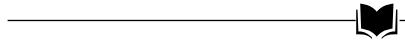
CHAPTER X

Division of Competences and Responsibilities Between EU Institutions/ Agencies and Member States for Border Management



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Abstract

In the European Union (EU), border control and surveillance have emerged as significant policies for managing migration. The EU's action at the external borders is based on a combination of migration securitisation and externalisation of border management policies. The EU follows a 'shared competence' and 'shared responsibility' for developing an integrated European border management system in the context of migration control. This chapter examines the division of internal and external competences and responsibilities between EU institutions/agencies and national authorities of member states concerning border management and migration. Further, it analyses the intensity and scope of the EU's intervention in this area along with its limitations. The European integrated border management is crucial for improving migration management and is conducted within a multi-level governance system with binding rules and various actors. This raises concerns regarding the exact allocation of competences and corresponding obligations and responsibilities conferred on each of them. The Schengen Borders Code (Regulation (EU) 2016/399) and the European Border and Coast Guard Regulation (Regulation (EU) 2019/1896) are the primary legally binding instruments, which specify common (supranational) rules governing the movement of persons across EU borders and highlight how member states manage their borders serving a common interest within

Gregor Maučec (2024) 'Division of Competences and Responsibilities Between EU Institutions/Agencies and Member States for Border Management'. In: Anikó Raisz (ed.) *Migration and Central Europe. Challenges and Legal Responses,* pp. 369–438. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2024.armace_10

an increasingly harmonised substantive and institutional framework. Although, the rules relating to the management of EU external borders continue to evolve in the context of the Schengen *acquis*, member states retain their own competences and responsibilities regarding border control and entry to their territories concerning the maintenance of legal and public order and national security. However, the member states are required to exercise their competence in this field in compliance with the objectives and acts of the EU's border management and migration *acquis* and policies, ensuring full respect for fundamental rights.

Keywords: European Integrated Border Management, European Border and Coast Guard (Frontex) Agency, member states' border authorities, border management – migration regime nexus, fundamental rights, Court of Justice of the EU

1. Introduction

As part of the comprehensive and harmonised approach to migration of the European Union (EU),[1] the European Commission came up with the first multiannual strategic policy document ('Communication from the Commission to the European Parliament and the Council') in March 2023 to provide a shared policy framework and guidance for implementing an effective European integrated border management (EIBM) system for 2023–2027, with a view to ensuring effective control of the EU's external land and sea borders.[2] This communication by the European Commission is built around the vague concepts of (1) "shared responsibility" at the EU's external borders between the EU institutions/agencies, as well as national authorities of the EU Member States responsible for border management,[3] and (2) a "well-defined

1 The EU's comprehensive approach to migration combines increased external action; mutually beneficial comprehensive partnerships with countries of origin and transit; addressal of the root causes of migration; opportunities for legal migration, more effective protection of EU external borders; resolute fighting of organised crime, human trafficking, and smuggling; instrumentalisation of migration as a hybrid threat; and stepping up of returns. European Council, 2023, p. 9.

2 Communication from the Commission to the European Parliament and the Council establishing the multiannual strategic policy for European integrated border management, COM/2023/146 final.

3 The doctrine of shared responsibility (which has not yet been developed into applicable international law) pertains to situations and cases in which multiple states and/or international organisations are responsible for the same or different violation(s) of international law simultaneously. These tenets thus apply *mutatis mutandis* to shared responsibility between the EU and its Member States. As the EU has its own legal personality and obligations, it is also independently responsible for the violation of its treaty obligations. The EU's responsibility does not automatically mean that its Member States can also be held accountable solely because of their EU membership. The basic principle under international law is that the legal personality of the EU protects its Member States from accountability, unless agreed otherwise. For example, the simple fact that Greece, Italy, and France are EU Member States does not mean that these Member States are also automatically legally

division" of competence and work among them. However, there is lack of clarity—in legal terms—regarding the content of tasks and the scope of mandate and responsibilities that each of these institutions/agencies/authorities is competent or obliged to exercise in the context of border enforcement and migration control.

Member States' "sovereignty clauses" for the surveillance and control of their external borders prevent the EU from fully exercising its power in this area. Since the conferral of competence to the EU on border management and related migration issues does not result in Member States losing their own competence and responsibility in this domain that is particularly sensitive for them, several legally complex questions arise. The main question—What is the division of competence and responsibility between the EU institutions/agencies and the Member States' authorities on migration-inclusive border management issues?—raises further sub-questions. For example, what issues can be regulated by the EU, and are there any issues to be handled solely by the Member States and their pertinent authorities? Related to that is the question of whether there are any overlapping or even duplicating efforts among such institutions and agencies, and are there loopholes in implementing the EIBM arising from an improper division of their work and responsibilities? If so, how can they be remedied? Another crucial question is what border agency/authority/body and in what cases is to be held responsible for possible violations or inadequate compliance with the applicable EU norms and standards, including fundamental rights provisions, in implementing EIBM. To answer these (sub)questions, this chapter discusses not only the specific tasks related to border management but also, in much broader terms, the division of competences as regards legislative tasks and implementation in the field of migration and border management.

These obscurities stem partly from the fact that the EU migration policy is implemented at different levels (national, European, and international), in different countries (Member States and third countries), and in different forms (from formal and legally binding to informal and non-binding) and degrees of cooperation, which results in the so-called hybrid operations with shared control.[4] Often, various parties are involved in border control, which can result in complex and ambiguous relationships between them when executing border management operations. Given the involvement of different parties, border management operations can be simultaneously subject to multiple legal frameworks and operational plans.[5] Thus, in practice, their roles, tasks, and powers may not always be properly coordinated.

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responsible for violations by EU institutions and agencies of the relevant international and EU law concerning border management and migration; however, a certain degree of their involvement is required, in accordance with the doctrine of attribution. See in this regard, among others, Advisory Council on Migration, 2022, pp. 10–11; Nedeski, 2021, pp. 139–178; Paasivirta, 2016, pp. 159–177; Nollkaemper, 2012–2013, pp. 359–438; Nollkaemper and Plakokefalos, 2017, p. 1108; Ryngaert, 2015, pp. 502–517; Wessel and Dekker, 2015, pp. 293–318; Brölmann, 2015, pp. 358–381.

4 Advisory Council on Migration, 2022, p. 7.

5 Ibid.

This may lead to undue shifting, failure to enforce, or overstepping by the involved institutions/agencies/authorities regarding their legal powers or responsibility (by acting *ultra vires*, that is, beyond their legal power or authority) in the field of border management and migration. There is also a tendency of Member States, and even EU institutions/agencies, to turn a blind eye to violations of international standards and European values, including pushback practices,[6] at the EU's external borders and to pass the buck.[7] The mutual contestation of competence and responsibility coupled with some practical obstacles and lack of clarity about to whom victims can turn if their rights are violated undermine the effective functioning of EU border management and migration law as well as adequate legal protection and access to justice.

Considering such shifting of blame for serious abuses onto each other; fuzziness in the delimitation between competences, tasks, and responsibilities of EU institutions/agencies and national authorities in the safeguarding and management of the EU's external borders; and the need for proper coordination amongst all key players at the EU and Member State level, this chapter examines the division of their work, competences, and accountability (for any violation of international and EU obligations), thereby paying particular attention to also ensuring an effective EU migration regime. In so doing, the chapter addresses the main legal issues and controversies arising from the distinctive roles and complex interplay between different national and European authorities in shaping and developing a migration-inclusive and integrated European border regime by discussing the legal architecture underlying the management and safeguarding of EU borders. This contribution thus focuses on the competence distribution and apportionment implied by this legal and institutional framework, as well as the extent of obligations binding on each concerned player—the pertinent EU institutions/agencies and their own officials or the Member States' authorities responsible for the management of their borders. This chapter also discusses the relevant and more recent jurisprudence of the Court of Justice of the EU (CJEU) to further clarify the division of work and scope of obligations, powers, and procedures under the applicable EU legal framework for the above actors involved in the EU integrated border management. Lastly, the chapter offers some major conclusions by answering the above research (sub)questions.

6 Pushbacks, which are often associated with violence, are regarded as contrary to international and EU law, as they involve the refusal or return of migrants by the Member States without such migrants being given the opportunity to apply for asylum. Consequently, such practices violate the international legal prohibitions of collective expulsions and *refoulment*. Notorious examples include institutionalised pushback practices at borders in Greece and Polish and Lithuanian border guards' sending back to Belarus a vast majority of migrants from Belarus who reached the EU's external borders in 2021. Moreover, Croatian pushbacks are often characterised by violence against migrants and their deliberate humiliation. Bochenek, 2023, pp. 1–2.

7 Advisory Council on Migration, 2022, p. 4 and p. 6.

2. Competencies and responsibilities on border management in the area of freedom, security, and justice

This work's purpose is not to trace back the development of the EU legal framework regulating border management and migration control, as other authors have already provided a historical overview of this evolvement.[8] Instead, this chapter focuses on the existing (supranational) EU norms and applicable standards that impose legal obligations on border authorities/agencies at the Member State and EU levels and also authorise them to make decisions and appropriately (re)act when carrying out border management activities. Therefore, it can be said that, since the mid-1990s, significant legal measures have been taken at the supranational level towards introducing an integrated EU border regime and developing common EU standards and rules in the overall area of border surveillance and control with a view to more effectively manage the external borders of the EU and ensure the uniform (high) level of their safeguarding. However, the Member States have retained their own competences and responsibilities in the area of border safeguarding and entry to their territories as an expression of their sovereignty.

For our discussion, some caveats must be made regarding the main subject of our inquiry and that need to be considered to properly understand and address the vast fragmentation regarding institutions/agencies/authorities in terms of competences and responsibilities for border management and migration in the EU. First, it should be noted that not all EU Member States are also members of the Schengen area, which establishes a unified system of external border controls and allows persons to move freely across borders within that area. One EU Member State—Cyprus (which already applies Schengen rules at its external borders)—is legally obliged to join the Schengen area in the future; moreover, since 31 March 2024, there are no longer border checks on persons at the EU's internal air and maritime borders between Bulgaria and Romania and other countries in the Schengen area, based on Decision (EU) 2024/210 (adopted by the Council of the EU on 30 December 2023).[9] Following this first step, the Council of the EU should take a further step to establish a date for lifting checks at the internal land borders between Bulgaria and Romania and their neighbouring Schengen states (Greece and Hungary). Ireland maintains an opt out, thus remaining outside the Schengen area. Denmark participates in the Schengen system but as a matter of public international law and not within the supranational legal system of the EU. Moreover, Denmark can opt into Schengen's developing measures by implementing these measures in domestic legislation. As regards all Title V measures of the Treaty on the Functioning of the EU (TFEU), building on the Schengen *acquis*, Denmark can decide within six months of their

8 See Fink, 2022, pp. 408–435, 407–409; Geddes and Scholten, 2016, pp. 144–147.

9 Council Decision (EU) 2024/210 of 30 December 2023 on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania, OJ L, 2024/210, 4.1.2024.

adoption whether to apply them in its national law, in which case, those measures will bind Denmark and the other participating Member States.[10] While the Schengen *acquis* does apply to most EU Member States, the Schengen system also extends beyond the external borders of the EU to non-EU states (the so-called "Schengen Associated Countries" that joined the intergovernmental Schengen cooperation), including Iceland, Liechtenstein, Norway, and Switzerland. This implies that not all EU Member States are bound by all the different pieces and instruments of EU law in the field of border management, asylum, and migration. It has also been shown that Ireland and Denmark are the EU Member States that have most often opted out of these supranational instruments and rules.[11] Consequently, national border authorities' scope of competences and degree of corresponding obligations and responsibilities vary among different EU Member States, as does the extent of their cooperation with the relevant EU agencies.

Second, as the chapter concentrates on the determination and apportionment of (shared) competences and responsibilities of the border actors of different Member States and the EU, it does not consider the role of third countries (non-EU states) and non-state actors (e.g. private entities, security providers, and military companies supplying training, know-how, or equipment for joint operations) with which the EU and Member States may collaborate in the implementation of the Schengen *acquis*. Moreover, the chapter does not address the powers and responsibilities shared between the EU bodies/agencies themselves, such as those arising from the cooperation of the European Border and Coast Guard (EBCG) Agency (or "Agency" hereafter) with other agencies working in the area of freedom, security, and justice, including the EU Agency for Law Enforcement Cooperation, EU Agency for Asylum, and EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice. These aspects of border management and migration, though interesting and relevant in themselves, are left to other researchers' examination and may as such provide a fertile ground for their future inquiries.

Third, the body of EU law regulating the management of the EU's external borders involves rules that can be grouped, by their content, into two sets. The first group of rules concerns border checks, migration, and asylum—based on Chapter 2, Title V (Area of Freedom, Security and Justice) TFEU—such as the Asylum Procedures Directive (recast) and Return Directive.[12] The second set of these rules pertains to measures of police and criminal justice cooperation—grounded in Chapters 4 and 5, Title V TFEU—such as the exchange of Personal Name Records of Air Passengers

10 Denmark has consistently applied this option to measures concerning border controls and visas. Peers, 2016, p. 89.

11 EU Agency for Fundamental Rights, 2020, p. 15.

12 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L180/60; Directive 2008/115/EC of the European Parliament and Council on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98.

under the Directive on the use of passenger name record data.[13] This chapter is mainly concerned with the former group of legal provisions and, in a narrow sense, Schengen rules that are mostly confined to the regulation of EU external border management (including the Schengen Borders Code and EBCG Regulation as the principal legal sources in this particular area).[14]

Fourth, as the shared competences and responsibilities of EU institutions/agencies and Member States for the management of EU external borders and migration are both internal and external, this work considers both these dimensions when discussing their division.

2.1. Management of the EU's external borders and the area of freedom, security, and justice

One objective common to the Member States and assigned to the EU is the establishment of a common external border management policy. Art. 3(2) of the Treaty on EU (TEU) calls for 'appropriate measures with respect to external border controls' (in addition to asylum, immigration, and the prevention and combat of crime) to offer EU citizens an area of freedom, security, and justice without internal borders in which the free movement of persons is ensured. Therefore, the EU aims to establish common standards for controls at its external borders and to gradually put in place a European integrated system for managing them.

Chapter 2, Title V, Part 3 of the TFEU, on the area of freedom, security, and justice, is devoted to policies on border checks, asylum, and immigration. It spells out the objectives pursued and confers on the EU the competence to reach them. The EU's competence regarding the exercise of controls on crossing its external borders was originally conferred upon it by the Maastricht Treaty of 1992, within the former third pillar, and was placed within Community competence by the Treaty of Amsterdam of 1997. Schengen *acquis* for external borders was thus incorporated into the EU legal order by the Treaty of Amsterdam. The Treaty of Lisbon, as the EU constitutional treaty, clarified the division of competences between the EU and its Member States, including in the area of freedom, security, and justice, where the EU has a shared competence (Art. 4(2)(j) TFEU). Details of its objectives and the methods for its exercise are set out in Title V Part 3 TFEU. The EU's competence concerning both external borders' management and migration issues falls within the area of freedom, security, and justice.

13 Directive (EU) 2016/681 of the European Parliament and of the Council on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L119/132.

14 Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016], OJ L77/1; Regulation (EU) 2019/1896 of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 [2019], OJ L295/1.

2.2. Development of EIBM

According to Art. 67(2) TFEU, which covers the general provisions concerning the area of freedom, security, and justice, the EU shall develop a common policy on external border control. Similarly, Art. 77(1) TFEU stipulates that the EU shall develop a policy with a view to

> … (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; and (c) the gradual introduction of an integrated management system for external borders.[15]

Art. 77(2) TFEU also states that

> *…the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; and (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.*[16]

These provisions do not, in any way, affect the Member States' competence regarding the geographical demarcation of their borders in accordance with international law.[17]

It should be highlighted that use of the term "common policy" above is not neutral, and this expression does not imply sole competence on the part of the EU. However, it reflects the political will to pursue a comprehensive integration process and arrange a division of competences between the EU and its Member States directed towards increasingly favouring the latter. This political desire is now spelled out in the EU founding treaty—the Treaty of Lisbon—and odds are that it will facilitate the exercise of the EU's competence and its justification in terms of the principle of subsidiarity.[18] However, in a field as sensitive as the control of their borders and access to their territory, Member States are reluctant to permit the loss of their competence. The same is also true of migration issues. Member States' competence in this sphere will thus have to co-exist with that of the EU. In this sense, a common

15 Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26. 10. 2012, pp. 1–390.
16 Ibid.
17 Art. 77(4) TFEU.
18 Neframi, 2011, p. 6.

external border management policy implements a process of division of competences through the intervention of the EU and Member States, with the ultimate objective of transferring the exercise of the competence 'where neither the scope nor the date may be set in advance'.[19]

In the field of external border management, the EU aims to develop and implement EIBM at the national and EU levels as a compensation measure for the free movement of persons within the EU. EIBM is commonly defined as coordination and cooperation among all relevant authorities and agencies at the EU and Member States' level that are involved in border management activities to ensure effective and coordinated border management at the EU's external borders, thus attaining the objective of open but well controlled and secure borders. Such an EU policy on the integrated management of external borders is a key feature of the area of freedom, security, and justice. EIBM is also central to improving the management of migration, with the goal to manage the crossing of external borders efficiently and address migratory challenges and potential future threats at the EU's external borders, thereby helping address serious cross-border crime and ensure high-level internal security within the EU. At the same time, the actors involved in border management must act with full respect for fundamental rights and in a manner that safeguards the free movement of persons within the EU.

The EBCG Agency, with its headquarters in Warsaw, Poland, supports EU Member States and Schengen-associated countries in the management of the EU's external borders. The Agency is a centre of excellence for border control activities at the EU's external borders, sharing intelligence and expertise with all Member States and neighbouring non-EU countries. Its officers stand together with national authorities to safeguard the Schengen area as they perform various tasks such as surveilling the border, fighting cross-border crime, and assisting in return operations. The origins of the EBCG Agency date back to 1999 when the European Council on Justice and Home Affairs started taking steps towards further strengthening cooperation in the area of border management. This led to the creation of the External Border Practitioners Common Unit—a group composed of members of the Strategic Committee on Immigration, Frontiers, and Asylum and heads of national border control services. The Common Unit coordinated national projects of Ad-Hoc Centres on Border Control. Their role was to oversee EU-wide pilot projects and implement common operations regarding border management.[20] In 2004, the European Council decided to go a step further in improving the Common Unit's procedures and working methods. Following the adoption of Council Regulation (EC) 2007/2004, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex) was established. Regulation (EC) 2007/2004 was later repealed by Regulation (EU) 2016/1624, establishing the EBCG Agency. EBCG Agency's mandate was amended most recently with the coming into force of

19 Constantinesco, 1974, p. 287.
20 Frontex, no date b.

Regulation (EU) 2019/1896.[21] This regulation provides the EBCG Agency a reinforced mandate and increased competences compared to Regulation (EU) 2016/1624, such as the EBCG Standing Corps.[22]

The Member States' national authorities responsible for border management, including the coast guard—insofar as they carry out maritime border surveillance operations and any other border control tasks—and the EBCG Agency, share the responsibility to implement EIBM, but in so doing, they assume different roles and tasks. While Member States retain the primary responsibility for the management of their sections of the external borders in their own and all Member States' interests, the EBCG Agency supports the application of EU measures relating to the management of external borders by providing technical and operational assistance and by reinforcing, assessing, and coordinating the actions of Member States that implement those measures. The EBCG Agency is prohibited from supporting any measure or being involved in any activity related to controls at internal borders.[23] Thus, e.g. the Member States are obliged to deploy appropriate staff and resources in sufficient numbers to ensure an efficient, high, and uniform level of control at their external borders ,[24] whereas the EBCG Agency's supportive role includes providing technical expertise, personnel, equipment, and financial resources to the Member States in their management of external borders. However, the EBCG Agency is fully responsible and accountable for any decision it makes and for any activity for which it is solely responsible under Regulation (EU) 2019/1896.[25]

3. EU's objectives on border management issues

Knowing what the EU may or may not do on border management issues is a matter of the objectives conferred upon it in the Treaty of Lisbon. The objectives pursued by the EU in this area are expressed in Art. 77(1) TFEU, including the absence of border controls between Member States, strengthened and efficient control of EU's external borders, and gradual introduction of an integrated system for the management of external borders. Obviously, these objectives are part of the wider objective of offering EU citizens an area of freedom, security, and justice without internal borders to ensure the free movement of persons .[26] In other words, these

21 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ 2019 L 295.
22 Frontex, no date b.
23 Art. 7(4) of Regulation (EU) 2019/1896.
24 Art. 15 of Regulation (EU) 2016/399.
25 Art. 7(4) Regulation (EU) 2019/1896.
26 Art. 3(2) TEU and Art. 67(1) TFEU.

objectives express the ultimate objective of the EU's action, which can also be seen from the various "soft law" acts and instruments—that is, management of borders across Europe in a manner that ensures open but well controlled and secure borders. The EU competences on border management issues express the allocation of the above objectives, which affect sensitive spheres within which the Member States wish to retain their competences. Therefore, the EU can only pursue these objectives indirectly, through support of and respect for national competences.

4. Nature and exercise of the EU's competence related to border management issues

To achieve its objectives concerning EIBM, the EU may act, pursuant to Art. 77(2) TFEU, in the following areas: (1) common policy on visas and other short-stay residence permits; (2) checks to which persons crossing external borders are subject; (3) conditions under which nationals of third countries shall have the freedom to travel within the EU for a short period; (4) any measure necessary for the gradual establishment of an integrated management system for external borders; and (5) absence of any controls on persons, whatever their nationality, when crossing internal borders.

Importantly, the Treaty of Lisbon expanded the EU's competence in these areas in the sense that the EU's exercise of the shared competence leads to the Member States' loss of competence, to the extent covered by the common rules. Yet, a distinction should be drawn between the internal and external competence of EU institutions/agencies as regards the above spheres.

4.1. EU's internal competence

Internally, the EU has a shared normative competence but also an operational competence involving support and coordination.

4.1.1. Normative competence

Within the context of the border management policy, the EU may adopt legislative acts in the form of regulations, directives, or decisions in accordance with the ordinary legislative procedure, or pursuant to a special legislative procedure. On border management issues, legislative acts are adopted jointly by the European Parliament and Council of the EU in accordance with the ordinary legislative procedure[27]. The ordinary legislative procedure applies to the adoption of any measure

27 Art. 294 TFEU.

referred to in Art. 77(2) TFEU, covering the common policy on visas, checks of persons crossing external borders, gradual establishment of EIBM, and absence of any controls on persons crossing internal borders. In this context, it is worth noting that Art. 68 TFEU emphasises the role of the European Council in defining the general guidelines to guide intervention by the institutions. Under that provision, 'the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice'.

The issue of the nature and extent of the competences of the EU and its institutions arises during the adoption of legislative acts, which contain the essential components of normative activity. Is should be noted, however, that pursuant to Art. 290 TFEU, legislative acts may provide for the European Commission's adoption of delegated acts to supplement or amend certain non-essential elements of the legislative act.[28] The following remarks are particularly relevant regarding the adoption of legislative acts. The area of freedom, security, and justice is, according to Art. 4(2)(j) TFEU, a principal area in which shared competence applies between the EU and Member States. Similarly, Art. 2(2) TFEU provides that

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Classifying the EU's competence as shared in the sphere of border management furthers the Member States' competence in several ways.

First, a normative action by the Member States is not ruled out as the Member States retain their normative competence, which is exercised as long as the EU does not act or, in the event of intervention by the EU, as long as the common rules allow the states room for manoeuvre.

Second, legislative intervention by the EU concerning border management in the context of migration must be justified in terms of the principle of subsidiarity. This follows from Art. 5(3) TEU:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

28 In this regard, the following is an example of the limits of the European Commission's power to supplement non-essential elements of the Schengen Borders Code regarding border surveillance: CJEU, *European Parliament v. Council*, C-355/10, ECLI: EU: C: 2012: 516.

The Member States' national parliaments and the CJEU monitor whether the principle of subsidiarity is duly respected.

According to the declaration in relation to the delimitation of competences, EU institutions may choose to repeal a legislative act, 'in particular better to ensure constant respect for the principles of subsidiarity and proportionality'.[29] The Treaty of Lisbon thus provides for the possibility of shared competence being given back to the Member States. Furthermore, The EU's competence on border management and related migration issues is an approximating or harmonising competence. EU institutions adopt common rules and standards through EU regulations or directives, which Member States have a duty to apply automatically and uniformly (EU regulations) or transpose them (EU directives). Member States may pass their own laws on issues not covered by EU regulations or directives and may also derogate from the common rules, if the EU directives allow this.

Fourth, EU institutions' legislative intervention must always respect fundamental rights (including when granting derogations to the Member States), in accordance with EU law, international law, and the European Convention on Human Rights. This was also confirmed by the CJEU's ruling in *European Parliament v Council of the European Union*.[30] In this case, the CJEU examined the validity of Directive 2003/86 on family reunification. It looked at the possible derogations Member States may avail, in relation to the fundamental rights of third-country nationals, notably the principle of non-discrimination and the right to family life. The CJEU referred to the general principles of Community law as a source of obligations for EU institutions, while considering the 1966 United Nations (UN) International Covenant on Civil Political Rights, 1989 UN Convention on the Rights of the Child, 1950 European Convention on Human Rights, and 2000 EU Charter of Fundamental Rights (not yet a legally binding instrument at that time). The CJEU held that while none of the derogating provisions may be regarded as conflicting with the rights at issue, it is for the national courts to monitor the intervention of the Member States.

Fifth, provisions of the EU founding treaties do not confine the EU's shared competence on border management and related migration challenges to the approximation or harmonisation of the Member States' laws and regulations. If there is no specific provision in the EU founding treaty, application of the principle of proportionality comes into play as regards the intensity of the EU's intervention. In this respect, Art. 5(4) TEU specifies that 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. EU institutions are accordingly required to 'apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality' .[31] The EU's acts undertaken in the area of border management and migration must thus be justified in terms of the principle of

29 Neframi, 2011, p. 12.
30 ECJ, 27 June 2006, C-540/03, ECR p. I-5769.
31 Art. 5(4) TEU.

proportionality, which can be monitored by the courts. If more intensive intervention by the EU is justified as necessary to achieve the objectives pursued within the framework of the competences conferred upon EU institutions, the EU founding treaties do not preclude the EU's intervention through regulations.[32] Finally, EU institutions have exercised their shared normative competence, pursuant to Art. 77(2) TFEU, particularly through the adoption of regulations.

4.1.2. Coordination, complementary, and support competence

In addition to being normative, the EU's shared internal competence is also operational, with support, coordination, and complementary actions. Art. 4(2)(j) TFEU—which stipulates that the competences shared between the EU and Member States apply to the area of freedom, security, and justice—does not constitute a provision conferring competence.[33] Provisions conferring competence in this area fall within Title V of Part 3 TFEU, which implies that this title may include special provisions as compared to Title I of Part 1 TFEU, which includes Art. 4(2)(j) TFEU. Title V relates to the categories and areas of the EU's competence and aims to clarify the division of competences.

Moreover, the operational competence of coordination is also exercised in administrative cooperation. Art. 74 TFEU provides that 'The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission'. Such measures must be justified in terms of the principles of subsidiarity and proportionality. In addition, under Art. 70 TFEU, the Council of the EU may, on a proposal from the European Commission, adopt measures

> … laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition.

Such measures can be seen as an example of the duty of sincere cooperation incumbent upon the Member States in accordance with the first paragraph of Art. 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

With regard to return operations and return interventions, the EBCG Agency may provide technical and operational assistance to competent authorities of the Member States, without entering into the merits of return decisions, which remain the sole responsibility of the Member States, and in accordance with the respect for

32 Neframi, 2011, p. 12.
33 Triantafyllou, 2005, p. 31.

fundamental rights, general principles of EU and international law including for international protection, and the principle of non-refoulement and children's rights.[34]

4.2. EU's external competence

The EU has an implied external relations power to conclude treaties, even if it does not have express external powers. However, the EU's external powers become exclusive once an issue in its internal law has been fully harmonised.[35] The Treaty of Lisbon confers on the EU an explicit external competence to conclude readmission agreements with third countries. Pursuant to Art. 79(3) TFEU,

> The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

Given that the EU's competence in the area of freedom, security, and justice is a shared competence, in the absence of a specific reference in Art. 79(3) TFEU, its competence to conclude readmission agreements is also shared. This implies that Member States may also conclude readmission agreements with third countries. However, according to Art. 216(1) TFEU, the EU may conclude an international agreement where the EU treaties so provide. Therefore, the EU may exercise its competence to conclude a readmission agreement independent of its Member States.[36] As regards issues other than the readmission of third-country nationals residing illegally in the EU, the EU may conclude an international agreement, acting alone, when its external competence is exclusive. Given the shared nature of the EU's internal competence on border management, the related migration issues, and reluctance of the Member States to cede their competence to the EU, the conditions for the EU's implicit external exclusive competence are not met.

In exercising external border controls, the EU's external competence is addressed by a special provision in the EU treaties. Protocol (No 23) on external relations of the Member States with regard to the crossing of external borders, which is annexed to the TEU and TFEU, considers the need of Member States to ensure effective controls at their external borders, in cooperation with third countries where appropriate. This protocol specifies that

34 Art. 48(1) of Regulation (EU) 2019/1896.

35 Peers, 2016, p. 161.

36 Neframi, 2011, p. 14. The EU Readmission Agreements are intended to supersede earlier legally binding bilateral readmission agreements concluded by Member States to the extent that their provisions are incompatible with those of EU Readmission Agreements. This also is a consequence of shared competence between the EU and its Member States in this area.

> The provisions on the measures on the crossing of external borders included in Article 77(2)(b) of the Treaty on the Functioning of the European Union shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements.[37]

It has been argued that Protocol No. 23 should be interpreted to mean that Member States retain external power as long as the issue is not fully harmonised by the EU internal legislation. Put differently, EU external power in this matter is not exclusive by nature *(a priori*) but can only become exclusive by exercise.[38] Accordingly, this Protocol cannot be conceived as precluding the adoption of EU rules that regulate Member States' exercise of their external competence in connection with border controls.

Regulation (EU) 2016/399 (the Schengen Borders Code), which contains specific provisions on Member States' bilateral agreements as regards border crossing, shared border crossing points, maritime traffic, rescue services, etc., may serve as an example of the rule that, even where EU external powers are exclusive, the EU can always choose to authorise its Member States to exercise some external powers to a limited extent. As to the EU's exercise of its external competence in the area of border management, the EU has concluded several treaties with Schengen Associated Countries (Norway, Switzerland, Iceland, and Lichtenstein) solely or largely on the issue of border controls; these treaties dealt with further participation of these countries in the EBCG Agency, the EU's border funds programme, and the relevant European Commission's committees. These treaties are applicable alongside various Schengen association agreements that also concern border controls and other border management-related issues.

In addition to the possibility of Member States entering into agreements with third countries concerning measures on the crossing of EU external borders, the EU's cooperation with third countries (non-EU countries) on border management issues is carried out mainly through activities of the EBCG Agency. Regulation (EU) 2019/1896 broadened the EBCG Agency's mandate in several areas, including cooperation with third countries. Pursuant to Art. 73 of this regulation, the EBCG Agency may cooperate with the authorities of third countries competent in spheres falling within its mandate.[39] This EBCG Agency's cooperation with third countries covers all areas of the Agency's operational work, including information exchange, risk analysis, joint operations, return, training, research, and innovation. It can be divided roughly into three types of cooperation: (1) operational cooperation and

37 Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 23) on external relations of the Member States with regard to the crossing of external borders, OJ C 202, 7. 6. 2016, pp. 303–303.

38 Peers, 2016, p. 162.

39 Fink and Rijpma, 2022, pp. 408–435, 422–424; Coman-Kund, 2019, pp. 34-58; Ekelund, 2019, pp. 79–99; Coman-Kund, 2018, pp. 178–193; Fink, 2012, p. 20.

assistance, (2) technical assistance through the launch and financing of different projects in third countries, and (3) return cooperation. The following is a brief outline of each of these three types of the EBCG Agency's cooperation with non-EU countries.

For the execution of operational and technical cooperation, the EBCG Agency may negotiate and, upon approval by the European Commission, conclude working arrangements with the relevant authorities of third countries that contain provisions on the nature, scope, and purpose of the cooperation, as well as on the respect for fundamental rights and protection of data as required by EU and international law. While these arrangements do not constitute international agreements and are thus not legally binding under public international law for the parties concerned, they represent the highest level of the EBCG Agency's commitment to third countries for long-term technical and operational cooperation within its remit. At the time of this writing, the EBCG Agency has concluded working arrangements with 19 national authorities (Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, North Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine, the United Kingdom, and the United States) as well as with two regional organisations (Commonwealth of Independent States Border Troop Commanders Council and the Mediterranean Regional Response Initiative Regional Centre in Western Balkans).[40]

Operational cooperation may also include the reception of third state staff or deployment of EU staff within the third state. By deploying the European standing corps, as well as technical equipment, the Agency supports both EU and non-EU countries in various border and migration management tasks, including border control (border surveillance and border checks), identification and registration of migrants, screening and debriefing, and support in carrying out coast guard activities. Joint operations may thus serve as a useful tool to assist third countries managing disproportionate migration flows, detect and prevent cross-border crime, contribute to the development of European cooperation on coast guard functions, and learn common EU border management standards and practices as part of their daily work.[41] Third states regularly participate in joint operations through the exchange of observers .[42] The EBCG Agency may also deploy Liaison Officers to non-EU countries to facilitate cooperation between the border management authorities of the host country and the Agency across various areas of the Agency's mandate, including contribution to the prevention of irregular migration and facilitation of returns.[43]

Another important aspect of operational cooperation between the EBCG Agency and third countries is the status agreements that allow the Agency to operationally assist third states on the ground in the framework of a joint operation. Status agreements provide the legal framework through which the EBCG Agency can assist non-EU

40 Frontex, no date a.
41 Frontex, 2021, p. 8.
42 Art. 78(2) of Regulation (EU) 2019/1896.
43 Art. 77 of Regulation (EU) 2019/1896.

countries in border management and deploy EBCG teams, standing corps officers, and other staff taking part in operations on their territory in full respect for their national sovereignty, along with patrol cars, helicopters, and other technical equipment to help detect criminal activities such as migrant smuggling; human trafficking; committing document fraud; and smuggling stolen vehicles, illegal drugs, weapons, and excise goods. These agreements are initiated and negotiated by the European Commission, with authorisation of the Council of the EU and consent of the European Parliament. They govern, *inter alia*, the scope of the operation, tasks, and executive powers of the team members; civil and criminal liability of the authorities involved; and the possibility for individuals to lodge complaints for alleged fundamental rights violations.[44] Subject to prior conclusion of a status agreement between the EU and the third country concerned, the EBCG Agency may carry out deployments and joint operations on its territory. Such a cooperation between the EU and third countries is an important element of the EIBM concept. The new mandate enables the EBCG Agency to assist those countries with a status agreement throughout their territory and not only in the regions bordering the EU, as was the case with the Agency's previous mandate. Unlike working arrangements, status agreements allow the EBCG Agency staff to exercise certain executive powers in third countries, such as border checks and registration of persons.

Status agreements allowing for joint operations can now be concluded with a wider range of countries and are no longer limited to the EU's neighbouring countries. Thanks to status agreements, the EBCG Agency can assist the third countries concerned with managing migratory flows, countering illegal immigration, and tackling cross-border crime. At the time of this writing, status agreements have been negotiated, are in force, or are pending signature with Albania, Bosnia and Herzegovina, Moldova, Montenegro, North Macedonia, and Serbia.[45] The status agreements with Bosnia and Herzegovina, Montenegro, and Serbia are being renegotiated to make full use of the EBCG Agency's reinforced role under Regulation (EU) 2019/1896. Cooperation with Western Balkan countries, including through the deployment of the EBCG

44 Art. 73(3) of Regulation (EU) 2019/1896. Rijpma, 2017, pp. 591–592.

45 Albania (agreement in force as of 1 May 2019 and new enhanced agreement under negotiation), Bosnia and Herzegovina (new enhanced agreement under negotiation), Moldova (agreement in force as of 1 November 2022), Montenegro (new enhanced agreement signed, provisionally applied as of 1 July 2023), Republic of North Macedonia (agreement in force as of 1 April 2023), Serbia (agreement in force as of 1 May 2021 and new enhanced agreement under negotiation); Council of the EU and the European Council, 2023; Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia, OJ L 61, 27.2.2023, pp. 3–19; Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova, OJ L 91, 18.3.2022, pp. 4–21; Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, OJ L 202, 25.6.2020, pp. 3–15; Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, OJ L 173, 3.6.2020, pp. 3–11; Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, OJ L 46, 18.2.2019, pp. 3–10.

Agency staff, is crucial for early detection and prevention of irregular migration movements and other migration challenges on the Western Balkans route. The EU's conclusion of status agreements with Western Balkan countries can strengthen the protection of the EU external borders and contribute to efforts by countries in the Western Balkans to block smugglers from using their territories as transit stages. In July 2022, the EU also started negotiations to conclude status agreements with Mauritania and Senegal.

Border management teams from the EBCG standing corps deployed under a status agreement remain, at all times, under the command and control of the authorities of the host country. Any deployment under a status agreement requires the consent of the host country, EBCG Agency and, where applicable, any neighbouring EU Member States. An operational plan, negotiated between the EBCG Agency and the relevant authority of the host country, needs to be made for each joint operation (i.e. an initiative to tackle illegal immigration or cross-border crime, or provide technical and operational assistance at the borders of the country concerned with an EU Member State) or rapid border intervention (i.e. an initiative to respond quickly to specific and disproportionate challenges on the borders of the country concerned with an EU Member State) on the territory of the country concerned. Such an operational plan needs to set out in detail the description and assessment of the situation and operational objectives; geographical scope of the action and description of tasks; composition of teams and other relevant staff; any technical equipment to be deployed; cooperation with other agencies, non-EU countries and international organisations; and respect for fundamental rights, including personal data protection.[46] Members of a border management team have the authority and powers necessary for border control as set out in the operational plan. They operate under instructions from and in the presence of relevant authorities of the country concerned and may, under certain conditions, carry and use weapons. They also receive an accreditation document confirming their identity and right to work under the operational plan.

An operational activity under a status agreement can also be suspended or terminated. The EBCG Agency's executive director is required to withdraw financing from, suspend, or terminate an operational activity if, e.g. an operational plan is not being properly implemented or the executive director considers that there have been serious violations of fundamental rights or international protection obligations related to the activity concerned or such breaches are likely to continue. In such cases, either party—the EU or the third country concerned—may suspend or terminate the status agreement in writing.[47]

Generally, joint operations conducted on the territory of third states under the status agreements follow the same principles as within the EU. The third states' border authorities have the power to issue instructions to all border management personnel, including officers deployed by the EBCG Agency, whereas the Agency only retains

46 *Frontex status agreements with non-EU countries,* 2023.
47 Ibid.

the power to communicate its views on the instructions issued to the third countries' border authorities or to suspend or terminate the joint operation altogether .[48] However, Melanie Fink and Jorrit J. Rijpma[49] pointed out that it is necessary to take appropriate measures to arrange the accountability issues or mechanism with regard to possible fundamental rights violations occurring in the implementation of joint operations; this is because the EU's control over border management standards and practices in third states is significantly more limited than that over Member States, as the latter must adhere to the Schengen, immigration, and asylum *acquis* and can be held accountable before the CJEU if they violate or do not comply with these rules. Such precautionary measures may include a prior respect for fundamental rights screening of the third country concerned by the EBCG Agency and EU Member States, establishing additional monitoring mechanism(s), and specifying where and how victims can seek a remedy if their rights have been violated. Otherwise, the EBCG standing corps under the third state's command may risk being involved in fundamental rights violations that cannot always be redressed within the EU legal system.[50]

Besides the physical operational presence of the EBCG Agency's personnel in the territory of third countries, the Agency may assist non-EU countries by launching and financing targeted technical assistance projects in these countries, thereby utilising various European Commission funding instruments. In this second type of international cooperation, the EBCG Agency aims to support the development of sustainable border and migration management solutions in priority non-EU countries through a set of tailored activities. The EBCG Agency develops its technical assistance work through EU-funded projects, its own funded technical assistance activities, and the provision of external support to EU-funded programmes. The EBCG Agency's technical assistance in these projects may thus involve training, capacity building, and exchanging information, as well as purchasing small equipment for border management.[51] In this context, the EBCG Agency tends to ensure that its technical assistance action complements the EU's overall external relations policies. While each technical assistance project focuses on a different priority region and topics, all project activities address specific needs of the beneficiary countries and support them in building their capacities in border security and management. These projects contribute to building trust, developing structured partnerships, and exchanging good practices in the domain of integrated border management, as well as laying the foundation for strategic cooperation or building on already established functional relationships between the national authorities of relevant third countries and the EBCG Agency.[52]

The third type of cooperation between the EBCG Agency and third counties' authorities is working together on returns. The EBCG Agency acts as a key partner

48 Arts. 43(1–2) and 46 of Regulation (EU) 2019/1896.
49 Fink and Rijpma, 2022, pp. 408–435, 424.
50 Ibid.
51 Ibid.
52 Frontex, 2021, p. 14.

in not only assisting EU Member States in returning non-EU nationals but also delivering technical and operational assistance to non-EU countries. Indeed, effective implementation of returns requires cooperation with third countries' authorities in each phase of the return process. This is why the EBCG Agency offers its support in the identification procedure, workshops, study visits, seminars, and dedicated training courses focusing on return operations and return monitors, who play a key role in ensuring full compliance of return operations and return interventions with the EU fundamental rights standards.[53] The aim of the return cooperation activities is to enhance the involved non-EU countries' knowledge and understanding of EU procedures on return, readmission, and reintegration, as well as to develop an integrated return management system in line with the best EU standards and in full respect of fundamental rights along the different procedures. Moreover, the EBCG Agency is establishing its Reintegration Programme to include reintegration services for (non-)voluntary returnees from all EU Member States along with return counselling and capacity-building projects.[54]

Relevant authorities of third countries generally participate only in pre-return activities—that is, identification of third-country nationals subject to return procedure and the acquisition of travel documents .[55] However, in "collecting return operations", a third country of return can provide the means of transport and return escorts .[56] Given that the EBCG Agency's role is limited to coordinating the return and ensuring the presence of a forced return monitor, making sure the third country authority's conduct towards non-EU nationals subject to the return procedure is fundamental-rights compliant may be particularly challenging for the Agency.[57] The function of a Return Coordinator was created under the New Pact on Migration and Asylum. The first EU Return Coordinator was appointed in March 2022 to establish an effective and common European return system by coordinating actions between the EU and EU Member States.[58] The Return Coordinator works closely with the High-Level Network for Returns, which consists of senior representatives from institutions responsible for returns in Member States and Schengen Associated Countries, the EBCG Agency, and the EU Agency for Asylum. The High-Level Network for Return supports the Return Coordinator with coherent and consistent implementation of the EU return policy by identifying priority activities to develop national frameworks, improve administrative and technical capacities to carry out returns, and enhance cooperation between EU Member States and the EBCG Agency.[59]

53 However, it is worth noting that the EBCG Agency's assistance in return operations does not extend to, e.g. offering return flights from third countries to countries of origin.
54 Frontex, 2021, p. 9.
55 Art. 48(1)(a)(i)–(ii) of Regulation (EU) 2019/1896.
56 Art. 50(3) of Regulation (EU) 2019/1896.
57 For the same view, see also Fink and Rijpma, 2022, pp. 408–435, 424.
58 The European Commission appointed Ms Mari Juritsch as the first EU Return Coordinator.
59 European Commission, no date.

4.3. EU's responsibility for border management activities at the EU's external borders and in third countries

As the EBCG Agency exercises the EU's external competence in third countries through its activities, it also bears the responsibility for such actions, including those involving fundamental rights violations. Given that border management is essentially a delicate activity involving fundamental rights, border management staff and other competent authorities need to protect and promote fundamental rights and uphold the highest professional and behavioural standards in border management in their daily work. This holds true for border control and surveillance performed both solely by Member States' and through EBCG Agency-assisted operations. Particularly sensitive cases regarding the fundamental rights of migrants and refugees include their death or disappearance at Europe's land and sea borders,[60] denial of entry into the Member States' territory to individuals, pushbacks of migrants or their forcible return to their country of departure, and detention of asylum seekers.

Notwithstanding certain improvements and developments in showing respect for the human rights of those who arrive at the EU's external borders, the growing number of people crossing the EU's external borders or attempting to enter the EU in an unauthorised manner pose a wide range of fundamental rights challenges for integrated border management. EU law also requires border management activities to strictly and fully respect the right to seek asylum.[61] Control of the EU's external land and sea borders is a joint responsibility of all EU Member States. However, when human rights violations occur in the operationalisation of this border management, what has happened and who exactly is responsible for what act are not always clear.[62] Moreover, such incidents often take place in rather inaccessible locations, such as in military zones or at sea during border control and surveillance.

Frequently, various actors are involved in border control and management, which may entail highly complex and ambiguous relationships between the players when carrying out joint operations. The multilevel governance system characteristic of the EU integrated border management thus raises several concerns and complex

60 The issue of respect for the right to life at European borders has also come before the European Court of Human Rights (ECtHR). The ECtHR rendered three significant judgments in the cases against Greece, Croatia, and Hungary, clarifying aspects of the right to life under Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to deaths of migrants at borders and failure of the competent authorities to take all reasonable measures to prevent the loss of lives in the event of a shipwreck. ECtHR, *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, 18 November 2021; *Safi and Others v. Greece*, No. 5418/15, 7 July 2022; *Alhowais v. Hungary*, No. 59435/17, 2 February 2023.

61 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ 2016 L 77 (Schengen Borders Code), Article 4; Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ 2019 L 295 (Frontex Regulation), Article 80.

62 Advisory Council on Migration, 2022, p. 3.

questions, notably in cases in which the EBCG Agency plays a role, such as who is to be held accountable and to what extent if fundamental rights are violated or not respected in such joint border management activities— the Member States, third countries, the EBCG Agency, or all of them?

This section addresses these questions mainly from the perspective of the EBCG Agency's obligations and responsibility concerning fundamental rights protection, whereas the Member States' obligations and responsibilities in this area are more thoroughly discussed in section 6. It should first be noted that, unlike the Member States, the EU and its institutions/agencies (including the EBCG Agency) cannot be brought before national courts or before the European Court of Human Rights (ECtHR) for alleged fundamental rights violations. This is because the EU is not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This will of course change when the EU accedes to the ECHR, as envisaged by Art. 6(2) TEU. However, as we shall see below, victims of such violations can bring a case before the CJEU, provided that some stringent requirements are met. Over the past few years, the EU Agency for Fundamental Rights (FRA) observed a gradual backsliding in fundamental rights protection when it comes to the management of EU's external borders.[63] Likewise, many recent reports issued by the UN and Council of Europe bodies, national human rights institutions, and civil society organisations have shown persistent and serious fundamental rights violations against migrants and refugees at the EU's external land and sea borders.[64] These reports indicate that the seriousness and intensity of reported fundamental rights abuses in connection with border management have increased considerably in recent years, with more and more border locations in several Member States involved in such human rights incidents (including verbal and physical violence against migrants, ill-treatment of migrants, failure to rescue migrants at sea, people arriving at the EU's external borders stripped of their clothing and their property stolen, forced separation of families, summary expulsion of those seeking asylum, non-compliance with the principle of non-refoulement during joint operations, and inadequate handling of the deteriorating detention conditions within the Member States).[65] Many of these incidents go unreported. More worryingly, the victims of these fundamental rights violations also include vulnerable persons and unaccompanied children. The increase in irregular arrivals to the EU and the ways in which some of these arrivals have occurred have led to other negative developments that affect the respect of fundamental rights in enforcing border control and managing migration. Low-ranking staff without full border guard training and military personnel have begun to patrol

63 FRA, 2023a, p. 9.

64 See UN Refugee Agency (UNHCR), 2022b; UN Human Rights Council, 2021, pp. 13–14; Office of the UN High Commissioner for Human Rights (OHCHR), 2022d; UN Security Council, 2023, p. 16; UN Committee on the Rights of the Child (CRC Committee), 2022, p. 13; CRC Committee, 2022; CRC Committee, 2018; Council of Europe and Group of Experts on Actions against Trafficking in Human Beings, 2023, p. 30.

65 Mungianu, 2016; see also Human Rights Watch, 2011.

borders and apprehend new arrivals. It is not impossible for this work to be done by private contractors in the near future. However, EU border management standards require border control staff, particularly those that may use coercive measures, to have a high degree of specialisation and professionalism, as well as a diverse skill set, including in fundamental rights protection.

The EBCG Agency must strictly adhere to the Charter of Fundamental Rights of the European Union,[66] the ECHR,[67] and relevant instruments of international and human rights law, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.[68] Fundamental rights are integrated into the EBCG Agency's Codes of Conduct,[69] the Common Core Curricula for border guards,[70] and more specialised trainings, such as courses designed specifically for sea or land border surveillance officers or forced-return monitors to enhance their understanding of fundamental rights and enable them to identify potential violations of these rights. While these guidelines, instructions, courses, and trainings are certainly welcome and may help increase the level of human rights protection in common border management activities, they do not resolve the major challenge of how to ensure the EBCG Agency's responsibility for violation of fundamental rights, nor do they provide any specific guidance on how to divide or allocate such a human rights accountability between the EBCG Agency and the border authorities of Member States and third countries. Because joint border management operations, by nature, involve multiple public actors from different jurisdictions and because of the specific role the EBCG Agency plays in these operations, it is very challenging to determine which actor is responsible for what.[71]

It is one of the principles of Regulation (EU) 2019/1896 [72] that members of the border management teams seconded or deployed by the Member States or EBCG Agency are to be treated equal to the border staff of the host Member State with regard to their civil liability (for any damage caused by them during their operations) and criminal liability (for any criminal offences that might be committed against or by them) under national law. However, as regards the disciplinary authority, the team members remain subject to the disciplinary measures of their home Member State, and the home Member State 'shall provide for appropriate disciplinary or other measures in accordance with its national law regarding violations of fundamental rights or international protection obligations in the course of any operational activity by the Agency' .[73] An important question, in this context, is what the possibility is

66 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
67 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005).
68 Convention Relating to the Status of Refugees, 28 July 1951, UNTS, vol. 189, p. 137; Protocol Relating to the Status of Refugees, 31 January 1967, UNTS, vol. 606, p. 267.
69 Frontex, 2020, p. 1.
70 Frontex, 2019, p. 4.
71 Fink, 2018; Fink, 2020, p. 532.
72 Arts. 84 and 85 of Regulation (EU) 2019/1896.
73 Art. 43(5) of Regulation (EU) 2019/1896.

that individuals whose fundamental rights have been affected can hold the EBCG Agency to account. Given that the EBCG Agency is the special agency of the EU, it cannot be held accountable before the courts of Member States or third countries, international judicial institutions, or settlement bodies. Thus, the only direct remedies available to individuals are those provided for in the EU legal order.[74] Another major obstacle in trying to hold the EBCG Agency liable for fundamental rights violations is that, generally, very little information on the Agency's activities is available to the wider public. This lack of transparency regarding the work of the EBCG Agency makes it difficult to work out the Agency's exact role and contribution when dealing with such incidents and situations.[75]

Art. 111 of Regulation (EU) 2019/1896 obliges the EBCG Agency to establish and further develop an independent and effective complaints mechanism to monitor and ensure respect for fundamental rights in all the activities of the Agency. According to this article, a special complaints procedure must be available to individuals who consider themselves victims of fundamental rights violations that occurred during border management operations in which the EBCG Agency took part, including a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation, return intervention, or operational activities of the Agency in a third country. Any persons who are directly affected by the actions or failure to act on the part of the staff involved in such EBCG Agency actions and who consider that their fundamental rights have been violated because of these actions or failure to act (e.g. failure to refer persons who inquired about international protection to the relevant authorities), may submit a written complaint to the Agency. This complaint mechanism was set up in 2016 following the adoption of 'The Agency's Rules on the Complaints Mechanism' by the Executive Director of the EBCG Agency.[76]

It follows from Art. 111 of Regulation (EU) 2019/1896 and Arts. 1 and 3 of the Rules on Complaints Mechanism that the fundamental rights officer is responsible for handling the complaints procedure, in particular, reviewing the admissibility of complaints, registering admissible complaints, and forwarding all registered complaints to the Executive Director of the EBCG Agency and forwarding complaints concerning members of the teams to the home Member State and their relevant authorities or bodies competent for border management, return, and fundamental rights. If a registered complaint pertains to a staff member of the EBCG Agency, 'the fundamental rights officer shall recommend appropriate follow-up, including disciplinary measures, to the Executive Director and, where appropriate, referral for the

74 Fink and Rijpma, 2022, pp. 408–435, 426.

75 Ibid.

76 Executive Director Decision No R-ED-2016-106 of 6 October 2016 on the Complaints Mechanism, Annex 1 'The Agency's Rules on the Complaints Mechanism', 6 October 2016. In 2022, this Executive Director's decision was replaced by the following decision of the Management Board: Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism, Annex 1 'The Agency's Rules on the Complaints Mechanism', 16 March 2022.

initiation of civil or criminal justice proceedings in accordance with this Regulation and national law'.[77] Substantive decisions concerning complaints are then made by the Executive Director who must ensure the appropriate follow-up and, within a determined timeframe, report back to the fundamental rights officer regarding the findings and implementation of disciplinary and other appropriate measures taken by the EBCG Agency in response to a complaint.

The complaints procedure is a bit different when a registered complaint concerns a team member from a host Member State or another participating Member State, including a seconded member of the teams or seconded national expert. In such a case, the home Member State must 'ensure appropriate follow-up, including disciplinary measures, referral for the initiation of civil or criminal justice proceedings as necessary, and other measures in accordance with national law'.[78] Then, the Member State in question must make a substantive decision and report back to the fundamental rights officer within a determined time period with the findings and follow-up to the complaint. The EBCG Agency must follow up on the matter, and the fundamental rights officer needs to inform the Agency's Executive Director and management board if the relevant Member State does not report back or its response is inconclusive. If such a member of the border management teams is found to have violated the obligations on international protection or fundamental rights during a common border management operation, the Member State concerned must, upon the EBCG Agency's request, remove that member immediately from the Agency's activity or the standing corps.[79]

The possibility of submitting free of charge a written communication containing allegations of fundamental rights violations, addressed to the EBCG Agency by any person of any age affected by the actions or failure to act of any person involved in an Agency activity, is indeed a significant step forward in safeguarding the respect for fundamental rights in all the EBCG Agency's activities and holding the Agency responsible for such violations. However, while this complaints mechanism of the EBCG Agency, set out in Art. 111 of the Regulation (EU) 2019/1896, is independent of other possible remedies (whether administrative or judicial), it is by nature an administrative (i.e. non-judicial) procedure that is internal to the EBCG Agency, thus raising concerns about its independence. Therefore, it cannot be seen as providing for an effective remedy and access to an independent and impartial adjudicative body within the meaning of Art. 47 of the Charter of Fundamental Rights of the EU.

In addition to the complaints mechanism outlined above, Art. 112 of Regulation (EU) 2019/1896 provides for interparliamentary cooperation in the field of EU border management issues, while considering that the specific nature of the EBCG is composed of the EBCG Agency on the one hand and Member States' competent national authorities on the other hand; this ensures that the scrutiny functions of the

77 Art. 111(6) of the Regulation (EU) 2019/1896.
78 Art. 111(7) of the Regulation (EU) 2019/1896.
79 Art. 111(8) of the Regulation (EU) 2019/1896.

respective parliaments (European Parliament's control over the Agency's work and the national parliaments' control over their national border authorities' work) are effectively exercised. This is also in accordance with the EU's core functional treaties and national laws of Member States, which provide that the European Parliament and national parliaments may cooperate within the meaning of Art. 9 of Protocol No 1 on the Role of National Parliaments in the European Union annexed to the TEU and TFEU. Moreover, the EBCG Agency must transmit its annual activity report to the national parliaments.

As previously highlighted, unlawful conduct by the EBCG Agency as a specialised EU body may lead to the EU being responsible under international law. In the public international law, entities with international legal personality are responsible for violations of their obligations or their non-compliance with them. Thus, a crucial question arising in our context is whether the EU can be said to have that kind of international legal personality. The most obvious way for an international organisation or entity to acquire legal personality is to include a specific mention to that effect in its constituent instrument. This was done explicitly for the EU with the Treaty of Lisbon. More specifically, Art. 47 TEU specifies that 'The Union shall have legal personality'. However, the fact that the EU has an international legal personality does not in any way authorise it to legislate or act beyond the competences conferred upon it by the Member States in the founding treaties.[80] Moreover, some legal and political scholars pointed out that legal personality can also be implicitly conferred to an international organisation or entity.[81] This view has been long accepted in public international law and also confirmed by the International Court of Justice (ICJ) in its advisory opinion on the UN.[82] All this implies that the EU's responsibility arises for any action or omission that can be attributed to its institutions, bodies, offices, and agencies, including the EBCG Agency, and constitutes a breach of the EU's international obligation, thus qualifying as an internationally wrongful act.[83]

Attribution of conduct to the EU and/or its institutions/bodies/offices/agencies may be particularly challenging when it comes to border management activities and

80 Declaration concerning the legal personality of the European Union.

81 For further developments on this point, see de Schoutheete and Andoura, 2007, pp. 3–7; Brownlie, 2003, p. 649; Dailler and Pellet, 2002, p. 596.

82 ICJ, 1949, p. 174. In its advisory opinion, the ICJ held that the UN was intended to exercise functions and rights that could only be explained based on the possession of a large measure of international legal personality and the capacity to operate upon the international plane. According to the ICJ, the UN had the capacity to bring a claim and give it the character of an international action for reparation of the damage caused to it. The ICJ further declared that although, according to the traditional rule, diplomatic protection must be exercised by the national state, the UN is an international organisation and, as such, should be considered in international law as possessing the powers that, even if they are not expressly stated in the UN Charter, are conferred upon it as being essential to the discharge of its functions. These ICJ findings concerning the international legal personality of an international institution are fully applicable to the EU, although the EU is to be regarded as a *sui generis* international entity rather than a typical international organisation.

83 Pellet, 2010, p. 6.

joint operations coordinated by the EBCG Agency because of various actors involved in such activities and operations. The Draft Articles on the Responsibility of International Organizations provide in Art. 7 that

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.[84]

This text indicates that in assigning the responsibility to the EU as a *sui generis* international entity in a situation in which the Member States put their organs at the disposal of the EU, a crucial question arises: Who effectively controlled the course of conduct that resulted in a breach of the EU's international obligation? Normally, the host state (a Member State or third country) gives operational instructions in the EBCG Agency's operations and activities, except for large vessels and other military-type equipment, over which the contributing Member States maintains some components of command and control.[85] This entails that fundamental rights violations or other breaches of international obligations occurring during such common operations are usually attributable to the Member States or third countries hosting or contributing to these activities. By way of illustration, the previous executive director of the EBCG Agency, Fabrice Leggeri, made an unprecedented decision in January 2021 to suspend the Agency's activities at the Hungarian external borders when this Member State's disregard for EU law and human rights was certified by the CJEU. This move of the EBCG Agency was intended to remedy its already compromised reputation amid increasing concerns about its involvement in scandals and allegations concerning maladministration and human rights violations at the EU's external borders.[86]

Another important example is a recent decision issued by the European Ombudsman following its inquiry into the *Adriana* shipwreck tragedy in June 2023.[87] The incident led to public concern about the role and responsibilities of the EU in protecting lives in the context of its migration and border policies. Given that the EBCG Agency, through its joint operations and surveillance activities, is often involved to some extent in the response to maritime emergencies, it is understandable that public disquiet extends to its role. In response to the Pylos tragedy, the European Ombudsman thus decided to open an own-initiative inquiry. While the inquiry found that the EBCG Agency had followed the applicable rules and protocols, it also revealed shortcomings in how the Agency reacts in maritime emergency situations in which it becomes involved, in the context of either its joint maritime operations or

84 International Law Commission, 2011, p. 3.
85 Art. 82(4) of Regulation (EU) 2019/1896.
86 Gatta, 2021.
87 European Ombudsman, 2024.

separate multipurpose aerial surveillance activities. Moreover, the inquiry demonstrated the need for greater clarity on roles and responsibilities and, crucially, on the nature of the EBCG Agency's cooperation with national border authorities. There are, however, certain limited and specific circumstances in which fundamental rights violations committed during common border management activities may be attributable to the EBCG Agency and, consequently, the EU. These circumstances include, e.g. the EBCG Agency's operational plan not respecting fundamental rights, the Agency compelling the host Member State or third country to issue certain instructions that violate fundamental rights or international protection obligations, or the Agency entirely bypassing the border authorities of the host Member State or third country by giving (*ultra vires*) instructions to the deployed border management staff and assets, thereby exceeding the scope of powers given to it by EU law.[88]

The EBCG Agency may also be held accountable for its complicity in committing human rights violations, whether or not the violation in question is attributable to it. In other words, the Agency has a positive obligation to ensure compliance with the EU fundamental rights law in common border management actions by taking all reasonable measures to protect individuals from the risk of fundamental rights violations the Agency is or should be aware of.[89] This positive obligation to protect is explicitly placed on the EBCG Agency in Art. 80 of Regulation (EU) 2019/1896, which requires that, in performing its tasks, the Agency should guarantee that the fundamental rights are complied with. This means that the EBCG Agency must make reasonable efforts to ensure that its standing staff, and all other participants in common border management operations, always act in line with the fundamental rights and the relevant EU and international law in performing their tasks and exercising their powers. Moreover, the law of international responsibility also includes rules on the international organisation's derivative responsibility. Art. 14 of the Draft Articles on the Responsibility of International Organizations provides certain requirements for aid or assistance, giving rise to the international responsibility of an aiding or assisting international organisation.[90] The first condition is that an international organisation that aids or assists a state or another international organisation in the commission of an internationally wrongful act by that state or another organisation does so with knowledge of the circumstances of the internationally wrongful act. If the assisting or aiding international organisation is unaware of the circumstances in which its aid or assistance is intended to be used by the Member States, third countries, or other international organisation, it bears no international responsibility. The second requirement for the international responsibility of an international organisation is that the aiding or assisting international organisation only incurs its

88 Fink, 2018, pp. 111–139.

89 On positive human rights obligations in the context of the European Convention on Human Rights, see *inter alia* Mowbray, 2004, pp. 1–96; Xenos, 2012, pp. 57–140; Lavrysen, 2016, pp. 45–130.

90 International Law Commission, 'Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations' (UN Doc A/66/10, 2011).

responsibility if the act in question would be internationally wrongful if committed by that international organisation itself, thus linking the international organisation's responsibility to the breach of an obligation that was binding on the international organisation when the organisation contributed significantly to such a breach.

The EU may avoid its derivative responsibility for wrongful acts committed by the border authorities of Member States or third countries because the EBCG Agency provides aid and assistance to them in the context of joint border management operations by concluding with them a memorandum stating the following: (1) If the EBCG Agency has reason to believe that the border management authorities and staff of Member States or third countries are involved in such joint operations are violating human rights law, international humanitarian law, and/or refugee law and if, despite the EBCG Agency's intercession with the national border authorities and staff of the Member States third countries in question, the Agency has reason to believe that such violations are still being committed, then the Agency may not lawfully continue to support that border management operation and must cease its participation completely. (2) The EBCG Agency may not lawfully provide logistic or service support to any such border management operation if it has reason to believe that the national border management units involved are violating any of those bodies of law. This follows directly from the EU's obligations under the customary international law and the EU Charter of Fundamental Rights and other international legal instruments to uphold, promote, and encourage respect for human rights, international humanitarian law, and refugee law.[91]

It is possible that the EU—alongside Member States or third countries—incurs international responsibility for fundamental rights violations and breaches of international protection obligations during the EBCG Agency's border management activities at the EU's external borders and in third countries; however, the major challenge remains the absence of any effective enforcement mechanism. The possibility of enforcing international responsibility through a doctrine of diplomatic protection under the law of state responsibility, that is, enforcing claims against other states or international organisations by an individual's state of nationality,[92] will most likely be inapplicable to situations wherein individuals were forced to leave their state of nationality or left their state of nationality by irregular means. An obvious exception to this general regime under international law is the provision contained in Art. 34 ECHR guaranteeing to individuals a right to directly invoke the responsibility of state parties to the ECHR, including all EU Member States, for the human rights violations they suffered. This means that individuals claiming to be victims of fundamental

91 See in this regard the European Ombudsman's recent conclusions related to the Pylos tragedy. The European Ombudsman suggested that, where national authorities are failing to fulfil their search and rescue obligations adequately or are otherwise involved in fundamental rights violations and/or where national authorities are constraining the search and rescue role and capacity of the EBCG Agency, this should lead the Agency's Executive Director to reconsider whether the Agency should continue its activities in that Member State. European Ombudsman, 2024.

92 Crawford, 2013, p. 570.

rights violations committed by the EU Member States' national border authorities in carrying out joint border management operations can turn to the ECtHR, provided that they have exhausted all domestic remedies in accordance with the generally recognised rules of international law. When the EU accedes to the ECHR and thus becomes its party (as mandated by Art. 6(2) TEU), the same will also apply to individual applications against the EU.

4.4. EBCG Agency's responsibility under EU law

As for the EBCG Agency's liability under EU law, there are two possibilities for holding the Agency judicially accountable through individual complaints. The first avenue involves an action for annulment where the CJEU may review the legality of the acts of EU bodies/offices/agencies, including those performed by the EBCG Agency, that are intended to produce legal effects vis-à-vis third parties and annul those not in compliance with EU law.[93] Because of strict rules on legal standing and the required legally binding nature of the acts in question,[94] these provisions in the TFEU will only rarely be applicable to the situations and cases of wrongful acts committed in the context of EU border management. Typically, violations of EU border management, asylum, and migration laws involve non-legal, physical, or factual acts, such as preventing persons from entering the territory of an EU Member State or pushing them back after they have entered one of the EU Member States. Such conduct cannot usually be reviewed by the CJEU under the title of action for annulment. One possible exception to this is a violation of border management rules (e.g. a fundamental rights violation) that is inherent in the adopted operational plan and therefore may potentially be challenged under the action for annulment.[95]

The second type of procedure available to individuals in challenging the EBCG Agency's controversial border management activities is to bring action before the CJEU for damages.[96] When it comes to non-contractual liability, the EBCG Agency is required to,

> …in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its staff in the performance of their duties, including those related to the use of executive powers.

93 Art. 263 TFEU.

94 Art. 263 TFEU provides the following:
Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

95 Lehnert, 2014, pp. 339–340.

96 For a more detailed analysis of this possibility, see Fink, 2018; Fink, 2020, p. 532.

This is based on Art. 97(4) of Regulation (EU) 2019/1896. This provision elaborates on Art. 340(2) TFEU, which provides for the EU's non-contractual liability in the event of any damage caused by its institutions or staff in performing their duties. According to the CJEU's settled jurisprudence, three conditions need to be met cumulatively to hold the EU accountable: (1) unlawfulness of the conduct that is a subject of complaint, (2) harm suffered by the victim, and (3) existence of a causal link between the unlawful conduct and damage caused.[97] These principles apply *mutatis mutandis* to the non-contractual liability incurred by the EU, within the meaning of Art. 340(2) TFEU, because of the unlawful conduct of and damage caused by one of its agencies, such as the EBCG Agency. The EU Agencies, including EBCG Agency, are required to make good such damage under EU Law. The CJEU's qualifies the conduct in question as "unlawful" based on two criteria: (1) the infringed rule must be intended to confer rights on individuals, and (2) the infringement thereof must be sufficiently serious.[98] These two criteria can be considered to have met if the EU authorities 'manifestly and gravely disregard the limits on their discretion', such as if a particular EU authority violates its legal obligations because it failed to exercise due care and diligence.[99] In adjudicating such cases, the CJEU thus considers the extent of discretion the authority concerned enjoys, clarity of the line that distinguishes its lawful act from unlawful conduct, and how reprehensible overstepping that boundary by the given authority was in a particular case.[100]

Arguably, acts of fundamental rights violations that most often occur in the context of border management activities, such as loss of life, torture, and other inhuman or degrading treatment or punishment, as well as unlawful *refoulement*, reach this relatively high threshold of sufficient seriousness because of their gravity alone. Indeed, many fundamental rights violations that happened during border control and border management operations were interpreted by the ECtHR, CJEU, and EU FRA as being of a particularly serious nature. This includes judicial findings in cases such as *Hirsi Jamaa and Others v. Italy* (concerning application of the prohibition of *refoulement* and collective expulsions to operations on the high seas);[101] *N.D. and N.T. v. Spain* (concerning the qualification of immediate forcible returns of large numbers of migrants at land borders);[102] *Commission v. Hungary* (concerning the requirements for effective access to asylum procedures);[103] and the most recent case of *WS and Others v. European Border and Coast Guard Agency (Frontex)* in which the General Court of the EU (a constituent court of the CJEU that first hears actions taken against EU institutions/bodies/agencies by individuals and Member

97 CJEU, *Lütticke v. Commission*, C-4/69, ECLI: EU: C: 1971: 40, para. 10.
98 CJEU, *P – Bergaderm and Goupil v. Commission*, C-352/98, ECLI: EU: C: 2000: 361, para. 42.
99 CJEU, *P – Bergaderm and Goupil v. Commission*, C-352/98, ECLI: EU: C: 2000: 361, para. 43.
100 These points are developed further by Fink, 2018, pp. 244–267.
101 ECtHR, *Hirsi Jamaa and Others v. Italy*, App no. 27765/09, 23 February 2012.
102 ECtHR, *N.D. and N.T. v. Spain*, App nos. 8675/15 and 8697/15, 13 February 2020.
103 CJEU, *Commission v. Hungary*, C-808/18, ECLI: EU: C: 2020: 1029.

States) rendered a landmark judgment on the EBCG Agency's obligations regarding the protection of fundamental rights and ensuing non-contractual liability of the Agency for not respecting these obligations in the context of joint operations and pilot projects carried out by the Agency or joint return operations coordinated by the Agency.[104] This latter case involved action for damages brought by several Syrian refugees against the EBCG Agency after they were returned from Greece to Türkiye (Turkey) despite expressing their desire while on a Greek island to lodge an application for international protection. Thus, following a joint return operation carried out by the EBCG Agency and Greece, they were ultimately transferred to Türkiye. Since their complaints to the EBCG Agency's Fundamental Rights Officer concerning their transfer to Türkiye were not successful, they decided to bring a claim for compensation before the General Court of the EU. In their action, they claimed that they sustained both material and non-material damage because of the EBCG Agency's alleged unlawful conduct before, during, and after the return operation. The applicants moreover alleged in the present case that, because the Agency violated its obligations relating to the protection of fundamental rights in the context of the return operation—notably, the principle of *non-refoulement*, right to asylum, prohibition of collective expulsion, rights of the child, prohibition of degrading treatment, right to good administration, and right to an effective remedy—they were unlawfully returned to Türkiye and could not obtain the international protection to which they were otherwise entitled.

However, in its judgment, the CJEU dismissed these allegations of the applicants, holding that the EBCG Agency, given the absence of its power to assess the merits of return decisions or applications for international protection, cannot be held liable for any damage related to the return of these refugees to Türkiye. Regarding return operations, the CJEU explained that the Agency's role is limited to the provision of technical and operational support to the Member States, while the assessment of the merits of return decisions and the examination of applications for international protection fall within the exclusive competence of the Member States. According to the CJEU, the EBCG Agency's alleged conduct could not have directly caused the damage allegedly suffered by the Syrian refugees in Türkiye and Iraq, nor their feelings of anguish connected with, *inter alia*, the return flight to Türkiye. Consequently, the CJEU concluded that the applicants failed to provide evidence showing a sufficiently direct causal link between the harm invoked and the conduct of which the EBCG Agency was accused.

104 CJEU, *WS and Others v. Frontex*, T-600/21, ECLI:EU:T:2023:492, judgment of the General Court (Sixth Chamber), 6 September 2023.

5. Limits on action by EU institutions/agencies in the area of border management and migration control

In accordance with the principle of conferred competence, the EU is required to act within the limits of the powers conferred on it by the Member States. The competences conferred on the EU may be increased or reduced only by amendment of the EU founding treaties following the ordinary procedure for revision, that is, by representatives of the Member States' governments meeting in an Intergovernmental Conference.[105] Furthermore, while endorsing the settled jurisprudence of the CJEU, the Treaty of Lisbon, through its flexibility clause,[106] does not allow any expansion of the EU's powers. As clearly stated in the Declaration on Art. 352 TFEU, this clause

> … cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.[107]

Pursuant to Title V (Area of Freedom, Security, and Justice) in Part 3 (Union Policies and Internal Actions) TFEU, and in particular Arts. 77 and 79 TFEU, which define the EU's tasks and activities concerning management of borders and migration in the EU, the EU's powers may not be exercised beyond the limits specified in these provisions. The objective of developing an integrated management system for the EU's external borders and common policies on visas and immigration needs to be combined with respect for the competence explicitly reserved for Member States under the treaties on which the EU is founded (section 5.1). However, the action of EU institutions/agencies on border management and migration control is not limited by only the explicit reservation of Member States' competence, as it must also comply with the principle of conferred competences and speciality (section 5.2). Next, there are limits on the action of EU institutions/agencies in connection with their external activities (section 5.3). Finally, the action of EU institutions/agencies action concerning border management and migration may also be limited territorially (section 5.4).

5.1. Explicit reservation of Member States' competence

The exercise of EU's competence in relation to border management and migration control does not affect Member States' competence concerning the integration of

105 Declaration in relation to the delimitation of competences, para. 3.
106 Art. 352 TFEU.
107 Declaration on Art. 352 of the TFEU.

legal migrants,[108] that is, third-country nationals residing legally in their territories;[109] determination of the number of third-country nationals admitted to their territory to seek work; or the preservation of law and order and safeguarding of internal security in the Member States.

5.1.1. Immigration for employment purposes and border management

With the Treaty of Lisbon, a new provision was introduced that constitutes a reservation on Member States' competence relating to the admission of third-country nationals for employment purposes: 'This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'.[110] Therefore, this is an important provision in the context of border control and migration management, as it provides for the reservation of competence by Member States to determine the volume of admission of third-country nationals coming from third countries and entering the EU for the first time. The inclusion of this specific provision in the Treaty of Lisbon has a lot to do with the Member States' objectives and competences in connection with employment and economic policy as a particularly sensitive issue, as well as with their fears regarding increased application of the ordinary legislative procedure and the qualified majority in the area of (economic) immigration.

It should be noted that the reservation of Member States' competence relates only to third-country nationals coming from a third country who already have work contracts or employment arrangements,[111] and not to persons coming from another Member State, even Member States that are not covered by the EU immigration policy. This reservation of Member States' competence also does not relate to access to employment for those who have already been or are to be admitted on some other legal basis, such as family reunification.[112]

5.1.2. Maintenance of law and order and safeguarding of internal security

The Member States' essential functions, such as ensuring their territorial integrity, maintaining law and order, and safeguarding national security, must be respected by the EU. Title V (Area of Freedom, Security and Justice) TFEU does not affect 'the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[113] Thus,

108 Art. 79(4) TFEU.
109 For a more detailed account of this specific aspect of the competences reserved for the Member States, see Neframi, 2011, pp. 16–17.
110 Art. 79(5) TFEU.
111 Peers, 2008, p. 245.
112 Neframi, 2011, pp. 18–19.
113 Art. 72 TFEU.

in line with the sole responsibility of each Member State for its national security,[114] Member States have a right to temporarily, and as a means of last resort, reinstate internal border controls—that is, checks at borders between Member States.[115] If there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period. However, the scope and duration of such an exceptional and temporary reintroduction of internal border control must not exceed what is strictly necessary to respond to the serious threat.[116]

This reservation of Member States' competence does not limit the EU's legislative competence but, rather, its operational competence.[117] Given that the adoption of measures to implement the EU's legislative acts falls within the Member States' competence, exercise of the EU's operational competence is confined to providing support and coordinating Member States' actions.[118] Importantly, Art. 72 TFEU does not exclude all forms of control. The CJEU pointed out that, in accordance with the principle of sincere cooperation,[119] Member States are required to exercise their competence with regard to the maintenance of public order and internal security so as not to hamper the full effect of the provisions of the EU founding treaties in other areas, including the EU internal market, EU citizenship, and freedom of movement.[120] In another case, the CJEU clarified that it is not enough for a Member State to merely rely on interests in connection with the maintenance of law and order and the safeguarding of internal security; a Member State must also prove that recourse to that derogation is necessary to exercise its responsibility on those matters.[121]

During the refugee crisis and the COVID-19 pandemic, several Member States, including Germany, Austria, France, Sweden, and Denmark, reintroduced checks at the internal borders under Arts. 25 and 29 of Regulation (EU) 2016/399 for reasons of national security (in the case of Member States invoking the overall security situation in the EU, as well as the secondary movement of refugees and other migrants within the EU) or public order (in the case of Member States' COVID-19 restriction measures). These internal border controls have remained in place for a prolonged period. For example, Austria has kept border controls on its southern borders with Slovenia and Hungary *de facto* continuously since September 2015, and they have been prolonged multiple times based on five different articles in Regulation (EU) 2016/399. The core question for our analysis is whether such a prolonged reintroduction of border checks at EU internal borders violates the spirit, if not the letter, of

114 Art. 4(2) TEU.
115 Arts. 25–35 of Regulation (EU) 2016/399.
116 Art. 25 of Regulation (EU) 2016/399.
117 Peers, 2008, p. 224.
118 Neframi, 2011, p. 19.
119 Art. 4(3) TEU.
120 CJEU, *Commission v France*, Case C-265/95, [1997] ECR I-6959.
121 CJEU, *Commission v. Poland and Others*, Joined Cases C-715/17, C-718/17 and C-719/17E-CLI:EU:C:2020:257, para. 143.

EU law, particularly the relevant provisions of Regulation (EU) 2016/399. This issue was first addressed by the French Constitutional Court, where the French highest administrative judge ruled that if there are "new" or "renewed" threats, checks at the internal borders can remain in place beyond the time limits set out in Regulation (EU) 2016/399.[122]

Recently, the CJEU also pronounced judgment on the lawfulness of reintroducing internal border controls. In its preliminary ruling concerning the prolonged reinstatement of checks at Austrian internal borders, the CJEU restrictively interpreted the exceptions to the rule of open borders within Schengen area and stated that Member States can reintroduce border controls at EU internal borders only under strict conditions.[123] This is because the CJEU considers the free movement of persons without internal border controls 'one of the main achievements' of the EU.[124] Therefore, the CJEU pointed out that by no means can such a temporary reintroduction of internal border control in exceptional circumstances jeopardise the principle of the free movement of people.[125] Obviously, the present case also involved high political significance reflected in the tension between, on the one hand, the sovereignty arguments invoked by the Member States concerning their internal security and, on the other hand, the importance of a Schengen area without internal borders while pursuing the principle of free movement of persons within the larger project of European integration.[126] The CJEU ruled in favour of the applicant and the European Commission, confirming that the pertinent provisions of Regulation (EU) 2016/399 need to be construed as forbidding prolonged border controls such as those in place in Austria and some other Member States.

Drawing on a teleological interpretation of the provisions in question, the CJEU noted that Regulation (EU) 2016/399 must be seen as part of the broader framework balancing free movement of persons, public policy, and national security. In the light of the fundamental importance of free movement of persons among the objectives of the EU referred to in Art. 3 TEU,[127] the CJEU concluded that the possibility for Member States to reintroduce border controls must be regarded as an exception, which must be interpreted strictly and narrowly. A more extensive or looser interpretation that allows border controls based on the same threat to be extended beyond six months would, in view of the CJEU, lead to a potentially unlimited reintroduction

122 Conseil d'État [Council of State], Decision No. 415291, 28 December 2017, para. 7; Conseil d'État [Council of State], Decision No. 425936, 16 October 2019, para. 7.

123 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298.

124 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, paras. 65 and 74.

125 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 74.

126 Cebulak and Morvillo, 2022, para. 4.

127 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 89.

of EU internal borders, thus undermining free movement of persons in the EU.[128] In the legislative context, the CJEU found the system of time limits provided in Regulation (EU) 2016/399 to be clear and precise, stating that the limit of six months laid down in Art. 25(4) of this regulation is absolute.

While the CJEU pointed out that the maximum period of six months referred to in Art. 25(4) of Regulation (EU) 2016/399 may be applied afresh only where the Member State concerned can demonstrate 'the existence of a new serious threat affecting its public policy or internal security', it only perfunctorily touched upon the substantive question of what constitutes such a "new threat". This may require the Member States to provide significant materials, such as studies, statistics, and reasoning, to justify the existence of the new threat.[129] In the present case, it seems that the Republic of Austria failed to demonstrate the existence of a new threat, as required by Art. 25 of Regulation (EU) 2016/399, which would have justified triggering anew the periods provided for in this article. Therefore, its internal border controls may be perceived as incompatible with Regulation (EU) 2016/399 and, consequently, contrary to EU law. However, this is a matter to be determined by the referring court of a Member State.[130]

The CJEU's considerations in this judgment that are most important for our discussion pertain to the question of whether the Member States can directly rely on EU primary law, more specifically Art. 72 TFEU, to reintroduce or prolong internal border controls. As one of the intervening parties, Germany relied upon the line of argument that 'when exceptional circumstances so justify, the Member States may invoke Art. 72 TFEU in order to derogate from the provisions of the Schengen Borders Code setting maximum total durations for the reintroduction of temporary internal border control'.[131] Germany maintained that the migration crisis was something that was not envisioned by the secondary EU legislation; thus, it resorted to the exceptions of national security interests provided for in EU treaty law. While recognising that Member States have a sovereign competence to define their essential security interests and adopt appropriate national measures to ensure their internal and external security, the CJEU recalled that a Member State's decision or national measure concerning internal border control that is adopted to protect national security or maintain public policy cannot render EU law inapplicable and exempt that Member State from its obligation to comply with EU law.[132]

128 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 66.

129 Cebulak and Morvillo, 2022, para.14.

130 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, paras. 79–82.

131 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 83.

132 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 84. See also *B.K. v. Republika Slovenija (Ministrstvo za obrambo)*, C-742/19, 15 July 2021, ECLI:EU:C:2021:597, para. 40.

Art. 72 TFEU states that Title V TFEU does not affect the exercise of responsibilities incumbent upon Member States regarding the maintenance of law and order (*ordre public*) and safeguarding of internal security. According to the settled case law of the CJEU, this derogation provided for in Art. 72 TFEU must be interpreted strictly. This implies that Art. 72 cannot be interpreted in a sense that it confers on Member States the power to 'depart from the provisions of EU law on the basis of no more than reliance on the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[133] Moreover, the CJEU held that the relevant provisions of Regulation (EU) 2016/399 (including Arts. 25 and 29) are

> … part of the comprehensive framework – established by the EU legislature in the exercise of the competences conferred upon it by Article 3(2) and (6) TEU and Article 5(1) and (2) TEU in conjunction with Article 4(2)(j) and Article 77(2)(b) and (e) TFEU – governing the way in which the Member States exercise the responsibilities incumbent upon them for the purpose of the maintenance of public policy and the safeguarding of internal security.[134]

This legislative framework is intended to strike a fair balance, as envisaged in Art. 3(2) TEU, between, on the one hand, the EU's objective to offer its citizens an area of freedom, security, and justice without internal borders, in which the free movement of persons is ensured, and, on the other hand, the Member States' essential national security and public policy interests pursued through adopting appropriate measures with respect to external border controls, asylum, immigration, and prevention and combat of crime. In creating and adopting the relevant provisions of Regulation (EU) 2016/399, the EU legislature, in view of the CJEU, took due account of the exercise of the responsibilities incumbent upon Member States regarding public policy and internal security threats; at the same, the EU legislature limited Member States' ability to interfere with the freedom of movement by temporarily reintroducing internal border control (in exceptional situations and under strict conditions) to strike a balance between the various interests at issue.[135] Finally, the CJEU reminded the European Commission of its oversight powers (under Art. 27(4) of Regulation (EU) 2016/399) as regards the necessity or proportionality of the Member States' planned reintroduction of internal border controls by issuing its opinion to that effect. The CJEU also cautioned both the European Commission and Member States to exercise

133 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 86. See also *Commission v. Hungary* (Reception of applicants for international protection), C-808/18, 17 December 2020, EU:C:2020:1029, paras. 214 and 215).

134 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 87.

135 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 89.

the powers conferred upon them by Regulation (EU) 2016/399 (notably, Art. 27) regarding the exchanges of information; opinions; consultations; and, where appropriate, mutual cooperation, with a view to maintaining the balance between the freedom of movement and public security.[136]

While the CJEU in its judgment took a principled stance on the elimination of internal border controls within the Schengen area based on clear legal commitments of Member States to an area without internal borders, it left some aspects of the strict interpretation of exceptions to the principle of free movement of persons unclear. This left room for Member States to claim and demonstrate, within the parameters of EU law, the existence of a new threat, as well as the necessity and proportionality of their internal border controls to justify their reintroduction or prolongation. These blanks may be filled by future decisions of the national courts, CJEU, or European Commission. It thus remains to be seen what course the subsequent case law of the Member States and CJEU will take and whether it will uphold the CJEU's approach in this recent prominent ruling that exceptions to the rule of open borders within Schengen area need to be interpreted narrowly. This means that border controls within Schengen should be exceptional, regardless of the nationality or legal status of a person crossing the EU internal borders.

5.2. Compliance with the principle of conferral and speciality

In addition to the reservations of Member States' competence enshrined in the Treaty of Lisbon, exercise of the EU's competence in connection with border management and related issues of migration must not encroach on areas that are not covered by Arts. 77 and 79 TFEU. This question is particularly interesting as regards the adoption of criminal penalties. Moreover, the EU's competence in connection with border management and related migration issues is exercised only when the main objective of the action taken is one of the objectives listed in Arts. 77 and 79 TFEU, even if the exercise of the EU's competence may affect third-country nationals on some other legal basis.[137]

The EU's integrated border management system aims to, *inter alia*, ensure effective implementation of the rules for crossing the EU's external borders. The Schengen Borders Code (Regulation (EU) 2016/399) contains provisions on the entry conditions and modalities of border checks, as well as the rules on refusal of entry. External borders may only be crossed at designated (official) border crossing points during opening hours .[138] Member States are accordingly required to introduce effective, proportionate, and dissuasive penalties for violations of these rules in their

136 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, paras. 91-92.

137 Neframi, 2011, p. 20.

138 Art. 5(1) of Regulation (EU) 2016/399.

national legislations.[139] This obligation is without prejudice to the Member States' international protection obligations. These express provisions respectively reflect the underlying effective sanctions principles of EU law and the exemption of refugees from penalties for irregular entry, as set out in Art. 31 of the 1951 Geneva Convention relating to the status of refugees (which exempts refugees who enter or stay in the EU without authorisation from penalties, under certain circumstances). It should be highlighted that these provisions do not require Member States to criminalise irregular (unauthorised) border crossing.[140] Generally, EU law is silent on the criminal law aspects of irregular migration apart from specific obligations to criminalise the trafficking, smuggling, and employment of irregular migrants, which do not require criminalisation of the irregular migrants themselves.[141] Another exception to this general regulation is the limitation on imposing custodial penalties on irregular migrants which, according to the CJEU, is inherent in the Returns Directive (Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals).[142]

Two EU legal instruments were adopted to more effectively prevent and combat illegal migration and human trafficking, including unauthorised entry, transit, and residence in the EU. Both instruments constitute the development of provisions of the Schengen *acquis*. They are intended to approximate existing legal provisions, particularly (1) the precise definition of the infringement in question and cases of exemption, which are subjects of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit, and residence, and (2) minimum rules for penalties, liability of natural and legal persons, and jurisdiction, which are subjects of the Council of the EU framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence.[143] The latter instrument provides the framework for measures relating to the liability of both natural and legal persons. They are to be used for combating the aid of illegal immigration, both in connection to unauthorised crossing of EU external borders in the strict sense and for sustaining networks that exploit human beings; the purpose of the directive is to provide a definition for the facilitation of illegal immigration and consequently for rendering more effective the implementation of the framework decision to prevent that offence.

Arts. 1(a) and (b) of Directive 2002/90/EC require each Member State to adopt appropriate sanctions on

139 Art. 5(3) of Regulation (EU) 2016/399.

140 This issue is further discussed in the subsequent chapters of this study.

141 Peers, 2016, p. 119.

142 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011; C-430/11, *Sagor*, ECLI:EU:C:2012:777.

143 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002, pp. 17–18; 2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002, pp. 1–3.

> any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens
>
> and
>
> any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

Instigation, participation, and attempt to commit such an offence are also punishable under this directive,[144] and Member States must take the measures necessary to ensure that they are subject to effective, proportionate, and dissuasive sanctions. The EU's competence to establish minimum rules and standards on the definition of criminal offences and sanctions in areas of serious crime, including trafficking in human beings and people smuggling, is otherwise covered by the provisions on judicial cooperation in criminal matters .[145] The CJEU has stressed that adoption of effective, proportionate, and dissuasive sanctions by Member States is crucial for effective application of EU law. The EU's acts, adopted in accordance with its competence in various areas, including competence in connection with border management and related migration, may provide a framework for Member States' competence by requiring them to adopt such penalties and indicating the type of penalty to be adopted.[146] This also implies that the EU's intervention may not interfere with the Member States' competence in criminal matters, in the absence of harmonisation according to Art. 83 TFEU.[147]

In accordance with the principle of speciality, the choice of legal basis for the EU's action in connection with third-country nationals that legally reside within the EU is also important for determining the scope of the EU's competence in the area of border management and migration. This choice will depend on the principal objective of the EU's action.[148] TFEU contains specific provisions regulating international trade in services, such as Art. 56 TFEU on the prohibition of restrictions on freedom to provide services that may apply to third-country nationals who provide services and are established within the EU. International trade in services falls within the EU's competence in connection with the common commercial policy,

144 Art. 2 of Directive 2002/90/EC.

145 Art. 83 TFEU.

146 CJEU, *Commission v Council*, Case C-176/03, [2005] ECR I-7879. See also Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03, *Commission v Council*), COM (2005) 583 final, 23 November 2005. Hagenau-Moizard, 2009, p. 205.

147 Neframi, 2011, p. 20.

148 Kohler and Engel, 2007, pp. 5–10.

and Art. 207 TFEU confers exclusive competence on the EU[149] covering trade in services. As a result, the EU's competence concerning the adoption of an act designed to regulate international trade (and not being based on Art. 79 TFEU) includes not only conclusion of international agreements but also adoption of the EU's unilateral legislative acts; this is not the case for the EU's competence in connection with migration exercised under Art. 79 TFEU for third-country nationals planning to stay and move freely within the EU for some time.[150]

5.3. Limits on the EU's external action

The EU's external competence in connection with border management and migration is not an exclusive competence (section 4.2). Accordingly, the possibilities for the EU to exercise its competence at international level are limited, as border management and migration issues are covered by a framework for the global exercise of external competences. Moreover, when the EU acts within the framework of a global approach to border management and related migration issues, combined with matters on which it has exclusive competence, it cannot simply ignore the limits of its competence. Consequently, the European Commission cannot act beyond its mandate when, e.g. the EU exercises its competence in connection with development cooperation that covers border management and migration matters. This is because of the horizontal nature of global approach to the EU's international action, which does not entail any extension of the EU's competences.[151] The EU's external action in relation to border management and migration is thus circumscribed by the reservation of Member States' competences, including in areas in which the EU has exclusive competence. For instance, an international agreement on services, which the European Commission intends to negotiate and conclude under the common commercial policy and for which the EU has exclusive competence, cannot contain provisions regarding an area or matter on which competence is reserved for the Member States[152] or an area or matter excluded from harmonisation .[153]

5.4. Territorial limits

From the territorial perspective, the substantive scope of the EU's competence in the area of border management and immigration is limited by the exempt position of Ireland and Denmark, which covers the whole area of freedom, security, and justice. Under Protocols Nos. 19, 21, and 22 of the Treaty of Lisbon, these two Member States are free to choose whether to participate in acts in connection with the EU's policies

149 Art. 3(1)(e) TFEU.
150 Neframi, 2011, p. 21.
151 Ibid.
152 Art. 79(5) TFEU.
153 Art. 79(4) TFEU.

on border management and migration. More specifically, Ireland may opt in pre-adoption or post-adoption of the relevant act, while Denmark does not have the possibility of opting in, but may join the implementation of such an act by concluding an international agreement with the EU. However, neither Ireland nor Denmark is treated in the same manner when the EU adopts acts relating to third-country nationals within other competences, as clarified in section 5.2. Given the EU's shared competence in the area of border management and migration, establishment of enhanced cooperation as regulated by Art. 20 TEU, and Arts. 326–334 TFEU may also be considered. In such a case, the EU's acts relating to the management of borders and (il)legal immigration, adopted in the context of enhanced cooperation, will be binding only on Member States that are parties to the acts in question. Such cooperation must be open at any time to all Member States, in accordance with Art. 328 TFEU. Accordingly, other (non-participating) Member States may choose to join enhanced cooperation later.[154]

6. Obligations/responsibilities of Member States' border authorities within the EU's internal competence framework

Pursuant to Art. 291(1) TFEU, Member States are required to adopt all measures of national law necessary to implement legally binding acts of the EU. This means that, in accordance with the principle of indirect administration, competence for implementing acts of the institutions is reserved for the Member States. The only exceptions to this rule are cases where the EU has operational competence under the founding treaties and where implementing powers may be conferred on the European Commission as enshrined in Arts. 291(2) to (4) TFEU. In addition to the principle of indirect administration, the Member States's adoption of measures is also an expression of the principle of sincere cooperation.[155]

Art. 4(3) TEU imposes on the Member States an obligation to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. According to the same provision, the Member States must 'refrain from any measure which could jeopardise the attainment of the Union's objectives'. The Member States are thus obliged to implement as well as comply with the common rules and principles when exercising their own competences.[156]

154 Neframi, 2011, p. 21.
155 Neframi, 2011, p. 22.
156 Ibid.

6.1. Obligation of implementation

The Member States have an obligation to take the necessary implementation measures when the EU adopts common rules by exercising its competence. Such an implementation of EU common rules may take the form of legislative measures (in the case of transposition of directives) or administrative measures (in the case of application of regulations). At any rate, the national courts of Member States are responsible for appropriate judicial implementation of common rules, which means that they must always ensure the effective application of EU law (as required by the principle of primacy) even when, e.g. national law is contrary to EU law. Moreover, Member States' obligation of implementation involves the requirement for adapting the national rules of procedure to meet the requirements of effective judicial protection (as required by the principle of effectiveness).[157]

In transposing EU directives into national legislations of Member States, particular questions may arise because of the nature of that action. In accordance with Art. 288 TFEU, Member States are free to choose the form and methods to be pursued to achieve the result required by a particular directive. In border control, management of new arrivals, illegal border crossings into the EU (i.e. irregular or undesired entry into the territory of the Member States), and (ir)regular migration, the EU's action does not cover the whole area but is currently limited to a higher or lower degree of harmonisation of national provisions. Therefore, Member States must either take the necessary administrative measures in directly applying several regulations related to EU border management[158] or adopt measures to transpose the

157 Neframi, 2011, p. 22.

158 These include Regulation (EU) 2016/399; Regulation (EU) 2019/1896; Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders; Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, and repealing Regulation (EU) No 1053/2013; Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU; Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals; Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011; Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226; Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and

relevant EU directives (notably those pertaining to legal and illegal migration and to the return of third-country nationals)[159] within the framework of their institutional autonomy. Regulations have general application, are binding in their entirety, and are directly applicable in all Member States after their entry into force (i.e. they do not need to be mediated into national law by implementing measures). However, in the case of directives (which are also an act of general application and binding as to the result to be achieved in the Member States to whom they are addressed), national authorities have the power to choose the transposing acts to achieve the objectives set by the directives, but they are nevertheless bound to respect the principle of effectiveness. Once adopted by the EU institutions in accordance with the EU treaties, the directives must be transposed by the Member States so they become law in the Member States. The CJEU held that the transposition of directives requires the adoption of legally binding acts by the Member States.[160] This obligation

amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA; Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726; Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention; Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation); and Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing as part of the Internal Security Fund, the Instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC.

159 These include, among others, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast); and Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. Two notable exceptions from this directive-oriented approach to regulating migration issues at the EU level are Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) and Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

160 CJEU, Case C-531/03, *Commission v Germany*, ECLI:EU:C:2005:159, 10 March 2005.

of transposition is therefore incumbent on the Member States. As such, the Member States' obligation of transposition does not affect the division of responsibilities for border management and migration between the Member State and its regional or local authorities. Moreover, Member States are required to adopt measures to transpose directives within the period prescribed in the directives themselves (generally two years).

If a Member State does not transpose a directive in question or transposes it incorrectly, it fails to fulfil its obligations, and the European Commission may, in accordance with Arts. 258–260 TFEU, initiate and bring infringement proceedings against that Member State before the CJEU. Non-enforcement of the judgment against the Member State concerned can lead to a new conviction by the CJEU, which may result in a fine (financial penalty). This equally applies to cases where the obligation to adopt the necessary measures is a matter for the local and regional authorities, as the EU is required to respect the Member States' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.[161] However, if a Member State fails to transpose a directive within the prescribed period or transposes it incorrectly, individuals may still rely on sufficiently clear, precise, and unconditional provisions of such a directive against that Member State in proceedings before the national courts. In *El Dridi*,[162] the CJEU interpreted Arts. 15 and 16 of Directive 2008/115/EC (the Return Directive), on detention for the purpose of removal, as being unconditional and sufficiently precise so as not to require any other specific elements for Member States to be able to implement them.

Similarly, in March 2011, the French Conseil d'État delivered a compelling opinion concerning the non-transposition of the Return Directive into French law within the prescribed period, in which it took the view that a Member State may be unable to rely on the derogations provided in this directive if it has not been transposed.[163] The French Conseil d'État held that the directive's provisions in question, on the period prescribed for voluntary departure, were sufficiently precise and unconditional to have a direct effect in national law, and foreign nationals contesting deportation orders may therefore rely directly upon them. According to the French Conseil d'État, the French national legislation should have defined, applying objective criteria, the concept of "flight risk" featuring in the Return Directive, which enables the period prescribed for voluntary departure to be shortened or cancelled. The Conseil d'État explained that as long as French law does not contain any such definition, France (as the EU Member State) could not invoke that risk to justify reduction or cancellation of that period. In this context, it is also worth noting that individuals who have suffered loss or injury caused by the Member State's failure to adequately implement or transpose common rules may bring an action for damages

161 Art. 4(2) TEU.
162 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011.
163 EC, avis MM. J. et T., n°345978 et 346612.

against the Member State in question before the national court, under the conditions established by the CJEU in *Francovich*.[164] In this judgment, the CJEU allowed individuals, under certain conditions, to have the possibility of obtaining compensation from a Member State for its insufficient or delayed transposition of a directive.

6.2. Obligation of compliance

When the Member States' jurisdiction is not affected by the exercise of the EU's competence in connection with the management of borders and migration, they may adopt national measures that go further than the EU legislative framework. However, national measures must always comply with the minimum rules of the EU legal framework within which they are adopted (section 6.2.1.), with the EU's fundamental rights provisions (section 6.2.2.), and with some other EU norms (section 6.2.3.). In accordance with the CJEU's case law, the national courts of Member States are required to refuse the application of any national provision that is contrary to the provisions adopted by the EU or where there is divergence between a domestic legal rule and EU legal rule, even if the application of the national rule is ordered by the domestic constitutional court.[165] This requirement arises from the legal principle of primacy (supremacy or precedence) as one of the basic principles of EU law, according to which EU law has priority over any contravening national law, including the constitution of a Member State itself. In other words, rules of national law, even those of a constitutional order, may not be allowed to undermine the unity and effectiveness of EU law.

6.2.1. Respect for the minimum rules

EU directives set minimum standards, often in recognition of the fact that the legal systems in some Member States have already set higher standards in regulating certain areas or subject matters. Thus, Member States have the right to set higher standards than those set in the directive. For example, the Return Directive (Directive 2008/115/EC) allows Member States to adopt or maintain provisions that are more favourable to illegally staying third-country nationals. However, this directive does not allow Member States to apply stricter rules in the area covered by it. This view was also confirmed by the CJEU's judgments in *El Dridi*, *Achughbabian*, and *Affum*. All three cases were referred to the CJEU concerning the imprisonment of third-country nationals in return procedures for the crime of irregular entry or stay.

164 CJEU, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357.

165 CJEU, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629; CJEU, Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, Judgment of the Court (Grand Chamber) of 8 September 2010.

In *El Dridi*,[166] The CJEU had to examine whether the criminal detention sanction could be regarded as a measure necessary to implement the return decision within the meaning of Art. 8(1) of the Return Directive or, on the contrary, a measure compromising the implementation of that decision. Given the circumstances of the case, the CJEU held that the criminal detention sanction was not compatible with the objective of the directive—to return a person to his or her country of origin in line with fundamental rights; as such, the sanction did not contribute to the removal of the third-country national from the Member State in question. According to the CJEU, when the obligation to return is not complied with within the period for voluntary departure, Member States need to pursue the enforcement of the return decision in a gradual and proportionate manner, using the least coercive measures possible and with due respect for fundamental rights. It follows from this CJEU decision that the Return Directive precludes national rules that provide for a prison sentence to be imposed on illegally staying third-country nationals on the sole ground that they remain, without valid grounds, on the Member State's national territory, contrary to an administrative order to leave that territory within a given period. While the Member States have criminal jurisdiction to adopt coercive measures to dissuade third-country nationals from staying illegally in their territory, the exercise of this criminal jurisdiction must not impede the achievement of the objectives pursued by the Return Directive and deprive it of its effectiveness.[167]

In a similar vein, the CJEU considered in *Achughbabian* whether the principles established in *El Dridi* also applied to a third-country national's imprisonment sentence for the offence of unlawful entry or stay in the territory of a Member State.[168] The CJEU interpreted the Return Directive as meaning that it does not preclude a Member State from classifying unlawful stay as an offence, laying down criminal sanctions to deter and prevent such a violation of the national residence rules, or imposing detention while determining whether or not the stay is legal. The CJEU clarified that the situation of detention being imposed before or during the return procedure is covered by the Return Directive, and, therefore, such a detention must pursue the removal. The CJEU found in this case that the minimum rules in the Return Directive were not respected by the Member State concerned because the criminal detention would not pursue the removal. According to the CJEU, the imposed detention would impede the application of the common standards and procedures set out in the Return Directive and delay the return of a third-country national, thereby undermining the effectiveness of the Return Directive. Similarly, the CJEU decided in *Affum* that the Return Directive precludes national legislation prescribing

166 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011, para. 59.
167 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011, para. 55.
168 CJEU, C-329/11, *Achughbabian v. Prefet du Val-de-Marne* [GC], 6 December 2011, paras. 37–39 and 45.

imprisonment for unlawful stay, as it would thwart the application of the return procedure and delay the return.[169]

Although the Member States have certain discretion in applying acts on border management issues and migration adopted for harmonising their laws and regulations (particularly, when that margin of discretion is explicitly provided by way of derogation), they must respect the minimum rules and not act in a manner that could undermine the effectiveness of such rules.[170] If a national court reviewing the legality of a Member State's measure is in doubt about whether the given measure complies with the minimum rules, it may or even must (depending on a particular case) refer the matter to the CJEU to give a preliminary ruling on the interpretation of the relevant EU legal provisions under Art. 267 TFEU. According to Art. 23a of Protocol No. 3 on the Statute of the CJEU, references for a preliminary ruling relating to border management and migration may be dealt with under an urgent procedure. It is also important to note that, according to the CJEU's ruling in *Inter-Environnement Wallonie*, Member States, in accordance with the principle of sincere cooperation,[171] must not adopt national measures that are incompatible with the directives' provisions, even before the period for their transposition has expired.[172]

6.2.2. Respect for fundamental rights

EU Member States are state parties to numerous international human rights treaties, including the Convention Relating to the Status of Refugees; European Convention on Human Rights; International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and various international instruments relating to maritime law, which include the obligation to search, rescue, and save lives at sea (e.g. the UN Convention on the Law of the Sea and the International Convention for the Safety of Life At Sea). Therefore, Member States are required to guarantee the human rights enshrined in these treaties. The scope of their obligations under human rights conventions, such as the European Convention on Human Rights, is defined by their jurisdiction. This implies that if a Member State does not have jurisdiction, there is no obligation to guarantee the rights specified in such a convention, and no accountability can thus be incurred by that Member State either. If international human rights obligations are violated while controlling and protecting the EU's external borders, a Member State, the EU, or both can be held accountable by victims for an internationally wrongful act. For this to be the case, however, the violation of such obligations must be attributable to that Member State and/or the EU (e.g. if the EBCG Agency is involved in the violation) under international law. Moreover, the Member States are

169 CJEU, C-47/15, *Sélina Affum v. Préfet du Pas-de-Calais* [GC], 7 June 2016.
170 Neframi, 2011, p. 24.
171 Art. 4(3) TEU.
172 CJEU, Case C-129/96, *Inter-Environnement Wallonie ASBL v. Région wallonne*, [1997] ECR I-7411.

bound by EU law, including European border management, asylum and migration legislation, and the EU Charter of Fundamental Rights.

In implementing EU rules concerning border management and migration, the competent Member States' authorities are thus required to apply their margin of discretion in a manner that ensures full respect for fundamental rights. This requirement is enshrined in Art. 67(1) TFEU: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights'. Thus, the CJEU pointed out in *European Parliament v. Council of the European Union* that the exercise of Member States' jurisdiction, within the leeway Member States, is provided under the Directive on family reunification (Council Directive 2003/86/EC on the right to family reunification) and is subject to judicial review as far as the respect for fundamental rights is concerned.[173] Because of the risk that Member States—as a result of implementing this directive's provisions that allow Member States to apply derogations—may adopt or maintain national laws that do not respect fundamental rights, the CJEU is required to review such national legislations.

Pursuant to Art. 72 TFEU, the CJEU's review must consider the Member States' competence to adopt measures concerning the maintenance of law and order and the safeguarding of internal security. The judicial review is conducted based on the principle of proportionality, with the CJEU examining whether the national measure is appropriate considering the objective to be achieved, whether it is necessary, and whether it maintains a balance between the interests. In the *El Dridi* judgment, the CJEU stated that where the Return Directive (Directive 2008/115/EC) allows Member States to adopt measures of various kinds, the choice of the national measure that imposes most restrictions on the rights and freedoms of the illegally staying third-country national must comply with the principle of proportionality.[174]

The national court—in which the Member State's acts are contested—must primarily review the respect for the principle of proportionality. Depending on the case, the national court may or must refer a question for preliminary ruling by the CJEU, which has jurisdiction to interpret the minimum rules laid down by the directives and, consequently, the indirect framework for the Member States' discretionary actions.[175] In connection to this, the CJEU ruled in *Aziz Melki and Sélim Abdeli* (the case concerned the rules relating to the priority question of constitutionality) that national rules on constitutionality review must be interpreted in accordance with EU law.[176] This interpretation by the CJEU also implies that national provisions relating to the review of the constitutionality of laws or regulations of Member States with implications for human rights and fundamental freedoms must not affect the possibility

173 CJEU, C-540/03, *European Parliament v. Council of the European Union*, [2006] ECR I-5769, 27 June 2006, paras. 62–65.

174 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011, para. 41.

175 Neframi, 2011, p. 25.

176 CJEU, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*, [2010] ECR I-5667, 22 June 2010.

or, as the case may be, the obligation of the national court to refer cases for preliminary ruling by the CJEU.

Art. 51(1) of the Charter of Fundamental Rights of the EU provides that, besides EU institutions, EU Member States are also bound to comply with the charter whenever applying or implementing EU law. In the field of border management and migration, Member States thus have an obligation to implement EU law in full compliance with the rights and requirements of the EU Charter, which has the same legal value as the EU treaties. In areas not covered by EU law, Member States must comply with the rights protected by the European Convention on Human Rights and other international human rights and refugee law instruments to which they are party. EU law instruments regulating border management and related migration issues and establishing the set of rules that regulate the functioning of the Schengen area—Regulation (EU) 2016/399 (Schengen Borders Code), Regulation (EU) 2022/922 (Schengen Evaluation and Monitoring Mechanism), and Regulations (EU) 2021/1148 and (EU) 2021/1060 (which regulate EU funding for border management)—contain several clauses and safeguards intended to protect fundamental rights. They underline the need to comply with the fundamental rights contained in the EU Charter of Fundamental Rights that are more often at stake in border management and migration control. However, many of these safeguards still need to be activated to their full extent.

The Member States must ensure that the fundamental rights are respected and protected in law and practice. This means, first, that their national legal systems must fully incorporate the requirements and safeguards flowing from EU law, the European Convention on Human Rights, and international human rights and refugee law. Likewise, Member States' national integrated border management strategies must adequately reflect fundamental rights. According to the most recent FRA report on the fundamental rights situation in the Member States,[177] immigration, borders, and asylum legislation in Latvia, Lithuania, Poland, Hungary, and Spain is inadequate as it allows the border authorities, in certain circumstances, to redirect third-country nationals who entered these Member States' territory in an unauthorised manner to the neighbouring country they came from, without assessing whether such a removal violates the principle of *non-refoulement*. Finnish and Estonian migration and asylum laws can also be considered highly problematic in this regard.[178]

More importantly, the fundamental rights guarantees and national strategies must be implemented and enforced by border management authorities and staff in Member States when carrying out border checks and controls at the EU's external borders in their daily work.[179] The recent FRA report identifies various inappropriate practices pursued by several Member States' border authorities and guards

177 FRA, 2023b, p. 150.

178 Ibid.

179 The EU's external sea borders has additional safeguards deriving from the international law of the sea, while at airports in the EU, the international civil aviation law, as well as EU instruments on passenger name records and advanced passenger information, contain further protective provisions.

that violate fundamental rights of migrants, refugees, and asylum seekers at these Member States' borders.[180] The Member States' border guards and other competent authorities must take all necessary measures to ensure that fundamental rights are effectively protected and promoted while also upholding the highest professional and behavioural standards in border management. They should pay particular attention to vulnerable persons attempting to cross the EU's external borders and, accordingly, adjust their behaviour and attitude when interacting with people who may have special needs, including children, victims of human trafficking or other violent crime, pregnant women, people with medical conditions, and persons with disabilities. Border management authorities and staff in the Member States should also be aware of and respect the mandate and powers of independent national, European, and international monitoring bodies of fundamental rights and refugee protection agencies, as well as other organisations present at the borders. They should grant them access to information, documents, and people in accordance with relevant laws. Independent and regular monitoring at external borders can help identify fundamental rights risks before violations may occur. Moreover, effective protection of fundamental rights requires systematic reporting of any violations, particularly those constituting serious crimes; prompt and effective investigation of all allegations; and effective and dissuasive sanctions when human rights and international protection violations occur in carrying out border management activities.

Notwithstanding some improvements and promising practices in border management- and migration-related fundamental rights issues across the EU, the Member States can and need to do more in terms of properly managing migration flows and further improving human rights protection for all asylum seekers, refugees, and other migrants arriving at their borders or present in their territory. Shortcomings, flaws, and obstacles persist in their laws, policies, practices, and attitudes. For example, although the law is very clear, deaths and disappearances of those trying to cross the Mediterranean Sea remain highly disturbing.[181] The Member States' obligation to save lives of migrants attempting to reach the EU borders requires them to deploy the necessary search and rescue capacities.[182] Member States must also

180 The cases include Greek, Cyprian, Latvian, Lithuanian, Polish, Hungarian, Croatian, Bulgarian, and Spanish border practices and incidents. FRA, 2023b, pp. 150–151.

181 In 2022, the International Organization for Migration recorded 3,168 deaths or disappearances at the EU's land and sea borders. FRA, 2023a, p. 10.

182 As far as the respect for the right to life at the Member States' borders is concerned, the ECtHR issued important judgments against three EU Member States: Croatia, Greece, and Hungary. ECtHR, *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, 18 November 2021; *Safi and Others v. Greece*, No. 5418/15, 7 July 2022; *Alhowais v. Hungary*, No. 59435/17, 2 February 2023. In *Safi and Others v. Greece*, the ECtHR concluded that the national authorities had not done all that could reasonably be expected of them to prevent the loss of lives. This is the first time the ECtHR applied this positive obligation, flowing from Article 2 ECHR, to a maritime search and rescue operation concerning asylum seekers. In its ruling, the ECtHR also noted shortcomings in national investigation proceedings and reiterated relevant safeguards for a thorough and effective investigation of such incidents.

provide adequate legal pathways to those seeking asylum, strengthen their monitoring of migrants' fundamental rights violations, and provide victims of human rights abuses meaningful access to justice.

Because of the growing number of people crossing or attempting to cross the EU external borders in an unauthorised or irregular manner, EU institutions and Member States decided to ensure effective and strict control of the EU external land and sea borders. Secondary EU law requires that the Member States' border management must respect the right to seek asylum and obligations related to access to international protection, particularly the principle of *non-refoulement*, and fundamental rights .[183] However, recent years have seen a significant growth in seriousness and intensity of reported fundamental rights abuses in connection with the Member States' border management.[184] When refugees and other migrants unlawfully cross, or try to cross, the EU's external borders, they experience rights violations in several Member States. Civil society actors who defend the rights of asylum seekers and other migrants and who work in the vicinity of the Member States' borders face hostile attitudes, investigations, intimidations, attacks, and increasing pressure from the Member States' authorities. In some Member States (including Greece, Hungary, and Italy), members of non-governmental organisations even encounter legal proceedings and other major restrictions on their work.[185]

Another major barrier in implementing border management-linked human rights norms is that victims of fundamental rights violations reported at the EU borders—which also involve allegations of criminal conduct, such as ill-treatment, people stripped of their clothes, failure to assist people in danger, or theft of personal belongings—do not find redress in national courts of Member States.[186] While the fundamental rights violations reported from the EU's external borders are serious, recurrent, and widespread, only a few cases are reported, recorded, and investigated by the Member States' national justice systems. In the absence of proper investigation, adjudication, and redress, a climate of impunity seems to prevail. Although the Member States have an undeniable sovereign right to control the entry of non-nationals into their territory, while exercising border control, they still have a duty to protect the fundamental rights of all people under their jurisdiction, irrespective of their nationality and legal status. Under EU law, this also includes providing access to asylum procedures. International and European human rights law requires that an effective remedy be available to all those who have an arguable claim that their rights have been breached by the national (border) authorities.[187]

The Member States thus have an obligation to establish dedicated mechanisms for lodging administrative and judicial complaints through which migrants, asylum

183 Art. 4 of Regulation (EU) 2016/399; Art. 80 of Regulation (EU) 2019/1896.
184 FRA, 2023a, p. 10.
185 European Commission, 2022a, p. 21; European Commission, 2022b, p. 29; European Commission, 2022c, p. 25.
186 FRA, 2023a, p. 11.
187 Art. 13 ECHR and Art. 47 Charter of Fundamental Rights of the EU.

applicants, and refugees can submit allegations of human rights violations at the Member States' borders. Where arguable complaints of violations of fundamental rights are made, Member States have a duty to carry out an effective investigation into those allegations.[188] According to the jurisprudence of the ECtHR, competent national authorities are required to carry out an effective official investigation in cases involving alleged violations of Art. 2 (on the right to life) and Art. 3 (on the prohibition of torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights. This implies that such an investigation must be prompt, expeditious, and capable of leading to the identification and punishment of those responsible for fundamental rights violations.[189]

Despite continuing reports of fundamental rights violations at borders on a large scale, the number of national judicial cases remains low.[190] The reasons for such an unsatisfactory situation are various and may include limited interest or fear on the part of victims in filing a case; lack of evidence; and difficulties in producing evidence of events taking place at sea, in military zones, or during the hours of darkness in forests.[191] Between July 2021 and February 2023, the ECtHR ruled in several cases that human rights were violated at the EU's land or sea borders.[192] In some of these cases, the ECtHR also found that no remedy had been available to the applicants at the national level.[193] At the same time, the ECtHR is increasingly handling proceedings regarding interim measures to prevent irreparable harm and has granted most of these requests.[194]

The Schengen Evaluation and Monitoring Mechanism oversees Member States' implementation of the EU legal rules that constitute the Schengen *acquis*. These evaluations also cover fundamental rights-related matters of border management in the Member States. As a result of the mechanism's evaluation, evaluation reports of inspections, including recommendations, are drawn up. Thus, Italy was recently urged

188 FRA, 2021a, p. 2; FRA, 2020, p. 2.

189 ECtHR, *Mocanu and Others v. Romania*, Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, paras. 315–326.

190 However, in a recent criminal case that resulted in a conviction, the Rome Tribunal found two Italian officers guilty of manslaughter because they failed to act in response to a shipwreck in 2013, in which over 200 people drowned. As the crime has since been declared to be time-barred, the officers were not punished. Italy, Rome Tribunal, Decision No. 14998, 16 December 2022.

191 FRA, 2023a, p. 11.

192 ECtHR, *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, 18 November 2021; *Safi and Others v. Greece*, No. 5418/15, 7 July 2022; *H.K. v. Hungary*, No. 18531/17, 22 September 2022; *Shahzad v. Hungary*, No. 12625/17, 8 July 2021; *Alhowais v. Hungary*, No. 59435/17, 2 February 2023; *D.A. and Others v. Poland*, No. 51246/17, 8 July 2021; *A.B. and Others v. Poland*, No. 42907/17, 30 June 2022; *A.I. and Others v. Poland*, No. 39028/17, 30 June 2022; *T.Z. and Others v. Poland*, No. 41764/17, 13 October 2022.

193 ECtHR, *Alhowais v. Hungary*, No. 59435/17, 2 February 2023, paras. 71–72; *D.A. and Others v. Poland*, No. 51246/17, 8 July 2021, paras. 39–41; *A.B. and Others v. Poland*, No. 42907/17, 30 June 2022, paras. 22–24; *A.I. and Others v. Poland*, No. 39028/17, 30 June 2022, paras. 25–27; *T.Z. and Others v. Poland*, No. 41764/17, 13 October 2022, paras. 12–15.

194 FRA, 2023a, p. 12; ECtHR, 2022, pp. 1–2.

to address reception gaps in Lampedusa,[195] while Greece was recommended to investigate allegations of ill-treatment at its external EU borders and strengthen fundamental rights-related aspects of its border management governance structure.[196] Apart from the Schengen Evaluation and Monitoring Mechanism, national human rights monitoring at some Member States' borders has proved to play an important role. Specifically, Member States' human rights institutions and ombudsmen (including the Greek Ombudsman, Polish Commissioner for Human Rights, and Spanish Ombudsman) have contributed to the investigations of fundamental rights violations at these countries' borders and/or referred individual cases to the national courts.[197]

Fundamental rights monitoring at EU external borders should be carried out systematically and regularly by the Member States with such borders for a range of their border management activities. These include border surveillance; apprehensions at land, sea, and air borders; and operation of referral mechanisms, including in the event of mass arrivals. To this end, Member States should establish or strengthen their national independent mechanisms to monitor fundamental rights compliance at their borders, in accordance with the European Commission's proposed screening regulation.[198] Such national independent monitoring mechanisms should examine how all these border management activities are carried out by Member States. They should consider and evaluate whether all people at the border are being treated with dignity, whether national border authorities and guards pay particular attention to vulnerable people, whether living conditions in initial reception facilities and immigration detention centres are adequate, whether those whose fundamental rights have been violated at the Member State's borders have access to effective judicial remedies, and what the fundamental rights implications are of implementing contingency plans in the event of mass arrivals at the Member State's border.[199]

To ensure that these national monitoring mechanisms are truly independent, full independence of the national entity monitoring fundamental rights at the Member State's borders should be guaranteed in law to allow for the mechanism to be free of any undue external influence. That is, national border-monitoring mechanisms should be free of any institutional affiliation with the Member States' authorities responsible for border and migration management. These mechanisms should have a relatively broad thematic mandate: They should be competent to monitor the actual implementation of fundamental rights safeguards during border checks and border surveillance within the meaning of Regulation (EU) 2016/399 (the Schengen Borders

195 Recommendation 15 in Council of the European Union, 2022b, p. 2.

196 Recommendations 2 and 24 in Council of the European Union, 2022a, para. 24 p. 8.

197 Hellenic Parliament, Standing Committee on Public Administration, Public Order and Justice, 2022, pp. 12–26; Polish Commissioner for Human Rights, 2023, paras. 1–5. The Spanish Ombudsman's recommendations are available from Defensor del Pueblo, 2022, para. 1.

198 Proposal for a Regulation of the European Parliament and of The Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM/2020/612 final).

199 FRA, 2022, p. 1.

Code) and at initial registration of new arrivals at or in proximity to EU external borders; they should have unhindered access to observe all border operations at any time; and they should be able to access remote border surveillance, monitor apprehensions, and inspect all designated reception areas and detention facilities.[200] So far, no EU Member State has taken any step towards setting up such a new and special fundamental rights monitoring mechanism, except for Croatia (through a pilot project by the Ministry of the Interior of the Republic of Croatia, which led to the conclusion in November 2022 of the cooperation agreement to implement an independent monitoring mechanism for the protection of fundamental rights in the actions of police officers of the Ministry of the Interior in the area of border surveillance, irregular migration, and international protection) and Greece (where the Greek National Commission for Human Rights set up a mechanism for recording incidents of informal forced [summary] returns).[201] Such fundamental rights monitoring and incident recording mechanisms are certainly meaningful as they can significantly increase transparency in the Member States' border management activities.[202]

Moreover, migrants are often turned back at EU internal borders—that is, borders between the Member States. Member States in southern Europe and along the Balkan route have increasingly used intra-EU bilateral readmission agreements (agreements between two Member States) to pass back to a neighbouring Member State migrants that they have apprehended in connection with the migrants' irregular crossing of an EU internal border.[203] Member States are allowed to do so under Art. 6(3) of the Return Directive (Directive 2008/115/EC) for migrants in an irregular situation, provided that a readmission agreement existed before 2009. However, for asylum applicants, the transfer procedure set out in Regulation (EU) No 604/2013 (the Dublin III Regulation) must be applied.[204] In this context, some rulings of the courts in France, Italy, and Slovenia reaffirmed the duty to respect the right to asylum and the principle of *non-refoulement* in intra-EU situations as well.[205] These judicial decisions also highlighted the importance of respecting individuals' rights to be heard and to

200 FRA, 2022, p. 5.

201 FRA, 2023a, p. 13.

202 For example, the Greek National Commission for Human Rights' mechanism recorded 50 incidents involving apprehension or interception of asylum seekers and their subsequent summary return to the Turkish side of the border. The mechanism also revealed that such incidents were frequently accompanied by ill-treatment of refugees and other migrants, deprivation or destruction of their identity documents, and other serious fundamental rights violations. It is, however, difficult to figure out whether the reports on these incidents at the Greek-Turkish border were referred to the competent judicial authorities for criminal investigation. FRA, 2023a, p. 13.

203 FRA, 2023a, p. 37.

204 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

205 FRA, 2021b, p. 161; France, Council of State, 7th Chamber, No. 440756, 8 July 2020, paras. 2 and 12 (concerning a mother from the Central African Republic and her child passed back to Italy in May 2020); Italy, Court of Rome (Tribunale Ordinario di Roma), Judgment No. 56420/2020, 18

be formally notified of decisions taken against them, in accordance with the general principles of EU law.

Furthermore, the European Commission, as the guardian of EU treaty law, may bring infringement proceedings against the Member States where, for instance, there is sufficient evidence that their authorities are responsible for pushbacks or other ill-treatment of migrants at their borders. However, the European Commission may be reluctant to pursue infringement proceedings against certain Member States that disregard refugee protections and border management-related human rights safeguards. Nevertheless, as the Greek government failed to investigate and address well-documented allegations of fundamental rights violations at its border, including continued violent pushback of people seeking asylum towards Turkey and the blatant disregard for EU asylum safeguards, the European Commission finally triggered an infringement procedure against Greece in January 2023 for its systematic breach of EU law in its treatment of people seeking asylum in the EU.[206] The European Commission's action to hold the Greek authorities accountable for their human rights violations against refugees and migrants by exposing people seeking asylum on its territory to suffering and abuse could result in the European Commission taking Greece to the CJEU if Greece does not comply with its obligations under EU law before it is referred to the CJEU and ultimately imposing financial sanctions on Greece.

6.2.3. Respect for EU norms other than provisions on border management and migration

Other EU law rules still have an important impact on border management and migration issues, notably in the area of free movement law as well as data protection law and association agreements.[207] In accordance with the principle of sincere cooperation ,[208] Member States are required not to take national measures that may thwart the achievement of the EU's objectives. Similarly, in exercising the competences reserved for them, Member States must not undermine the rules and principles of EU law. Accordingly, the Member States' margin for intervention in border management, migration, and asylum matters must not affect the application of more specific provisions concerning the situation of third-country nationals, such as those relating to EU citizenship or freedom of movement.[209] For example, the CJEU held in *Gerardo Ruiz Zambrano* that Art. 20 TFEU on the rights of citizens of the EU precludes a Member State from refusing to grant residence and work permits to third-country national parents, upon whom their minor children, who are EU citizens,

January 2021 (concerning a Pakistani national informally pushed back to Slovenia); Slovenia, Supreme Court, VSRS Judgment I U p 23/2021, 9 April 2021. See also ASGI, 2020, p. 1–8.

206 OXFAM International, 2023.

207 Peers, 2016, pp. 97–102.

208 Art. 4(3) TEU.

209 Neframi, 2011, p. 25. See also Barbou des Places, 2010, pp. 341–356. CJEU, Case C-294/06 *Payir and Others v. Secretary of State for the Home Department*, [2008] ECR I-203, 24 January 2008.

are dependent. The CJEU explained that such a refusal would have the effect of depriving the EU citizen children of the genuine enjoyment of the substance of the rights conferred upon them by their status as EU citizens.[210] In another case (*Metock*), the CJEU held that Member States could not make the right to live together under the Citizens' Rights Directive (Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) conditional on matters such as when and where the marriage had taken place or on the fact that the third-country national spouse had previously been lawfully resident in another Member State.[211]

7. Obligations/responsibilities of Member States' authorities within the EU's external action framework

The Member States' competent authorities have an obligation to implement international agreements relating to border management and migration that are concluded by the EU (section 7.1.). Moreover, they have an obligation to facilitate the EU's exercise of its competence (section 7.2.).

7.1. Obligation to implement international agreements

The EU may, in certain cases, conclude an international agreement with one or more third countries or international organisations.[212] Such agreements concluded by the EU are binding upon not only EU institutions but also its Member States.[213] Thus, the EU's international agreements constitute common rules, which the Member States must implement. In the case of their non-implementation, a Member State fails to fulfil its obligations and is subject to sanction by the CJEU. The Member States' competence in connection with border management and migration is affected by the conclusion of status agreements (see section 4.2) and readmission agreements by the EU. Member States are required, in accordance with the principle of sincere cooperation, to implement these agreements, which supersede any prior Member States' agreements.

Moreover, the Member States' competence in connection with border management and migration must not hinder the implementation of international agreements concluded by the EU, which relate to the free movement of third-country

210 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* [GC], 8 March 2011.
211 CJEU, Case C-127/08, *Metock and Others v. Minister for Equality, Justice and Law Reform* [2008] ECR I-6241, 25 July 2008, paras. 53–54 and 58.
212 Art. 216(1) TFEU.
213 Art. 216(2) TFEU.

nationals.[214] Third countries may be associated to the EU through the conclusion of association agreements foreseen in Art. 217 TFEU: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'. Art. 217 TFEU thus provides a very flexible legal basis, allowing for various privileged relations by the EU with third partners. Notwithstanding the broad scope of Art. 217 TFEU, almost all EU association agreements are concluded as "mixed agreements", which implies that besides the EU, its Member States are also involved as parties in their own right.[215] This means that EU association agreements are binding on the Member States as a whole, regardless of the division of competences between the EU and its Member States.[216] Hence, the reservation of Member States' competence in connection with entry, border crossing, and immigration for employment purposes cannot preclude the implementation of EU association agreements, which include provisions on the rights of the partner country's nationals.[217]

7.2. Support for international action by Member States

The exercise of Member States' external competence must not undermine the EU internal common rules. Pursuant to the principle of sincere cooperation in Art. 4(3) TEU, Member States need to facilitate the EU's tasks in carrying out its mission. This entails that the requirement of compliance in the exercise of Member States' internal competence applies equally to the Member States' international activities.[218] As regards the conclusion of readmission agreements and agreements with third countries concerning measures on crossing the EU's external borders (which must respect EU law and other relevant international agreements), the obligation entails providing a framework for the exercise of Member States' competence. In the context of the local border traffic regime in particular, Member States may conclude bilateral agreements with their neighbouring non-EU countries to ease the crossing of EU external borders for border residents who frequently need to cross these borders (e.g. holders of local border traffic permits). When the EU has not exercised its competence in connection with the partner country in question, Member States may also conclude readmission agreements. Mere obtaining of a negotiating mandate from the Council of the EU by the European Commission does not deprive Member States of their competence. However, as the CJEU pointed out in *Commission v. Luxembourg* and *Commission v. Germany*, Member States have a duty to closely cooperate with

214 Thym and Zoeteweij-Turhan, 2015.

215 For a comprehensive study of the law and practice of EU association agreements, see Van Elsuwege and Chamon, 2019. In this context, Nedeski distinguished between two types of shared obligations in mixed agreements to unravel who can be held responsible in case of a violation of such agreements: the EU, the Member State(s) concerned, or both. Nedeski, 2021, pp. 139–178.

216 Neframi, 2010, p. 171.

217 Peers, 2018, p. 53.

218 Neframi, 2011, p. 27.

and assist the European Commission, in accordance with the principle of sincere cooperation .[219]

In exercising their shared competence in matters of border management and migration at the international level (i.e. within other multilateral fora, such as the UN, Council of Europe, and Organisation for Economic Co-operation and Development), Member States must ensure, in accordance with the principle of sincere cooperation, unity of the EU's international representation by presenting a common position of the EU.[220] However, this does not constitute the Member States' obligation of a result unless the EU acts autonomously when dealing with border management and related migration matters at the international level.

8. Conclusion

As presented in this chapter, the relationship between the EU and its Member States—in terms of their shared competences and responsibilities in the area of border management as a key part of regulating migration phenomenon—is rather complicated. This chapter aimed to provide thorough insights into the complex issues surrounding the division of competences and responsibilities shared between EU institutions/agencies and the Member States' authorities in developing and implementing an EU common and integrated border management regime as an integral component of the wider EU migration framework. Considering the continuously expanding role and mandate of the EU in border management matters, the consequent potential legal implications for Member States themselves, and the impact of EU actions on refugees and other migrants, EIBM remains organised around multi-level administrative governance.

Clearly, the control of the EU's external borders serves the legitimate purpose of verifying the right of a migrant to enter EU territory. At the same time, Member States have retained their sovereign right to control the entry of non-nationals, including third-country nationals, into their territory while exercising border control, particularly when the maintenance of their law and order and safeguarding of their internal security may be at risk. Member States' national interests thus get in the way of a genuinely effective and thorough EU's asylum and migration policy, including border management, in line with binding international standards. As a result, the EU policy in these areas is not yet sufficiently approached as a joint task for all Member States.

219 Art. 4(3) TEU ;CJEU, Case C-266/03 *Commission v. Luxembourg*, [2005] ECR I-4805, 2 June 2005; CJEU, Case C-433/03 *Commission v. Germany*, [2005] ECR I- 6985, 14 July 2005.

220 Neframi, 2011, p. 26.

As the Member States' competence in the sphere of common external border management co-exists with that of the EU, Member States' national authorities responsible for border control also share their responsibility with the EBCG Agency to implement EIBM. Member States keep the primary responsibility for managing their sections of the external borders and for issuing return decisions, whereas the EBCG Agency supports the implementation of EU measures relating to the management of external borders and return operations by providing coordination as well as technical and operational assistance. The EU's shared competence in connection with the migration policy, including management of external borders, is both internal (normative and operational) and external (various types of agreements with third countries). However, the EU's powers and the tasks and activities of its institutions/agencies concerning management of borders and migration in the EU may not be exercised beyond the limits specified in the relevant provisions of the Treaty of Lisbon. These limits are linked to (1) the competence explicitly reserved for Member States under the EU Treaties, (2) the principle of conferred competences and speciality, (3) the EU's external action, and (4) certain territorial aspects (e.g. the exempt position of Member States such as Denmark and Ireland).

Given that the EU has its own legal personality with its own obligations, it is also independently responsible for the violations of its treaty obligations, including border management-related human rights abuses. At the same time, Member States are also responsible for border governance in the territory under their jurisdiction and for any border management activities and operations in other places where they exercise authority or effective control over an area, place, individual, or transaction. The transnational nature of some Member States' actions in the context of governing the EU's external borders does not exempt them from complying with and implementing their international and human rights obligations (both negative and positive), nor from their responsibility. In certain cases, the accountability of multiple Member States may be implicated, such as on the high seas or elsewhere when they act extraterritorially. Moreover, Member States cannot—by (partially) "outsourcing" a certain task, such as border control or border surveillance, to the EU institutions and agencies—shift away from their own obligations and responsibilities. They may be held accountable for what their own national border management staff have done or failed to do.

Under international human rights treaties, such as the European Convention on Human Rights, Member States also have a positive obligation to act and report on the human rights situation and violations at the EU's external borders. Even if individual Member States are helping implement a joint migration policy in an EU context, they are still individually responsible for ensuring the legal protection of those whose rights are being violated, and for actively striving for a mechanism that will prevent the violation of fundamental rights at the EU's external borders wherever possible. According to the ECtHR case law, Member States remain responsible under the European Convention on Human Rights, and these individual obligations apply alongside their joint actions (e.g. common border management operations) in an EU

context. In addition, it has been argued that Member States act as the management of the EU (the European Council) and can also be jointly responsible in this role.[221]

There continue to be shortcomings in the existing system of legal protection at the EU's external borders. These involve both obstacles in terms of access to national and European courts and flaws in monitoring mechanisms. As things stand, the legal remedies against actions of the EBCG Agency available to individuals remain inadequate. Likewise, proceedings before national courts are usually lengthy or insufficiently effective. Therefore, significant efforts need to be made towards improving the effectiveness of legal protection as part of the rule of law at the EU level, eliminating the ongoing practice of pushbacks, pullbacks, ill-treatment of migrants, and other serious human rights violations at the external EU borders, as well as towards preventing such unacceptable practices wherever possible in the future. In the same vein, Member States should take concrete steps to ensure effective monitoring of external border controls and the functioning of individual complaints procedures. However, this can only be achieved by sufficient political will and maturity, which is currently lacking in most Member States. Achieving major progress in this area requires not only joint responsibility and action of Member States with external EU borders with the European Commission, but also appropriate contributions of all other Member States.

221 Advisory Council on Migration, 2022, p. 11.

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