2

Border control and visa policy

The migration pressure on European Union (EU) Member States bordering the Mediterranean Sea dominated debates on borders and asylum in the EU in 2011. The Arab spring and the Libyan uprising led to a surge in new arrivals to these Member States, fuelling public debate. These new arrivals often travelled onwards to other EU Member States, prompting some of them to intensify police checks at internal Schengen borders. This influx, and the response to it, thrust the Schengen Agreements to the centre of many of these debates. Core to the Schengen discussions were the respect for the agreements, cooperation between Member States and delays in new accessions. The situation of persons entering the EU irregularly through its external borders amounts to a fundamental rights emergency.

This chapter covers the developments in the EU and its Member States on policies and practices in the areas of border control and visa policy in 2011. It looks at the fundamental rights challenges facing the EU, in particular those arising from the added pressure of migration on its southern Mediterranean borders, and the legislative proposals the EU has made over the year. It then turns to the Visa Code, focusing on refused visa applicants' right to appeal. In order to gain a comprehensive overview of this area, this chapter should be read together with Chapter 1 on asylum, immigration and integration.

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

- the emergency situation at the EU's external borders and the large number of new arrivals in EU Member States bordering the Mediterranean Sea, combined with their onward movement to other Member States, triggers a discussion on whether the reintroduction of Schengen border controls calls into question the right to free movement within the EU;
- some EU Member States face increased numbers of asylum applications following the visa waivers, leading the European Commission to propose a clause that would allow suspension of visa-free movement where this has led to significant increases of irregular migration flows or asylum applications;
- an EU Agency for the operational management of large-scale information technology systems in the area of freedom, security and justice is established in Tallinn, Estonia;
- the European Commission proposes a common framework for cooperation and information exchange between Member States and Frontex;
- the founding regulation of Frontex is amended, putting more emphasis on fundamental rights.

2.1. Border control

The adoption of a new regulation for Frontex, the EU agency that coordinates Member State cooperation on border security, represented a significant step towards a fundamental rights framework for sensitive border-control issues.[1] Some of its provisions are designed to strengthen the compliance of Frontex's activities with fundamental rights. Under Article 26, Frontex is to: set up an effective mechanism to monitor respect for fundamental rights; establish a consultative forum to assist in fundamental rights matters, to which FRA and other actors will be invited; and appoint a fundamental rights officer.

1 Regulation (EU) No. 1168/2011, OJ 2011 L 304/1.

FRA ACTIVITY

Embedding fundamental rights in EU border management activities

In 2011, FRA and Frontex collaborated on the implementation of the cooperation arrangement signed on 26 May 2010, which is designed to strengthen respect for fundamental rights in the field of border management. The arrangement addresses cooperation on joint operations (Article 3), risk analysis (Article 4), training on fundamental rights for border guards and Frontex staff (Articles 5 and 8), research (Article 6), returns (Article 7), work programmes and action plans (Article 9).

Among the work accomplished, FRA contributed to the development of the Frontex Fundamental Rights Strategy, which the Frontex Management Board adopted on 31 March. FRA also participated in the formulation of the plan to implement the strategy, or the Fundamental Rights Action Plan. The FRA provided pre-deployment briefings for two joint operations (Minerva and Hammer) concerning sea and air borders. In the context of its project on the treatment of third-country nationals at the EU's external borders, the FRA observed joint patrols at sea off the coasts of **Greece** and **Spain**. Together, the two agencies agreed upon a plan for training Frontex staff on fundamental rights.

For more information, see: http://fra.europa.eu/fraWebsite/media/mr-270510_en.htm

2.1.1. Emergencies at the EU's external borders

The situation of persons irregularly entering the EU's external border between **Greece** and Turkey amounted to a fundamental rights emergency. Other EU Member States suspended transfers of asylum seekers to **Greece** under the Dublin cooperation.

Upon **Greece**'s request, Frontex deployed Rapid Border Intervention Teams (Rabit) at the land border with Turkey from 2 November 2010 to 2 March 2011. During that time, the teams detected a total of 11,809 migrants entering the border in an irregular manner, or some 58 migrants per day on average.[2] Migrants continued to arrive later in 2011, though their numbers dwindled. As a follow-up to the Rabit deployment, Frontex launched Joint Operation Poseidon Land. At the Turkish border, Poseidon apprehended 3,781 migrants in December, or 121 per day on average. The total number of irregular migrants intercepted crossing the Greek–Turkish land border reached 55,017 in 2011 according to Frontex, a 14 % increase over the year earlier.

As part of its Rabit operation, Frontex deployed substantial resources to improve the treatment of individuals subject to procedures at the border with Turkey. This has reduced the risk that migrants who have crossed irregularly into **Greece** are immediately pushed back to Turkey without any formal procedures. The EU's operational assistance through Frontex, however, covers only initial processing and does not address the most critical fundamental rights concern – the inhuman conditions in which persons are held in facilities near the border.[3] Frontex's mandate does not extend to the reception of persons crossing borders irregularly. Human Rights Watch, in a September report, expressed concerns over Frontex's role which it characterised as facilitator of the transfer of migrants to inhuman and degrading conditions in detention centres in Greece.[4] The report referred to the European Court of Human Rights' (ECtHR) judgment in the *M.S.S. v. Belgium and Greece*[5] case, which found that Greek detention practices violated Article 3 of the European Convention on Human Rights (ECHR). At the request of four Members of the European Parliament representing the Greens, European Free Alliance faction, a study – *FRONTEX Agency: Which guarantees for Human Rights?*[6] – was commissioned. It advocates a more vigilant Frontex stance on fundamental rights compliance.

The Greek Minister of Citizen Protection presented the Comprehensive Programme of Border Management for Combating Irregular Migration to the cabinet on 6 September.[7] The programme includes plans for erecting a wall along the 12-kilometre Greek-Turkish land border in the Evros region near Orestiada. Critics consider the wall plan inappropriate and suggest it will prove ineffective.

Although no reliable statistics document the number of fatalities at sea, civil society organisations have tried to estimate the size of the tragedy using indirect sources, such as incidents reported in the press and accounts provided by eyewitnesses. Fortress Europe, an NGO based in **Italy**, has compiled the most comprehensive estimates based on a systematic review of press articles. According to it, 2011 recorded the largest number of migrant deaths in the Mediterranean since 1994: by early December, 2,251 migrants had died or gone missing in the Sicily Channel alone.

The most severe incident took place on 6 April when more than 220 Somali, Eritrean and Ivorians drowned after their boat capsized 39 miles (63 kilometres) to the south of Lampedusa, Italy.[8] Another tragedy occurred on 31 July, when 25 migrants died after their boat

2 Frontex (2011a).

3 FRA (2011).
4 Human Rights Watch (2011).
5 ECtHR, GC, *M.S.S v. Belgium and Greece,* No. 30696/09, 21 January 2011.
6 Keller, S. *et al.* (2011).
7 Greece, Ministry of Citizen Protection (2011).
8 UNHCR (2011a).

had docked at the Lampedusa Port.[9] Following these deaths,[10] the United Nations High Commissioner for Refugees (UNHCR) issued a statement urging improvements in rescue at sea mechanisms.[11]

FRA ACTIVITY

Getting to the root of the situation at the Greek border

The FRA produced a thematic situation report *Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner* in 2011. The report identifies the factors contributing to the situation in Greece's Evros region and pinpoints, as the chief concern, the difficulties in coordinating local responses. Responsibilities for migration management are divided among four ministries, making the allocation of responsibilities at local level unclear. One way forward would be to develop a specific coordination mechanism at the local operational level, an approach which has proven effective in other EU Member States.

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

In the wake of the Arab Spring, **Italy** and **Malta** received a large number of arrivals over a short period of time. In 2011, nearly 63,000 persons crossed the Mediterranean as a result of the Tunisian revolution and the war in Libya, according to Frontex information provided to the FRA. Half of the arrivals were Tunisians, 25,000 were Libyans and the others were from sub-Saharan Africa and Asia.

The large majority arrived between February and April, with some 51,000 persons landing on the small island of Lampedusa, Italy and 1,579 persons reaching Malta. On the night from 4 to 5 April alone, 840 migrants arrived at Lampedusa, 627 of whom were first rescued by the Italian coastguard.[12] In March, the UNHCR called for a quick transfer to mainland Italy of the 5,000 migrants hosted at Lampedusa, whose reception facility has a maximum capacity of only 850 persons.[13] It took several weeks for transfers to begin.

Disagreement among EU Member States on the nearest safe port delayed the disembarkation of rescued migrants. In July, more than 100 migrants were stranded on a vessel under NATO command for several days, due to a disagreement between **Italy**, **Malta** and **Spain** over where to take the migrants.[14] In another incident, 104 of 112 Tunisian migrants were accompanied back to Tunisian territorial waters after Italian vessels rescued them on 22 August.[15]

A riot against forced returns to Tunisia broke out at the Lampedusa reception facility at the end of September, severely damaging it. As a result, **Italy** opted to declare the port unsafe. In a joint press release, the UNHCR, the International Organization for Migration (IOM) and the British non-governmental organisation Save the children commented that this decision "undermined the entire rescue at sea system for migrants and asylum seekers and at the same time could make rescue operations more hazardous and complex".[16] The facilities in Lampedusa remained unused at the end of the reporting period.

The European Commission's 2011 proposal to amend the Schengen Borders Code (see 2.1.2. on Schengen cooperation) includes provisions on improved border guard training in order to detect situations of particular vulnerability involving unaccompanied minors and victims of trafficking (Article 15).

At the end of the reporting period, the Commission published a proposal for the establishment of a European Border Surveillance System, Eurosur.[17] The proposal aims to reinforce control of Schengen's external borders, by establishing a system for the exchange of surveillance information among EU Member States and with Frontex envisages the establishment of a framework for information exchange and cooperation between Member States and Frontex. The draft regulation states that the aim of Eurosur is to prevent irregular migration and cross-border crime at the Schengen external land and maritime borders as well as to reduce the loss of lives at sea. The proposal refers to the need for EU Member States and Frontex to respect European fundamental rights and data protection rules. The draft regulation also envisages the possibility of cooperation with third countries, although it prohibits exchange of data with a third country that could use such information to identify persons or groups of persons who are at serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights. The development of Eurosur needs close monitoring. While the system rests on already existing national or European instruments and tools, Eurosur is likely to create a synergy that may have an impact on fundamental rights, especially in relation to asylum and data protection.

9 Italy, Camera dei deputati, Assemblea (2011).
10 The Guardian (2011).
11 United Nations News Centre (2011).
12 ASCA (*Agenzia Stampa Quotidiana Nazionale*), (2011); Frontex (2011b).
13 UNHCR (2011b).
14 Times of Malta (2011).
15 TM News (2011).
16 UNHCR *et al.* (2011).
17 European Commission (2011a).

FRA ACTIVITY

Identifying gaps and promising practices for migration management at borders

The FRA interviewed migrants, border authorities, fishermen and other actors in 2011 to collect information on the interception of migrants, rescue at sea, disembarkation and first reception procedures at the southern Mediterranean border. The interviews identified deficits regarding the search for migrants lost at sea but also documented positive rescue practices. Communication barriers exacerbated by the need to act quickly makes it difficult to identify groups at risk, such as separated children, asylum seekers or victims of trafficking. The FRA discussed the preliminary results of the research with stakeholders in **Greece**, **Italy**, **Malta** and **Spain**.

Civil society actors play an important role in providing assistance and protection to newly arrived migrants. A number – including the Spanish NGO Accem, the Italian Council for Refugees Foundation, the European Council on Refugees and Exiles, the Jesuit Refugee Service Malta, Praksis in Greece and Save the Children Italy – have cooperated within the Commission's co-funded DRIVE project led by the International Catholic Migration Commission (ICMC). The project report pinpoints gaps and formulates practical recommendations for first-contact procedures following disembarkation that are sensitive to individual needs, called protection-sensitive measures.[18]

2.1.2. Schengen cooperation

Freedom of movement within the EU was put to the test in 2011. The arrival of Tunisian migrants in the wake of the Arab Spring prompted **France** to intensify police checks at its internal border crossing points with **Italy**. In order to avoid breaching the Schengen Borders Code, the checks at each location were limited to no more than six consecutive hours and did not involve a systematic monitoring of all those present.

Some criticism was levelled at the Italian authorities for allegedly attempting to encourage some of the migrants to travel to other EU Member States and for contravening the spirit of the Schengen agreement. The issue prompted discussion at EU level regarding a mechanism for temporary reinstatement of controls at internal borders. The **Danish** government announced stricter customs controls at the country's main land border crossing points in order to combat cross-border crime, such as drug smuggling. The European Commission was scrutinising these plans when the new Danish government decided not to follow through on them.

18 ICMC (2011).

The **Netherlands** changed its legislation on mobile patrolling, which the Council of State, a body which advises on proposed legislation,[19] had previously ruled incompatible with EU law. In a related decision, the District Court of The Hague ruled that the border checks governed by this new law were no different from border control as prohibited by the Schengen Borders Code (Article 21). The practice and law were thus both found in violation of Article 21 of the Schengen Code.[20]

At EU level, the Council of the European Union called for the reintroduction of border checks "only as a very last resort" in response to exceptional circumstances that put Schengen cooperation at risk. Alongside a proposal amending the Schengen Border Code's mechanism for temporarily reintroducing internal border controls in exceptional circumstances,[21] the European Commission also presented a proposal to establish an evaluation mechanism to verify the application of the Schengen *acquis*.[22]

The European Commission proposed replacing the External Borders Fund with an Internal Security Fund designed to reinforce the work of EU Member States at external borders, provide emergency assistance in exceptional cases, aid the development of the smart border package and support the introduction and operation of Eurosur. The fund will also be used for Schengen governance and the evaluation and monitoring mechanism, which will verify the application of Schengen *acquis*.

On 25 October, the Commission issued a communication on smart borders which presents an appraisal of the use of new systems for border surveillance. It has two components: the proposed entry/exit system, an information technology system which monitors third-country nationals to ensure that they do not overstay; and the registered travellers' programme which is designed to speed registered travellers with electronic identification tokens across borders and trace those whose visas have expired. Given the potential impact on privacy, the technologies presented raise issues of necessity and proportionality, with respect to the extent of the data collected and stored.[23]

In 2011, EU Member States prepared national components for launching the Schengen Information System II (SIS II). According to the legal instruments underpinning the system, SIS II alerts on persons and objects can be accessed by border control authorities, police and customs officials, visa issuing authorities and national judicial authorities. Such authorities have

19 Netherlands, Council of State (2010).
20 Netherlands (2011).
21 European Commission (2011b); European Commission (2011c).
22 European Commission (2010e).
23 European Commission (2011d).

access to data only within their area of legal competence.[24] SIS II is scheduled to become operational in the first quarter of 2013. The European Commission is currently developing and testing the central elements and communication infrastructure of SIS II.

2.1.3. The Schengen evaluation system and fundamental rights

The rules governing the Schengen evaluation mechanism are currently under review.[25] In September, the European Commission proposed replacing the existing intergovernmental approach with a new system that gives the Commission itself more responsibility. The proposal recognises the need to evaluate all areas of the Schengen *acquis* and to pay particular attention to fundamental rights, including data protection, when the *acquis* is applied.[26] In accordance with the ordinary legislative procedure, the proposal would empower the European Commission to:

- lead teams of experts during on-site visits (announced and unannounced);
- adopt reports (following consultation of a committee of Member State experts) containing recommendations for remedying deficiencies identified in the course of inspections, and requiring concrete follow-up by the Member State concerned;
- provide appropriate support to the Member State concerned and assistance from EU agencies in cases of serious deficiencies;
- request Frontex to provide its expertise to recommend where unannounced visits should be conducted; this could also be triggered by fundamental rights concerns;
- in case of serious deficiencies, propose to temporarily close a specific border crossing point.[27]

Under the current rules, an intergovernmental peer review mechanism verifies the correct application of the Schengen arrangements by EU Member State and candidate or acceding country, evaluating each EU Member State at least once every five years. The Schengen Evaluation Working Party, which consists of Member State experts assisted by a representative of the Secretariat of the Council of the European Union and an observer from the European Commission, carries out the evaluations. The evaluations are structured by sector: control over land borders, sea borders and air borders, police cooperation, visas and consular cooperation, data protection and SIS-Sirene system. The Member State evaluated follows up with a report or an action plan detailing how it plans to address any weaknesses identified and regularly reports on progress until all weaknesses are remedied.

The Schengen Borders Code is the centrepiece of the Schengen evaluation process. It contains a number of references to fundamental rights. Yet there is little information to conclude that Schengen evaluators also evaluate adherence to fundamental rights. The FRA consulted EU Member States to determine whether evaluators raise such concerns during, or as a result of, the evaluations. Feedback from the Member States was, however, limited due to the confidential nature of the reports.

During 2010 and 2011, some 14 evaluations took place in seven EU Member States. The high number of evaluations reflects the planned Schengen accession of **Bulgaria** and **Romania**. Three of the seven Member States reviewed did not provide any information on the results. Another three countries (**Austria**, **Portugal** and **Romania**) indicated that the recommendations they received related solely to technical and organisational issues, and not to fundamental rights concerns. Only one Member State, Bulgaria, reported recommendations, subsequently implemented, related to fundamental rights. These concerned the need to build custodial premises for migrants in an irregular situation who were apprehended at or near the border.

Although basic rights are mentioned explicitly in the Schengen Borders Code and come into play at various stages of border control, it seems safe to assume that evaluations so far have not focused on fundamental rights issues, at least not systematically. Future evaluations could consider, respond to and be triggered by specific fundamental rights concerns. Human dignity, non-discrimination, proportionality between measures and objectives, the rights of persons seeking international protection, children and victims of trafficking and non-refoulement, which prohibits the return of migrants to places where their lives or freedoms might be threatened, are some of the key rights guaranteed in the Schengen Borders Code. They should therefore be taken into consideration in evaluations of the implementation of Schengen rules at different stages of the border control process, such as conduct and procedures related to risk analysis, first and second-line checks, interviews with suspects and at-risk passengers, referral, non-admission, return and restriction of

24 For more information on the Schengen Information System, see: www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-(jai)/sirene-schengen-information-system?lang=en#?lang=en.
25 European Commission (2011c).
26 *Ibid.*
27 *Ibid.*

movement, as well as training curricula for border guards on these issues.

2.1.4. The external dimension of EU's border control policies

The external dimension of EU's border control policies further developed in 2011. The revised Frontex regulation strengthens the agency's cooperation with third countries. Frontex can deploy liaison officers to establish and maintain contacts with relevant third-country authorities in order to prevent illegal immigration and to facilitate the return of migrants in an irregular situation.[28]

The European Commission proposal to amend the Schengen Borders Code includes a provision allowing for bilateral agreements with non-EU authorities on joint border controls, either on third-country territory or on the territory of a Member State.[29] The situation of persons requesting international protection is dealt with in both cases (Annex VI). According to the proposal, a third-country national submitting a request for international protection to border guards of an EU Member State exercising their functions in a third country, is permitted to launch an asylum procedure in the EU Member State concerned. When asylum requests are presented to border guards in a Member State, they should be channelled into that state's asylum procedures, even if the asylum seeker has not yet passed the exit checks of third-country border guards.

2.2. A common visa policy

The Community Code on Visas (Regulation (EC) No. 810/2009, also known as the Visa Code) establishes the procedures and conditions for issuing visas for transit through, or stays in, the territory of an EU Member State which do not exceed three months in any six-month period.[30] The Visa Code says that the fundamental rights enshrined in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union must be guaranteed to any person applying for a visa.[31]

> *"The reception arrangements for applicants should be made with due respect for human dignity. Processing of visa applications should be conducted in a professional and respectful manner and be proportionate to the objectives pursued."*
>
> *Recital 6 of the Community Code on Visas, Regulation (EC) No. 810/2009*

The Code also addresses the conduct of staff, such as consular staff, (Article 39) saying that applicants should be received courteously. In its on-going efforts to support the harmonisation of practices, the European Commission amended the 2010 handbook for the processing of visa applications and the modification of issued visas.[32] The handbook clearly states that the processing of visa applications should be conducted by staff in a professional and respectful manner and in full compliance with the prohibition of inhuman and degrading treatment and the prohibition of discrimination enshrined respectively in Articles 3 and 14 of the ECHR and Articles 4 and 21 of the EU Charter of Fundamental Rights.

Promising practice

Combating corruption in visa issuing procedures

From the perspective of the applicant and of the public, the visa issuing process may perhaps be perceived as lacking in sufficient transparency. To tackle the issue, the **Czech Republic** introduced an anti-corruption helpline available in both Czech and English. The aim of the helpline is to register and record any cases of corruption that immigrants and other foreigners may encounter when dealing with immigration offices and their staff, such as when applying for a visa or a residence permit.

2.2.1. External service providers

In order to cope with rising numbers of applications and additional technical requirements, such as the collection of biometric identifiers, many EU Member States cooperate with external service providers. Annex X of the Visa Code establishes the minimum requirements for such cooperation and, among other matters, extends the requirements for staff conduct to external service provides.

The **French** Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés,* CNIL), in evaluating the outsourcing of biometric data collection, referred to "serious risks to privacy and individual liberties". The authority expressed "serious reservations" in view of the "possible use of these data by service providers as well as the local authorities".[33]

2.2.2. The Visa Information System (VIS)

The Visa Information System (VIS),[34] which contains data on admissible applications for short-stay visas, became operational in North Africa (Algeria, Egypt,

28 Revised Frontex Regulation, Art. 14.
29 European Commission (2011e).
30 Regulation (EC) No. 810/2009, OJ 2009 L243/3, Art. 58, p. 26.
31 *Ibid.,* Recital 29.
32 European Commission (2010); European Commission (2011f).
33 France, French Data Protection Agency (2009; 2010).
34 Regulation (EC) No. 767/2008, OJ 2008, L 218/60.

Libya, Mauritania, Morocco and Tunisia) on 11 October 2011. The VIS will subsequently be deployed in the Near East (Israel, Jordan, Lebanon and Syria) followed by the Gulf region (Afghanistan, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen).[35] The VIS will be gradually deployed, region by region, until all Schengen States' consulates worldwide are connected.

Both the Visa Code (Article 43, on cooperation with external service providers) as well as the VIS Regulation (Articles 31, 37, 39, 41 on communication of data, right of information, cooperation on data protection and supervision, respectively) make reference to the Data Protection Directive (Directive 95/46/EC).[36] Data are kept in the VIS for a maximum of five years, dating either from the visa expiry or from the rejection of the visa request. Those entered into the VIS have the right to obtain a copy of their data from the relevant Schengen state. They may also request that inaccurate data be corrected and any data unlawfully recorded be deleted. In each Schengen state, national supervisory authorities independently monitor the processing of personal data registered in the VIS. The European Data Protection Supervisor monitors the data processing activities conducted by the VIS management authority. It is as yet unclear how provisions on data protection will be implemented.

To manage the information systems Eurodac, VIS and SIS II, on 25 October 2011 the EU established an agency responsible for the operational management of large-scale information technology (IT) systems in the area of freedom, security and justice.[37] In recital 21 of the regulation, the Estonia-based agency is requested to cooperate with other agencies of the Union, in particular with the FRA, in the area of freedom, security and justice. The tasks relating to technical development and the preparation for the operational management of SIS II and VIS are carried out in Strasbourg, France and a backup site for those IT systems has been installed in Sankt Johann im Pongau, Austria.

2.2.3. Suspending the visa waiver

The EU process of visa liberalisation faced challenges in 2010 and 2011, as the numbers of asylum seekers from Serbia and the former Yugoslav Republic of Macedonia (FYROM) rose following the introduction of visa waivers for these two countries in 2009. The increase in applications chiefly affected **Belgium**, **Germany** and **Sweden**.[38] In 2011, 4,245 Serbian nationals applied for asylum in **Germany**, 2,635 in **Sweden** and 1,415 in **Belgium**. In **Germany**, the number of applications dropped between May and July; however, numbers increased again substantially later in the year. A large majority of the applicants were of Roma origin. In Germany, one of the few EU countries that record the ethnicity of asylum applicants, Roma represented 95 % of all Serbian asylum seekers in 2010, and 86 % of all nationals from FYROM in the same year. In **Sweden**, almost all asylum seekers from Serbia and FYROM were Roma. In **Belgium**, the ethnic composition of the Serbian and Macedonian asylum seekers was roughly half Roma, half Albanian.[39]

Applicants from FYROM and Serbia were rarely granted protection in 2010. The EU27 overall protection rate amounted to 2.46 % for Serbians in first instance decisions and 7.77 % in final decisions. The rates were even lower for applicants from FYROM, where the overall protection rate of first instance decisions in the EU27 was 1.32 % and in final decisions 1.85 %.[40] Available figures for 2011 show a similar trend: 2.75 % Serbians and 1.23 % FYROM nationals received protection in first instance decisions.[41] 2011 statistics on final decisions were not yet available when this report was drafted.

In reaction to this increase in asylum seekers, at the end of 2010, **France** and the **Netherlands** requested the introduction of a safeguard clause suspending the visa waiver in the event of an emergency. The European Commission proposed a clause in the Visa Regulation (539/2001) that would allow temporary suspensions of the visa waiver for third countries in exceptional and well-defined circumstances.[42] The clause provides a general framework for the future, without being related to specific third countries. Under the proposal, the European Commission would assess Member State information and statistics and adopt, with the assistance of committees composed of representatives from EU countries, known as the comitology procedure, a decision temporarily suspending the visa waiver for one or more third countries. On 13 December 2011, the Justice and Home Affairs Council adopted a general approach on certain elements of the amendment to the Visa Regulation, thus allowing for negotiations with the European Parliament to start. Seventeen NGOs reacted by sending a letter of concern in October to the relevant member of the European Commission that EU Member States were thereby discouraging western Balkan countries from allowing the departures of ethnic groups, particularly Roma, risking violations of everyone's fundamental right to leave any country including his/her own. The measures targeted mainly those persons seeking asylum, including Roma.

35 European Commission (2009).
36 Directive 95/46/EC, OJ 2005 L 281.
37 Council Regulation (EU) No. 1077/2011 L286/1.
38 For further information on asylum application numbers in 2011, see: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-048/EN/KS-SF-11-048-EN.PDF.
39 European Stability Initiative (2011).
40 Eurostat, all data extracted on 16 December 2011.
41 Eurostat, all data extracted on 21 March 2012.
42 European Commission (2011g).

2.2.4. The right to appeal negative visa decisions

The provisions in the Visa Code on the right to appeal entered into force on 5 April 2011, making it mandatory for EU Member States to introduce appeal procedures for persons whose application for a Schengen visa has been refused. A negative decision on a visa application, the annulment or the revocation of a visa (Article 32 (3), Article 34 (7)) can be appealed according to the procedures provided for in national law.

The Visa Code contains a standard form in Annex VI for authorities to explain the reasons for their refusal, annulment or revocation of a visa. Individuals are entitled to a copy of the filled-out form, which also includes information for the applicant on the appeal procedure.

All EU Member States and associated states taking part in the Schengen cooperation[43] have established a procedure to appeal the refusal of a Schengen visa.

EU Member States without a consulate in a third country or in a certain region of a third country may conclude representation arrangements with other Member States. The main rule is that the representing consulate shall, when contemplating refusing a visa, submit the application to the relevant authorities of the represented Member State in order for them to take the final decision on the application (Article 8 (2)). The representing consulate shall in turn inform the applicant of the decision taken by the represented Member State (Article 32 (4)). A more common arrangement is, however, that the Member State represented authorises the representing Member State to refuse to issue a visa after examination of the application. Appeals of negative decisions shall be conducted against the Member State that took the final decision on the application.

The Visa Code does not prescribe standards for the independence of the appellate body. Figure 2.1 provides an overview of solutions for which EU Member States have opted when the visa has been refused at a diplomatic or consular representation. Existing appeals body can broadly be categorised into three groups: judicial bodies, quasi-judicial bodies and public authorities. The following Member States have opted for judicial bodies as the appeals body: in **Bulgaria, Greece, Italy**[44] and **Lithuania** the applicant may appeal directly to the Administrative Courts. In **Luxembourg** decisions may be appealed to the Administrative Tribunal and further to the Administrative Court. In **Austria** a decision on a refused visa may be appealed to the Administrative Court and/or the Constitutional Court. In **Cyprus** there is a right to appeal to the Supreme Court. In **Latvia, Slovenia** and **Sweden** the applicant has the right to appeal to the consulate to reconsider the decision and also has the right to further appeal to the Administrative Court. In **Germany**, the refused applicant may request that the consulate reconsider the decision and may also submit a further appeal to the Administrative Court in Berlin. **Spain** applies the same system of appeal and the designated body is the High Court of Madrid.

Other Member States designate appeals body within their administrations. In **Estonia, Finland, Hungary** and **Poland** a refused visa can be appealed to the Ministry of Foreign Affairs. After **Romania** accedes to the Schengen area, the Ministry of Foreign Affairs will examine appeals there.[45] In **Denmark** a refused visa may be appealed to the Ministry of Justice, in the **Netherlands** to the Ministry of the Interior and Kingdom Relations and in **Portugal** to the Foreigners and Borders Service (*Serviço de Estrangeiros e Fronteiras,* SEF).

In a number of Member States the appeals body is of a quasi-judicial nature. In **Belgium,** the appeals body is the Council for Alien Law Litigation, in **France** the Appeals Commission on Visa Refusals, in **Malta** the Immigration Appeals Board and in **Slovakia** the Remonstrance Commission. In the **Czech Republic,** the appeals body is the Appeals Commission on Residence of Foreign Nationals, although the consulate has the possibility to reconsider its decision before the formal appeal procedure starts.

The following two **German** cases illustrate how the state balances the objectives of facilitating legitimate travel and tackling illegal immigration. In a case weighing the public interest in the prevention of irregular immigration against the special protection of family ties, the Federal Administrative Court upheld a visa rejection, arguing that there were justified doubts about the applicant's intent to return to her home country. She had made clear that she wanted to stay in **Germany** permanently because of her children.[46] In another case, however, the Berlin Administrative Court argued that the extension of a visa during a previous stay was insufficient grounds to conclude that a person is unwilling to return to his/her home country. The court decided for the complainant, ruling that persons who extend a Schengen visa are not automatically excluded from the receipt of another visa.[47]

43 For more information on Schengen cooperation Member States, see: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm.

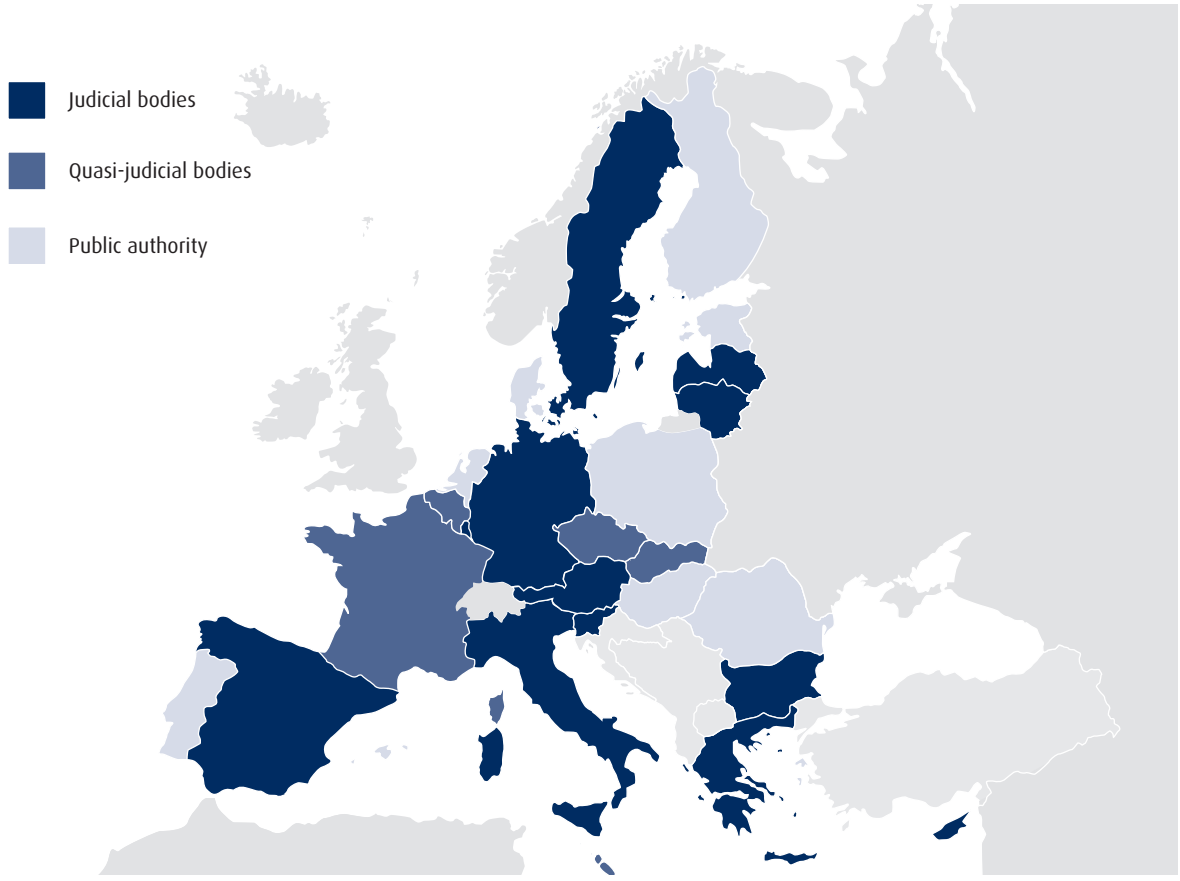
44 In Italy, only one court has the competence: the Lazio Regional Administrative Court.

45 Romania, Law No. 157/2011.

46 Germany, Federal Administrative Court, 1 C 1.10.

47 Germany, Berlin Administrative Court, 3rd Chamber, 3 K 301.09 V.

Figure 2.1: Appellate bodies and the degree of their independence, by country



Notes: *Bulgaria, Cyprus and Romania do not issue Schengen Visas; Ireland and the United Kingdom have opted out of the Schengen cooperation. Information collected from the responsible authorities by the Franet network in 2011 and from the websites of the relevant ministries.*

Source: *FRA, 2011*

In 2011, the FRA collected statistics on the number of appeals against visa decisions and on the number of reversed decisions, in order to determine whether remedies for visa decisions are in place. Among the EU Member States participating in the Schengen cooperation, only five could provide relevant figures for 2011. As illustrated in Table 2.1, appeals against visa decisions can be successful, although the number of reversed decisions varies substantially among the five countries reviewed.[48]

Table 2.1: Number of visa appeals lodged and decisions not upheld, by country

Country	Number of issued short-term Schengen visas (C) in the same time period	Number of appeals	Time period	Decision reversed/ to be re-examined
DK	95,453	932	2011	39*
EE	72,616	81	5 April–27 September 2011	15
HU	150,893	121	5 April–31 August 2011	41
LV	166,239	34	2011	1
PL	389,484	683	5 April–31 August 2011	123
PT	90,689	421	5 April–31 October 2011	236

Note: ** In Denmark appeals decided in 2011 also include appeals lodged in 2010.*
Source: *FRA, 2012; based on information collected from the responsible authorities by the Franet network in 2011*

48 The numbers indicated in the table may not be limited to Schengen visas but may also include visas with limited territorial validity as well as national visas.

Outlook

There is a clear risk that the challenges the EU faced in 2011 will persist in years to come. Unless changes are implemented, the arrival of large numbers of persons at the EU's external borders will continue to pose a real test regarding respect for fundamental rights. Such arrivals expose existing gaps in national reception capacities and highlight the complexity of guaranteeing protection at borders and providing efficient referral mechanisms.

Political will and decisive measures alone will improve organisational capacities. Accessing EU funding and using it effectively to strengthen reception capacities in line with fundamental rights will be essential in this regard.

Fundamental rights principles covered by the Schengen Borders Code and the Visa Code will need to be implemented in practice. Future evaluations of the Schengen agreements will need to devote adequate attention to the application of these principles. The revised Frontex regulation and the implementation of its fundamental rights strategy are likely to raise expectations in the field.

Fundamental rights concerns related to data protection and privacy will remain in focus in the visa policy field. New technologies for border surveillance and for storing personal data are either already in use or under continued development: VIS is being implemented; SIS II is under preparation; the European Commission has tabled its proposal for Eurosur; and smart border concepts are under discussion. Such technological advances in the field will continue to raise concerns about issues of necessity and proportionality with respect to the data collected and stored, as well as about how they affect the privacy of persons whose personal data are collected and stored.

References

ASCA (*Agenzia Stampa Quotidiana Nazionale*), (2011) 'Immigrati: nuovi sbarchi a Lampedusa. In 24 ore arrivate 840 persone', 5 April 2011.

Council Regulation (EU) No. 1077/2011 of the European Parliament and of the Council of 25 October 2001 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ 2011 L286/1.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 2005 L 281.

European Commission (2009), *Decision of 30 November 2009 determining the first regions for the start of operations of the Visa Information System (VIS)*, C(2009) 8542, Brussels, 30 November 2009.

European Commission (2010), *Commission Decision of 19.3.2010 establishing the Handbook for the processing of visa applications and the modification of issued visas*, C(2010) 1620 final, Brussels, 19 March 2010.

European Commission (2011a), *Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (Eurosur),* COM(2011) 873 final, Brussels, 12 December 2011.

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

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

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

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

European Commission (2011f), *Commission Implementing Decision of 4.8.2011 amending Commission Decision No. C (2010) 1620 final of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas*, C(2011) 5501 final, Brussels, 4 August 2011.

European Commission (2011g), *Proposal for a Regulation amending Council Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, COM(2011) 290 final, Brussels, 24 May 2011.

European Stability Initiative (2011), 'Advancing Freedom of Movement in a Populist Age – How the Western Balkans asylum seeker's affair can be resolved', Brussels, 9 July 2011.

European Union Fundamental Rights Agency (FRA) (2011), *Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner,* Vienna.

France, French Data Protection Agency (*Commission nationale de l'informatique et des libertés,* CNIL) Deliberation No. 2009-494, 17 September 2009.

France, French Data Protection Agency (*Commission nationale de l'informatique et des libertés,* CNIL) CNIX1015396X, Decision No. 2009-494 an opinion on the draft decree amending articles R. 611-10 and R. 611-13 of the Code of the Entry and Stay of Aliens and Asylum Seekers in order to be able to entrust the collection of biometric data from visa applicants by approved suppliers (*Délibération n° 2009-494 portant avis sur le projet de décret modifiant les articles R. 611-10 et R. 611-13 du code de l'entrée et du séjour des étrangers et du droit d'asile dans le but de pouvoir confier à des prestataires agréés le recueil des données biométriques des demandeurs de visa*), 12 June 2010.

Frontex (2011a), *RABIT Operation 2010 Ends, Poseidon 2011*, 3 March 2011, Press release, available at: http://frontex.europa.eu/news/rabit-operation-2010-ends-replaced-by-jo-poseidon-2011-pWiZjT.

Frontex (2011b), *Hermes Operation Extended,* Press Release, 24 March 2011.

Greece, Hellenic Data Protection Authority (2010), Opinion 3/2010, 19 October 2010.

Greece, Ministry of Citizen Protection (*ΕΛΛΗΝΙΚΗ ΔΗΜΟΚΡΑΤΙΑ, ΥΠΟΥΡΓΕΙΟ ΠΡΟΣΤΑΣΙΑΣ ΤΟΥ ΠΟΛΙΤΗ*) (2011) *Παρουσίαση στο Υπουργικό Συμβούλιο (6/9), από τον Υπουργό Προστασίας του Πολίτη, κ. Χρήστο Παπουτσή, του Ολοκληρωμένου Προγράμματος διαχείρισης των συνόρων για την Αντιμετώπιση της Παράνομης Μετανάστευσης*, Press Release, 7 July 2011, available at: www.minocp.gov.gr/index.

php?option=ozo_content&lang=&perform=view&id=3790&Itemid=513.

The Guardian (2011), *Aircraft carrier left us to die, say migrants*, 8 May 2011; BBC News Europe (2011), *Libya: Hundreds feared dead as migrant boat capsizes,* 9 May 2011.

Human Rights Watch (2011), *The EU's Dirty Hands: FRONTEX Involvement in Ill-Treatment of Migrant Detainees in Greece*, United States of America, Human Rights Watch.

International Catholic Migration Commission (ICMC) (2011), *MAYDAY! Strengthening responses of assistance and protection to boat people and other migrants arriving in Southern Europe,* September 2011.

Italy, Camera dei deputati, Assemblea, Seduta di mercoledì 3 agosto 2011, *Informativa urgente del Governo sulla tragica vicenda della morte di venticinque persone a bordo di una nave di immigrati approdata a Lampedusa*, 3 August 2011, available at: www.interno.it/mininterno/export/sites/default/it/assets/files/21/0388_Informativa_Lampedusa_Viale.pdf.

Keller, S., Lunacek, U., Lochbihler, B. and Flautre, H. (2011), *FRONTEX Agency: Which guarantees for Human Rights?*

Malta Today (2011), *UNHCR, IOM, Save the Children express concern at Lampedusa 'unsafe port' status*, 30 September 2011.

Netherlands (2011) District Court The Hague (*Rechtbank's-Gravenhage*), LJN: BR0684, No. AWB 11/19820, 4 July 2011.

Netherlands, National Ombudsman (*De Nationale Ombudsman*) (2010), *Toegang verboden. Onderzoek naar de opname van vreemdelingen in het Schengen Informatie Systeem en de informatievoorziening hierover*, De Nationale Ombudsman, Den Haag.

Netherlands, Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid*) (2011b), iOverheid, Scientific Council for Government Policy/Amsterdam University Press, Den Haag/Amsterdam.

Rathenau Institute (*Rathenau Instituut*) (2010), *Databases. Over ICT-beloftes, informatiehonger en digitale autonomie*, Den Haag, Rathenau Instituut.

Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ 2009 L243/3, Article 58, p. 26.

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

Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011 L 304/1.

Romania, Law No. 157/2011.

Slovenia, Administrative Court of the Republic of Slovenia, No. I U 577/2010, 8 September 2010.

Times of Malta (2011), *Migrants' rescue: Malta awaits NATO's explanation*, 14 July 2011.

TM News (2011), *Immigrati/Rimpatrio in mare per 104, consegnati a tunisini, Rimpatrio unico nel suo genere fino ad ora,* 22 August 2011, available at: www.tmnews.it/web/sezioni/cronaca/PN_20110822_00061.shtml.

United Nations High Commissioner for Refugees (UNHCR) (2011a), Press release, Rome, 8 April 2011, available at: www.unhcr.it/news/dir/27/view/963/appello-per-la-difesa-dei-principi-del-soccorso-in-mare-e-della-condivisione-degli-oneri-96300.html.

UNHCR (2011b), *Forte preoccupazione per l'aggravarsi della situazione umanitaria a Lampedusa*, Rome, Press release, 21 March 2011.

UNHCR, International Organization for Migration (IOM) and Save the children (2011), 'Lampedusa declared non-safe port, rescuing at sea at risk: Concern for migrants' detention on the ships', Joint press release, Rome, 30 September 2011.

United Nations News Centre (2011), *As hundreds feared drowned off Libya, UN agency urges better rescue methods,* 10 May 2011.

UN & CoE

January

February

March

April

May

June

July

August

September

October

November

December

EU

January

February

2 March – Frontex brings its Rapid Border Intervention Team (Rabit) operation in Greece to an end

10 March – European Commission proposes amendments to the Schengen Borders Code, including on how to deal with asylum applications during joint border controls

31 March – Frontex adopts its fundamental rights strategy

March

5 April – The provision on the right to appeal visa rejections of the Community Code on Visas enters into force

April

24 May – European Commission proposes suspending visa-free travel in cases of abuse of asylum systems

May

June

July

August

16 September – European Commission proposes a mechanism for the temporary reintroduction of border controls

September

11 October – The EU Visa Information System (VIS) becomes operational in North Africa

25 October – European Commission adopts a Communication on smart borders

25 October – Council of the European Union establishes an information technology (IT) agency in Tallinn to manage the operation of large-scale IT systems

25 October – European Parliament and Council of the European Union amend the founding regulation of Frontex and strengthen its fundamental rights language

October

15 November – European Commission proposes financial solidarity instrument to support EU Member States in the external borders and visa fields

November

12 December – European Commission tables proposal for a European external border surveillance system (Eurosur)

December