned changes within systems are in italics, or shown by a light blue background.

- Fingerprint; Palm print; Facial image; DNA profile.

**EUMS:** EU Member States; **SAC:** Schengen Associated Countries, i.e. Iceland, Liechtenstein, Norway and Switzerland.

1. Ireland and the United Kingdom do not participate in VIS. Denmark is not bound by the Regulation but has opted in for VIS. VIS does not yet apply to Croatia and Cyprus, and only partially applies to Bulgaria and Romania as per Council Decision (EU) 2017/1908 of 12 October 2017.

2. Cyprus and Ireland are not yet connected to SIS. Denmark is not bound by the Regulation or the Council Decision but has opted in for the SIS II, and must decide whether to opt in again upon the adoption of the SIS II proposals. The United Kingdom is participating in SIS but cannot use or access alerts for refusing entry or stay into the Schengen area. Bulgaria, Croatia and Romania cannot issue Schengen-wide alerts for refusing entry or stay in the Schengen area as they are not yet part of the Schengen area.

3. Denmark may decide to opt in for EES and ETIAS.

4. ECRIS-TCN does not apply to Denmark. The United Kingdom and Ireland may decide to opt in.

5. Denmark, Ireland and the United Kingdom will take part as they participate in the IT systems made interoperable.

**Source:** FRA, based on existing and proposed legal instruments, 2018
Negotiations on the EU legal instruments establishing new IT systems or revising existing ones proceed quickly compared with those for most asylum instruments. The Council as well as the LIBE Committee of the European Parliament agreed on their respective positions on all seven proposals concerning IT systems tabled by the Commission in 2016 – in ETIAS and the three proposals concerning the revision of SIS II – in less than one year. In contrast, two core asylum instruments – the proposed Dublin and Asylum Procedures regulations (tabled in May and July 2016, respectively) – were still discussed in the Council (and the proposed Asylum Procedures Regulation also in the LIBE Committee of the European Parliament) at year’s end. The EES proposal – tabled just one month before three of the still pending asylum proposals (Eurodac, Dublin and the EU Asylum Agency) – was adopted in November 2017.

The speed at which negotiations on IT systems progress leaves limited time to explore and understand the possible consequences of an increasing use of databases for people’s rights. The European Commission’s increased investment in preparatory work – best illustrated by the establishment of a High-Level Expert Group on Information Systems and Interoperability, in which FRA participated – only partially mitigates this. To illustrate this, FRA – as a member of this group – produced a report mapping the relevant fundamental rights issues. However, in a fast-changing environment, new elements – such as the Multiple-Identity Detector (MID) described in the next sub-section – only emerged at a late stage of the preparations. FRA therefore did not analyse its possible impact on fundamental rights.

Apart from the data protection angle – primarily analysed in publications by the European Data Protection Supervisor – the impact of large-scale EU IT systems on fundamental rights remains largely unexplored. A FRA project is partly filling this gap. Recent FRA research analyses the immediate fundamental rights implications of processing biometric and other data in large-scale EU IT systems in the field of asylum and migration. The use of IT systems entails both risks and opportunities for fundamental rights. IT systems can offer more robust and timely protection – for example, for missing children and victims and witnesses of crime – and can help prevent identity fraud and identity theft. At the same time, many fundamental rights challenges result from the weak position of the individuals whose data are stored in large-scale IT systems. They range from respect of human dignity when taking fingerprints and challenges in correcting or deleting data inaccurately or unlawfully stored, to the risk of unlawful use and sharing of personal data with third parties. One of the most serious risks concerns data of people in need of international protection: if such data get into the hands of the persecuting agent – be it a state authority or a private actor – they may result in serious harm for the persons concerned (including a risk of kidnapping) or their family members remaining in the country of origin.

Next to these immediate benefits and concerns, there are also longer-term implications, the fundamental rights consequences of which are difficult to assess. According to some experts, curtailing privacy by processing large amounts of personal data, including biometric data, may affect democracy since privacy is a value inherent to a liberal democratic and pluralist society, and a cornerstone for the enjoyment of human rights. The development of face-recognition technology brings new potential fundamental rights risks. It is conceivable that, in the future, technology will make it possible to match faces recorded on video taken from surveillance cameras – installed, for example, at the entrance of a shopping mall – against biometric pictures stored in IT systems. These developments could drastically change the way immigration law is enforced, opening up new possibilities to find migrants in an irregular situation or asylum applicants who moved on from one Member State to another without authorisation. Police in a number of countries, including the United States and the United Kingdom, are already developing and testing facial-recognition systems, utilising surveillance footage to find criminal suspects, as Eu-LISA reported. The extension of such pilots to immigration law enforcement – which is not planned under the proposed initiatives on the table – would raise serious necessity and proportionality questions.

6.2.2. Interoperability: the Common Identity Repository (CIR) and the Multiple-Identity Detector (MID)

In its December 2017 proposals on interoperability, the European Commission suggests, among other things, replacing the basic identity data of all people whose data are stored in large-scale EU IT systems with a central identity repository. This data repository would be common and used by all IT systems – except SIS II, for which a separate technical solution is envisaged. In other words, the fingerprints, facial images and other data, such as names, nationality, dates and places of birth, sex and travel document references, are removed from the individual IT systems and stored in a common platform – the Common Identity Repository (CIR), illustrated in Figure 6.6 – which
the EES, VIS, Eurodac, ETIAS, and ECRIS-TCN will use. Such a common platform will store a reference to the IT system from which the data originated. Officers will not search for a person in an individual database anymore, but will directly consult the common repository through a European Search Portal, which will allow for searches using biometrics.

Attached to the proposed Common Identity Repository, there will be a mechanism to detect if data on the same person are stored in the IT systems with different names and identities: the Multiple-Identity Detector. Different identities used by one and the same person will be linked. The officer searching the system will see – provided he or she has access rights – all entries relating to the individual, regardless of whether they have been stored under a different name.

Such reforms will result in an overhaul of the large-scale EU IT systems insofar as they will create a new database – the Common Identity Repository – storing the identity data of virtually all third-country nationals who entered or applied to enter into the EU for a short stay, sought asylum or stayed irregularly. Combined with the Multiple-Identity Detector, the Common Identity Repository is intended to become an efficient tool to ensure the correct identification of a person whose data are stored in one or more IT systems. If deemed necessary and proportionate, in future, the Common Identity Repository and the Multiple-Identity Detector could also be used for purposes beyond those currently envisaged. However, the Common Identity Repository and the Multiple-Identity Detector also have new fundamental rights implications. For example, in case personal data on an individual are stored in different systems under multiple identities, any officer entitled to query the Common Identity Repository will be able to see which IT systems store data on an individual. In such situations, even if an authority is not entitled to consult ECRIS-TCN – as this system stores sensitive data on past criminal records, it is only accessible to a restricted number of authorities – it will be able to deduce that an individual has a past criminal record as soon as the Common Identity Repository flags that the person is included in ECRIS-TCN. Such information, which the officer should not be entitled to have, will likely affect the officer’s perception of the individual and actions taken.

In other cases, interoperability will exacerbate existing fundamental rights challenges. FRA’s research on the existing IT systems found serious difficulties with informing data subjects about what will happen with the personal data being processed. In addition, in cases of mistakes in the system, a person trying to get wrong information corrected or deleted already faces many practical obstacles. Interoperability will make more complex exercising the right to information as well as the right to access, correction and deletion of data. Therefore, the fundamental rights safeguards will need to be carefully reviewed.

**Figure 6.6: Common Identity Repository**

![Common Identity Repository Diagram](https://example.com/common-identity-repository.png)

Source: FRA, 2018
6.3. **Fight against irregular immigration intensifies fundamental rights risks**

In 2017, the European Union and its Member States made significant efforts to return more migrants in an irregular situation and to combat migrant smuggling. Such actions implicate core fundamental rights, including the right to life, the prohibition of torture, the right to liberty, the right to an effective remedy, and the principle of non-refoulement.

After briefly outlining the main EU-level policy developments regarding returns, this section highlights the increasing risk of arbitrary detention, and addresses effective return monitoring. The last sub-section looks at the collateral effects of policies to combat migrant smuggling.

6.3.1. **Detention for purposes of return**

At EU Member State level, the number of returns increased from fewer than 200,000 in 2014 to over 250,000 in 2016 and decreased to 213,000 in 2017, as Figure 6.7 shows. In Germany, removals increased from 10884 in 2014 to 23966 in 2017. According to the Ministry of Security and Justice, in the Netherlands, the total number of returns increased from 16590 in 2015 to 20770 in 2017.

In March 2017, the European Commission published recommendations, accompanied by a renewed Action Plan, to make returns more effective. Suggested measures cover different areas, such as improving cooperation between authorities, making full use of existing large-scale EU IT systems, simplifying procedures (for example, issuing return decisions together with decisions ending legal stay), and more effective enforcement of return decisions.

In the recommendations, deprivation of liberty features as an important building block for effective returns. EU Member States are encouraged to implement in their national laws the upper limits of pre-removal detention set in Article 15 (6) of the Return Directive (six months extendable to 18 months in certain exceptional situations); and to bring detention capacities in line with actual needs. The revised Return Handbook, adopted later in the year, contains a list of situations which EU Member States should consider as indications of a ‘risk of absconding’ – in practice, the most frequent justification for ordering detention. It also defines circumstances where a risk of absconding should be presumed, shifting to the individual the burden to rebut the presumption. It also recommends that EU Member States adopt a stricter approach in the granting of voluntary departure to persons issued a return decision.

Detention constitutes a major interference with the right to liberty protected by Article 6 of the Charter. Any deprivation of liberty must, therefore, respect the safeguards established to prevent unlawful and arbitrary detention. Figure 6.8 summarises schematically the five conditions detention must fulfil to respect fundamental rights. To support the judiciary, the European Law Institute analysed these safeguards in a statement published in September 2017.
One of the many controversial issues relating to deprivation of liberty is the maximum length a person can be detained for the purpose of return. European and international law requires that immigration detention be only as long as necessary. This means, for example, that detention in view of implementing a removal becomes arbitrary where a reasonable prospect of removal no longer exists.68

Neither international nor European human rights law establishes a maximum time for detention of adults or children. The Return Directive is the first binding supranational document limiting it, albeit only for pre-removal detention. The directive sets two ceilings. The first ceiling is set at six months (Article 15 (5)). Pre-removal detention should normally not be extended beyond such a period. Article 15 (6) of the directive specifies two exceptional situations in which detention can be extended for a further 12 months (up to 18 months in total), provided that the possibility is set forth in national law and the authorities make all reasonable efforts to carry out the removal. The first is when the removal procedure is likely to last longer because the person does not cooperate. The second is beyond the person’s influence; it is if the country of return delays issuing the necessary documentation. Further extension is not possible beyond these deadlines for any reason whatsoever.69

The national laws of all EU Member States bound by the Return Directive, as well as Ireland (which is not bound by it),20 set maximum time limits for detention pending removal. The United Kingdom – which does not apply the Return Directive – is the only EU Member State that does not set a maximum time limit (Figure 6.9).21 Of the 26 EU Member States bound by the Return Directive, 17 apply the maximum limit of pre-removal detention of 18 months set out in the Return Directive and four (Belgium, Finland, Hungary, and Sweden) apply a maximum length between 8-12 months. In 2017, Austria increased its upper limit from 10 to 18 months in exceptional cases,72 in line with the Return Directive and the European Commission’s recommendations. The lack of comparable statistics on immigration detention in the EU makes it difficult to assess to what degree the reinforced attention on making returns more effective has prompted an increase in the use of immigration detention – as, for example, reported from the Netherlands. The Dutch authorities indicated that, in the first half of 2017, the total number of people in immigration detention rose by 33 % compared to the same period in 2016, apparently caused by an increase in the apprehension of people from the Western Balkans and North Africa.73

Nevertheless, reports pointing to patterns of arbitrary detention emerged from different EU Member States, as the following three examples show. In mainland France, the organisation La Cimade noted that, since 2 October 2017, instances of judges overturning immigration detention decisions have increased to 41 % – compared to 30 % in 2016.24 The French Public Defender of Rights also criticised the greater use of administrative detention in cases of families with children in an irregular situation.75 In Spain, the authorities started to hold migrants in facilities other than formal immigration detention centres. This included the Archidona facility in Málaga – a newly created but not yet used prison – which the Ombudsman criticised for not respecting minimum standards, recommending improving healthcare, providing adequate means of communication to detainees, and addressing other identified shortcomings.76 The Danish Refugee Council, which offers advice to asylum seekers in detention, noted that the police are detaining some rejected asylum applicants (in particular from Iraq) to encourage them to cooperate with their return, as envisaged in Article 36 (5) of the Danish Aliens Act.77 This may raise issues in light of the strict approach taken by the ECtHR on Article 5 (1) (b) of the ECHR, which regulates deprivation of liberty to secure the fulfilment of any obligation prescribed by law.28

Deprivation of liberty being imposed systematically without assessing whether it is necessary and proportionate in an individual case appeared more frequent at the external borders. In two of the Greek
hotspots (Moria in Lesvos and Pyli in Kos), newly arriving men of specific nationalities considered to have only small chances of receiving international protection are systematically held in closed facilities. In Hungary, virtually all asylum applicants, except for unaccompanied children under 14 years of age, are placed in the two transit zones in Röszke and Tompa at the Serbian border. Under international and European law, these are to be considered places where people are deprived of liberty, as those held there can only leave the facility if they agree to return to the Serbian side of the border fence. Finally, in Southern Spain, migrants who arrive by sea are systematically detained, according to the Spanish Commission of Aid to Refugees (CEAR).

The groups of immigrants covered by FRA’s EU-MIDIS II survey include some who have experience with irregular residence. Some 3% of first-generation immigrants included in EU-MIDIS II indicated that they did not hold a residence permit at the time of the survey. A higher number – 8% – indicated that they did not have a residence permit when they arrived in the EU. As many as 16% of immigrants in the sample indicated that they did not have a valid residence permit at least once during their stay in the EU. Among them, more than one third indicated that they were without papers several times (i.e. 6% of all immigrants in the sample).

Out of those who stayed irregularly in the EU at least once, 8% were detained at one point. Looking at all immigrants who arrived in their country of residence in the five years before the survey (2010 to 2015 – hence more recent immigrants), this percentage increases to 11%. Of all respondents who were detained at one point, slightly more than half (56%) were in detention for two days or less. Some 30% of those detained were in detention for more than one week.

Reacting to the fact that immigration detention often takes place in facilities that do not respect human dignity, the Council of Europe continued to work on developing European Rules on the Administrative
Detention of Migrants. One controversial point is immigration detention of children, a matter regarding which significant developments occurred in 2017 (see Section 8.1.1. in Chapter 8 on the Rights of the Child).

6.3.2. Forced return monitoring

FRA has repeatedly highlighted the importance of forced return monitoring pursuant to Article 8 (6) of the Return Directive as a tool to promote fundamental rights-compliant returns. The implementation of this provision has only progressed slowly. By the end of 2017, Cyprus, Germany, Slovakia and Sweden had no operational monitoring systems in place. In Germany, pre-return procedures are only occasionally monitored by charity organisations at Länder level. In Cyprus, monitoring bodies have been appointed, but did no monitoring in 2017. In Slovakia, monitoring is not effective, as it is implemented by an agency that belongs to the branch of government responsible for returns. In Sweden, legislation adopted in 2017 established that the Swedish Migration Board is responsible for monitoring forced returns. Structural changes are underway to establish a functioning return monitoring mechanism within the service’s international relations entity.

Table 6.2 compares developments in EU Member States over the past four years. Two aspects warrant highlighting. First, in 2014, ten EU Member States lacked operational return monitoring systems that FRA considered sufficiently independent to qualify as “effective”. By 2017, that number dropped to four – and two of them, Germany and Sweden, were taking steps to have effective monitoring systems by 2018. Second, developments have not been linear: in Croatia and Lithuania, monitoring was project-based and was suspended when funding came to an end and only resumed when funds were available again. In France, the independent authority tasked with forced return monitoring did not carry out any monitoring missions in 2016, resuming them in February 2017. At the same time, even where systems are operational their effectiveness may be questioned: as an illustration, Myria, the Belgian Federal Migration Centre, criticised the lack of transparency and independence of the General Inspectorate.

In 2017, Frontex coordinated and co-financed 341 return operations by charter flights at EU level, an increase of 47 % compared to 2016. A monitor was physically present on board during 188 of these return operations, including all “collecting return operations” (i.e. for which the forced-return escorts are provided by a country of return) and over 80 % of the joint return operations. By contrast, in 130 out of 150 national return operations supported by Frontex, there was no monitor.

Under Article 29 of the European Border and Coast Guard Regulation (EU) 2016/1624 (EBCG Regulation), Frontex established different pools of experts, including of forced-return monitors, which it started using as of 7 January 2017. The pools consist of experts trained in cooperation with FRA and the International Centre for Migration Policy Development (ICMPD). By year’s end, the pool included 61 monitors, all associated with the organisation responsible for forced-return monitoring at the national level. Based on the requests received from Member States, Frontex deployed forced-return monitors from the pool in 94 return operations. These deployments concerned return operations that could not be covered by the national forced-return monitors established under Article 8 (6) of the Return Directive. As it lacked a national return monitoring system, upon request, Frontex supported Germany with a monitor from the pool in 48 national return operations. Although such support filled an important gap, if continued in the longer term, it undermines the purpose of the European pool of forced-return monitors, which is primarily intended to support return operations involving more than one returning Member State.

During 2017, the forced-return monitors who reported to Frontex did not note any serious incidents. They did, however, provide suggestions and recommendations for enhancing compliance and protection of vulnerable persons during return operations.

Recurrent issues identified by monitors concern the provision of specific measures for the return of families with children, communication between escorts and returnees, the unsystematic issuance of fit-to-fly certificates, privacy during body searches, and the protection of sensitive health data while ensuring its exchange between medical personnel in the Member States and medical personnel on board the return flight. At the same time, reports analysed by Frontex’s Fundamental Rights Officer indicate that, in general, means of restraint and force were applied based on individual assessments, with escort officers treating detainees subject to these measures in a humane and professional manner.

The monitors recommended increasing female escort officers, providing separate waiting areas for families at airports, adapting pre-departure facilities to the special needs of families with children and vulnerable groups, and using interpreters. They noted that this would not only reduce the risk of violating the rights of children or of vulnerable individuals, but would also help avoid unnecessary tensions.
Table 6.2: Forced return monitoring systems 2014-2017, EU-28

<table>
<thead>
<tr>
<th>EU Member State</th>
<th>Organisation responsible for monitoring forced return</th>
<th>Operational?*</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>Human Rights Association Austria and Austrian Ombudsman Board</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>BE</td>
<td>General Inspectorate of the General Federal Police and the Local Police</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>BG</td>
<td>Ombudsman, Centre for the Study of Democracy NGO</td>
<td>x ✓ ✓ ✓</td>
</tr>
<tr>
<td>CY</td>
<td>Office of the Commissioner for Administration</td>
<td>x x x x</td>
</tr>
<tr>
<td>CZ</td>
<td>Public Defender of Rights (PDR)</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>DE</td>
<td>Fora at various airports (Frankfurt, Hamburg, Düsseldorf, Berlin)</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>DK</td>
<td>Parliamentary Ombudsman</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>EE</td>
<td>Estonian Red Cross</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>EL</td>
<td>Greek Ombudsman</td>
<td>x ✓ ✓ ✓</td>
</tr>
<tr>
<td>ES</td>
<td>Ombudsman (Defensor del Pueblo)</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>FI</td>
<td>Non-Discrimination Ombudsman</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>FR</td>
<td>General Inspector of All Places of Deprivation of Liberty</td>
<td>x ✓ x ✓</td>
</tr>
<tr>
<td>HR</td>
<td>Croatian Ombudsman and Croatian Law Centre</td>
<td>x ✓ x ✓</td>
</tr>
<tr>
<td>HU</td>
<td>Hungarian Prosecution Service</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>IE**</td>
<td>No monitoring system in law</td>
<td>– – – –</td>
</tr>
<tr>
<td>IT</td>
<td>National Authority for the Rights of Persons Deprived of Liberty</td>
<td>x x ✓ ✓</td>
</tr>
<tr>
<td>LT</td>
<td>Lithuanian Red Cross Society</td>
<td>✓ x x ✓</td>
</tr>
<tr>
<td>LU</td>
<td>Luxembourg Red Cross</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>LV</td>
<td>Ombudsman’s Office</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>MT</td>
<td>Board of Visitors for Detained Persons</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>NL</td>
<td>Security and Justice Inspectorate</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>PL</td>
<td>Various NGOs, e.g. the Helsinki Foundation</td>
<td>✓ ✓ x ✓</td>
</tr>
<tr>
<td>PT</td>
<td>General Inspectorate of Internal Affairs</td>
<td>x ✓ ✓ ✓</td>
</tr>
<tr>
<td>RO</td>
<td>Romanian National Council for Refugees</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
<tr>
<td>SE</td>
<td>Swedish Migration Board</td>
<td>x x x x</td>
</tr>
<tr>
<td>SI</td>
<td>Karitas Slovenia</td>
<td>x ✓ ✓ ✓</td>
</tr>
<tr>
<td>SK</td>
<td>Ministry of Interior</td>
<td>✓ ✓ ✓</td>
</tr>
<tr>
<td>UK**</td>
<td>Her Majesty’s Inspector of Prisons (HMIP), Independent Monitoring Boards</td>
<td>✓ ✓ ✓ ✓</td>
</tr>
</tbody>
</table>

Notes: ✓ = Yes  
* = No. In Slovakia and Sweden, monitoring is implemented by an agency belonging to the branch of government responsible for returns. Thus it is not sufficiently independent to qualify as ‘effective’ under Article 8 (6) of the Return Directive. In France, the “Contrôleur général des lieux de privation de liberté” did not monitor any forced return operations during 2016.  
(±) = In Germany, the return monitoring system covers only parts of the country.  
* Operational means that a monitoring entity which does not belong to the branch of government responsible for returns has been appointed and has carried out some monitoring activities during the year.  
** Ireland and the United Kingdom are not bound by the Return Directive.

Source: FRA, 2018
6.3.3. Fundamental rights impact of actions against migrant smuggling

Activities to implement the EU Action Plan against migrant smuggling (2015-2020) continued. The European Commission published its evaluation of the EU Facilitation Directive (2002/90/EC) and Framework Decision (2002/946/JHA) in March. It concluded that there is no need to revise the EU facilitation acquis, but acknowledged that some actors perceive a risk of criminalisation of humanitarian assistance. The Regulation establishing the European Border and Coast Guard (Regulation (EU) 2016/1624) also recognises that the EU Facilitation Directive allows Member States not to impose sanctions where the aim of the behaviour is to provide humanitarian assistance to migrants (recital (9)).

Although there is limited evidence of the prosecution and conviction of individuals or organisations that facilitate irregular border crossings or transit and stay for humanitarian reasons, individuals providing humanitarian assistance to migrants in an irregular situation within a Member State territory, at land borders or on the high seas, are fearful. To strengthen legal clarity and avoid punishing humanitarian actions, the European Commission recommends enhancing the exchange of knowledge and good practices between prosecutors, law enforcement and civil society, and has indicated that it plans to closely cooperate with Eurojust and FRA in this endeavour.

At Member State level, in Croatia, the protection of humanitarian actors improved with a change of legislation introducing a safeguard clause. In the past, police indirectly threatened to pursue for migrant smuggling volunteers and some NGO staff who accompanied asylum seekers to police stations to apply for international protection. Such incidents stopped. Eurojust analysed selected French court cases on migrant smuggling from 1996 to 2016: only cases adjudicated before 2012 (the year when France introduced legislative changes exempting humanitarian actions from punishment) concerned individuals prosecuted for sheltering migrants without papers. In the Netherlands, where the law does not provide for a humanitarian exception, the Dutch Supreme Court ruled that if the person was brought into the Netherlands to avoid an emergency, this constitutes a ground for not punishing a person who would otherwise be found guilty of migrant smuggling under the criminal code.

In practice, in 2017, reports of threats of punishment for providing humanitarian assistance emerged from France, particularly around Calais and at the French-Italian border. For instance, in March, in the Italian border town of Ventimiglia, three volunteers with the NGO “Roya Citoyenne” were arrested for distributing food to irregular migrants, an action banned by local decree. Similarly, the Paris prefect banned food distribution outside the La Chapelle reception centre, which led to arrests and fines for members of the NGO “Solidarité Migrants Wilson” in February. In Calais (France), after the charity organisation “Secours Catholique” installed portable showers in an informal camp for homeless migrants, riot police arrested one of the charity’s employees for providing assistance to the illegal residence of a foreigner, prohibited by the French law on foreigners; charges were ultimately dropped.

In the Central Mediterranean, vessels deployed by civil society organisations continued to play an important role in search and rescue at sea. During the first six months of 2017 (1 January – 30 June), some ten vessels deployed by NGOs rescued more than a third of the persons rescued at sea (33,190 of the 82,187 persons rescued at sea during this period). Nevertheless, allegations that some NGOs are cooperating with smugglers in Libya prompted a shift in perceptions of their contribution. The Italian Senate, which examined this issue in detail, dismissed such allegations. It found that NGOs were not involved directly or indirectly in migrant smuggling, but recommended better coordination of their work with the Italian coast guard.

The Action Plan on measures to support Italy indicates that “Italy should draft, in consultation with the Commission and on the basis of a dialogue with the NGOs, a Code of Conduct for NGOs involved in search and rescue activities.” The Code of Conduct subsequently drawn up prohibits NGOs from entering Libyan territorial waters, envisages the presence of police officers aboard NGO vessels, prohibits NGOs from communicating with smugglers, forbids NGOs to switch off their transponders, and obliges them not to obstruct the Libyan coast guard. Several civil society organisations criticised the code, indicating that it would increase the risk of casualties at sea. Some NGOs signed the code, while others – such as Médecins Sans Frontières – refused, indicating that it mixes EU migration policies with the imperative of saving lives at sea. With departures from Libya decreasing in the second half of 2017, the role of NGOs in the Central Mediterranean also diminished, and some suspended or ended their operations.

At the same time, the Italian authorities took measures to address actions by NGO-deployed vessels considered to exceed their rescue-at-sea activities. In August, a court in Trapani (Italy) ordered the seizure of the “Juventa”, the rescue boat deployed by the NGO “Jugend Rettet”. In October, the Italian police conducted a search on board of the “Vos Hestia”, the Save the Children ship, after an undercover agent worked on the ship. These legal proceedings will have to deal with the delicate question of determining the scope of acts covered by the humanitarian clause excluding punishment for what would otherwise be deemed smuggling of migrants.
FRA opinions

Although the number of people arriving at the EU’s external border in an unauthorised manner dropped in 2017, significant fundamental rights challenges remained. Some of the gravest violations involve the mistreatment of migrants who cross the border by circumventing border controls. Reports of abusive behaviour increased significantly in 2017, particularly on the Western Balkan route. Respondents in FRA’s EU-MIDIS II survey, which interviewed over 12,000 first-generation immigrants in the EU, also indicated experiences with violence by police or border guards. Despite the significant number of allegations, criminal proceedings are rarely initiated – partly due to victims’ reluctance to pursue claims, but also because of insufficient evidence. Convictions hardly occur.

Article 4 of the EU Charter of Fundamental Rights prohibits torture, inhuman or degrading treatment. The prohibition is absolute, meaning that it does not allow for exceptions or derogations.

FRA opinion 6.1

EU Member States should reinforce preventive measures to reduce the risk that individual police and border guard officers engage in abusive behaviour at the borders. Whenever reports of mistreatment emerge, these should be investigated effectively and perpetrators brought to justice.

In 2017, the EU gave high priority to reforming its large-scale information technology (IT) systems in the field of migration and asylum. Through ‘interoperability’, the different systems will be better connected with one another. A central repository will pull together the identity of all persons stored in the different systems, and a mechanism will detect if data on the same person are stored in the IT systems under different names and identities. Not all aspects of the proposed regulations on interoperability have been subjected to careful fundamental rights scrutiny.

The reforms of the IT systems affect several rights protected by the EU Charter of Fundamental Rights, including the right to protection of personal data (Article 8), the rights of the child (Article 24), the right to asylum (Article 18), the right to an effective remedy (Article 47) and the right to liberty and security of person (Article 6).

FRA opinion 6.2

The EU should ensure that either the EU legislator or independent expert bodies thoroughly assess all fundamental rights impacts of the different proposals on interoperability prior to their adoption and implementation, paying particular attention to the diverse experiences of women and men.

The European Union and its Member States made significant efforts to increase the return of migrants in an irregular situation. Immigration and other relevant authorities consider deprivation of liberty as an important building block for effective returns. The revised Return Handbook, adopted in 2017, contains a list of situations which EU Member States should consider as indications of a ‘risk of absconding’ – in practice, the most frequent justification for ordering detention. It also defines circumstances where a risk of absconding should be presumed, shifting the burden to rebut the presumption on the individual. The lack of comparable statistics on immigration detention in the EU makes it difficult to assess to what degree the reinforced attention on making returns more effective has prompted an increase in the use of immigration detention. However, reports pointing to patterns of arbitrary detention emerged from different EU Member States.

Detention constitutes a major interference with the right to liberty protected by Article 6 of the EU Charter of Fundamental Rights. Any deprivation of liberty must, therefore, respect the safeguards established to prevent unlawful and arbitrary detention.

FRA opinion 6.3

When depriving individuals of their liberty for immigration-related reasons, EU Member States must respect all safeguards imposed by the Charter as well as those deriving from the European Convention on Human Rights. In particular, detention must be necessary in the individual case.

FRA has consistently highlighted the importance of forced return monitoring pursuant to Article 8 (6) of the Return Directive as a tool to promote fundamental rights-compliant returns. Not all EU Member States have set up operational forced return monitoring systems.

The implementation of returns entails significant risks related to core fundamental rights set out in the EU Charter of Fundamental Rights, including the right to life (Article 2), the prohibition of torture, inhuman or degrading treatment or punishment (Article 4), the right to liberty (Article 6), the right to an effective remedy and the principle of non-refoulement (Article 19).

FRA opinion 6.4

All EU Member States bound by the Return Directive should set up an effective return monitoring system.
## Annex – Maximum permitted length of detention pending removal

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