

PART B ENTRY AND BORDER CONTROLS

I.

Legal Framework for Entry and Border Controls

Selected Bibliography: Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011); Blumann (ed), *Les frontières de l'Union européenne* (Bruylant, 2013); den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012); Goodwin Gill/McAdam, *The Refugee in International Law*, 3rd edn (OUP, 2007); Groenendijk/Guild/Minderhoud (eds), *In Search of Europe's Borders* (Kluwer, 2003); Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer, 2000); Maes/Foblets/De Bruycker/Vanheule/Wouters (eds), *External Dimensions of EU Migration and Asylum Law and Policy* (Bruylant, 2011); Martenczuk/van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (VUB Press, 2008); Meloni, *Visa Policy within the European Union Structure* (Springer, 2005); Muzak, in Mayer & Stöger (2012), 'Articles 77 80 TFEU', in: Mayer/Stöger (eds), *Kommentar zu EUV und AEUV* (Maunz, looseleaf: 141th edn, 2012); Pastore, 'Visas, Borders, Immigration', in: Walker (ed), *Europe's Area of Freedom, Security and Justice* (OUP, 2004), p. 89 143; Rubio Marín (ed), *Human Rights and Immigration* (OUP, 2014); Peers, *EU Justice and Home Affairs Law*, 3rd edn (OUP, 2011); ter Steeg, *Das Einwanderungskonzept der EU* (Nomos, 2006); Ryan/Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff, 2010); Thym, *Migrationsverwaltungsrecht* (Mohr Siebeck, 2010); Weiß, 'Articles 77 80 TFEU', in: Streinz (ed), *EUV/AEUV. Kommentar*, 2nd edn (C.H. Beck, 2011).

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I. General Remarks

1. Evolution of the Schengen Acquis

The political objective of establishing an **internal market as an 'area without internal frontiers'**¹ supported the abolition of border controls as a 'constant and concrete reminder to the ordinary citizen that the construction of a real European Community

¹ Article 26(2) TFEU.

is far from complete.² After initial discussions on the feasibility of supranational law making, the Benelux countries, France and Germany seized the initiative and signed a political commitment on the gradual abolition of checks at their common borders in 1985.³ The latter paved the way for the ‘**Schengen Implementing Convention**’ of 1990 with detailed rules on the abolition of border controls and corresponding flanking measures.⁴ The remaining Member States, with the exception of Ireland and the United Kingdom, later acceded to the Schengen Implementing Convention on the basis of international accession treaties during the 1990s.⁵ On this basis, intra European border controls were gradually being abandoned: until today, we must distinguish between the applicability of the Schengen *acquis* and the **effective abolition of border controls** following an evaluation procedure and a decision to put the common rules into effect.⁶ EU Member States with the exception of the UK and Ireland had thus signed up to the travel area at the time of the Treaty of Amsterdam which integrated the Schengen *acquis* into the framework of the European Union.

- 2 Legally, the incorporated Schengen *acquis* was (and continues to be) construed as a specific form of enhanced cooperation whose establishment has already been authorised and which comprises **all Member States with the exception of the United Kingdom and Ireland**⁷, along with rather complex rules on the association of Denmark and the status of the United Kingdom and Ireland in relation to the new rules (see below MN 5). The **Schengen Protocol attached to the Treaty of Amsterdam** also contained principles and procedures for the definition of the body of rules that make up the Schengen *acquis* and the allocation of legal bases in the EU Treaties for all Schengen related instruments.⁸ Insofar as the amendment of former rules are concerned, the Schengen Protocol reaffirmed that all ‘proposals and initiatives ... shall be subject to the relevant provisions of the Treaties.’⁹ Many rules have been replaced in the meantime by new legislative instruments in line with the decision making procedure applicable, thus illustrating that the **Schengen law has become regular European law**. The Schengen

² Commission White Paper, *Completing the Internal Market*, COM(85) 310, para 47; on the evolution of border control cooperation, see Pastore, *Visas, Borders, Immigration*, p. 94 98.

³ The Agreement on the Gradual Abolition of Checks at their Common Borders of 14 June 1985 between the Benelux countries, France and Germany was an agreement of political intent to abolish border controls in the future by means of a second treaty.

⁴ Convention Implementing the Schengen Agreement of 14 June 1985 of 19 June 1990 (OJ 2000 L 293/19); on the contents, see O’Keeffe, ‘The Schengen Convention’, Y.E.L. 11 (1991), p. 185 219.

⁵ Agreements on accession were signed with regard to: Italy on 27 November 1990 (BGBl. = [German] Federal Law Gazette 1993 II 1902), entry into force on 1 July 1997 (BGBl. 1997 II 1530); Spain and Portugal on 25 June 1991 (BGBl. 1993 II 1902), entry into force on 1 March 1994 (BGBl. 1996 II 242); Greece on 6 November 1992 (BGBl. 1996 II 2542) and Austria on 28 April 1995 (BGBl. 1997 II 966), which both entered into force on 1 July 1997 (BGBl. 1998 II 1968); Denmark, Finland and Sweden on 19 December 1996 (OJ 2000 L 239/97), which was never ratified and entered into force as an integral part of the Treaty of Amsterdam (see below MN 2).

⁶ On gradual implementation, see the Joint Declaration to Article 139(2) Schengen Implementing Convention, *ibid.*; within the EU framework, corresponding rules were laid down in Article 3(2) Act of Accession 2003 (OJ 2003 L 236/33), Article 4(2) Act of Accession 2005 (OJ 2005 L 157/203) and Article 4(2) Act of Accession 2012 (OJ 2012 L 112/21); border controls were abandoned in 1995, 1997, 1999, 2000, 2007, 2008, and 2013.

⁷ See Article 1 of the present Protocol (No. 19) on the Schengen *acquis* integrated into the framework of the European Union (OJ 2008 C 115/290) and the predecessor (OJ 1997 C 340/93); new Member States will participate in the Schengen area in accordance with Article 7 *ibid.*

⁸ The integration was performed by Decision 435/99/EC (OJ 1999 L 176/1) and Decision 436/99/EC (*ibid.* 17); for constitutional implications, see Thym, ‘The Schengen Law’, *ELJ* 8 (2002), p. 218 245.

⁹ Article 5 Schengen Protocol, *ibid.*; for details, see Hailbronner, ‘European Immigration and Asylum Law under the Amsterdam Treaty’, *CML Rev.* 35 (1998), p. 1047, 1059 1065; and Corrado, ‘L’Intégration de Schengen dans l’Union Européenne’, *Revue du Marché Commun* 1999, p. 342 349.

Borders Code Regulation (EC) No 562/2006 and the Visa Code Regulation (EC) No 810/2009, which will be commented upon in this volume, are the most prominent expression of the supranationalised Schengen law.

Whereas to many citizens ‘Schengen’ simply means they do not need a passport when crossing borders in continental Europe, the so called **flanking measures** compensating national authorities for the loss of control options at domestic borders through pan European cooperation on issues such as visas, police cooperation, criminal matters and immigration, present the focal point of policy debates. First agreed upon by interior ministers of the five original Schengen participants, these flanking measures soon developed a momentum of their own and constitute, to this day, the backbone of justice and home affairs cooperation in the European Union. This process has been **described (and criticised) as ‘securisation’** by some authors, since the agenda of interior ministers dominated early debates,¹⁰ although deliberations have become much more balanced in the meantime after the progressive extension of qualified majority voting in the Council and co decision powers of the European Parliament (see Hailbronner/Thym, Constitutional Framework, MN 3 4).¹¹ While the ECJ originally emphasised the inherent link between the flanking measures and the abolition of internal border controls,¹² the Treaty of Lisbon reaffirmed the **conceptual autonomy of the area of freedom, security and justice** as a policy field in its own right. EU activities are no longer presented as a spillover of the single market, but pursue self sufficient objectives whose exact demarcation remains the prerogative of the EU legislature (see Hailbronner/Thym, Constitutional Framework, MN 5 9).

Conceptually, the move towards an ‘area of freedom, security and justice’ highlights the territorial dimension of the Schengen area and related policies with regard to border controls and visas. Nevertheless, the use of the term ‘area’ **does not have a fixed meaning** in the EU context: it was used repeatedly for the description of projects, such as the European Economic Area or the European Higher Education Area, whose contours remained uncertain.¹³ Joint policy measures on border controls can be perceived, nonetheless, to present the **federal dimension of the integration project** with the European Union assuming some (not: all) state like features, at least at a symbolic level.¹⁴ Judges in Luxembourg moved in this direction semantically when they spoke, in judgments on Union citizenship, of the ‘territory of the Union as a whole’¹⁵ or, simply, of the ‘territory of the European Union.’¹⁶ It should be noted, though, that the federalising pull of the Schengen acquis **remains incomplete**: the asymmetric (non)participation of some

¹⁰ See Guiraudon, ‘European Integration and Migration Policy’, JCMSt. 38 (2000), p. 251 271; and Costello, ‘Administrative Governance and the Europeanisation of Asylum and Immigration Policy’, in: Hofmann/Türk (eds), *EU Administrative Governance* (Elgar, 2006), p. 287, 289 293.

¹¹ See Acosta Arcarazo/Geddes, ‘The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy’, JCMSt. 51 (2013), p. 179 193; and Oosterom Staples, ‘Has Europeanization Silenced Criticism on Intergovernmental External Border Cooperation?’, in: Guild/Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff, 2012), p. 95 125.

¹² Cf. ECJ, *Wijzenbeek*, C 378/97, EU:C:1999:439, para 40 rejecting the direct applicability of Article 26 TFEU.

¹³ Monar, ‘The Area of Freedom, Security and Justice’, in: von Bogdandy/Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Hart, 2009), p. 551, 556 557 shows that the term ‘area’ was meant originally to avoid the term ‘policy’ at the time of the Treaty of Amsterdam, which in eurospeak may imply a higher density of cooperation (today’s designation as a ‘policy’ was introduced by the Treaty of Lisbon).

¹⁴ See Lindahl, ‘Finding a Place for Freedom, Security and Justice’, EL Rev. 29 (2004), p. 461 484.

¹⁵ ECJ, *McCarthy*, C 434/09, EU:C:2011:277, para 66.

¹⁶ ECJ, *Dereci et al.*, C 256/11, EU:C:2011:734, para 50; for further reading, see Azoulay, ‘Transfiguring European Citizenship’, in: Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (CUP, 2015), sect. 1, 2 (forthcoming).

Member States limits the identificatory potential of external border controls;¹⁷ instead of federal agencies replacing the Member States, national authorities embark upon various forms of transnational cooperation in justice and home affairs (see below MN 8); and Article 77(4) TFEU reaffirms that border control policies shall not affect the national demarcation of state borders in accordance with international law.¹⁸ In the words of the German Constitutional Court: the area of freedom, security and justice ‘reduces territorial sovereignty as an element of the state territory’, although the EU ‘does not have comprehensive territorial authority replacing that of the [Member States].’¹⁹

2. Territorial Scope (Member State Participation)

- 5 Measures on border controls and visas are subject to country specific opt outs for the United Kingdom, Ireland and Denmark. The abstract rules guiding these arrangements have been described in the introductory chapter (see Hailbronner/Thym, Constitutional Framework, MN 38 45). It was demonstrated that the overall picture is rather complex and it can be difficult to discern in specific scenarios, since the **country specific opt outs for the United Kingdom, Ireland and Denmark** do not follow a uniform pattern. There are differences between the rules for Denmark on the one side and those for the United Kingdom and Ireland on the other side. Moreover, the above mentioned countries rely on two different sets of rules: measures building upon the Schengen acquis and other instruments. In practice, the last recitals of most instruments indicate whether the United Kingdom, Ireland and/or Denmark are bound. In order to facilitate orientation, the list of the measures below indicates whether the instruments commented upon in this volume are binding for the United Kingdom, Ireland and/or Denmark and whether they are considered to be building upon the Schengen acquis.²⁰

Instrument	United Kingdom	Ireland	Denmark ²¹	Schengen? ²²
Schengen Borders Code Regulation (EC) No 562/2006	no	no	no (int. law)	yes
Visa Code Regulation (EC) No 810/2009	no	no	no (int. law)	yes
Frontex Regulation (EC) No 2007/2004	no	no	no (int. law)	yes

¹⁷ See Thym, ‘Supranational Differentiation and Enhanced Cooperation’, in: Tridimas/Schütze (eds), *The Oxford Principles of European Union Law*, Vol. I (OUP, 2015), sect. 4.4 (forthcoming).

¹⁸ The provision was introduced by the Treaty of Lisbon in line with the debates in the European Convention drafting the Constitutional Treaty in response to the lingering dispute between Spain and the United Kingdom over Gibraltar; see Labayle, ‘L’espace de liberté, sécurité et justice dans la Constitution pour l’Europe’, *Revue trimestrielle de droit européen* 41 (2005), p. 437, 453.

¹⁹ Federal Constitutional Court (*Bundesverfassungsgericht*), judgment of 30 June 2009, 2 BvE 2/08 et al., *Treaty of Lisbon*, BVerfGE 123, 267, para 345 (informal translation of the court).

²⁰ For a list of other instruments, including the measures of the original Schengen acquis integrated into the EU Framework in 1999 (see above MN 2 3), see Thym, *Ungleichzeitigkeit und Europäisches Verfassungsrecht* (Nomos 2004), p. 119 130, available online at <http://www.ungleichzeitigkeit.de> [last accessed 24 November 2015].

²¹ Note that Denmark can bound by measures building upon the Schengen acquis as a matter of public international law, if it declares its intention to do so in line with the rules of the Schengen Protocol described by Hailbronner/Thym, Constitutional Framework, MN 41.

²² Does the measure build upon the Schengen acquis? If yes, it is subject to the opt out arrangements in the Schengen Protocol described by see *ibid*.

Instrument	United Kingdom	Ireland	Denmark	Schengen?
Sea Borders Regulation (EU) No. 656/2014	no	no	no (int. law)	yes

Participation in border control and visa policy instruments commented upon in this volume.

II. Treaty Guidance under Article 77 TFEU

Article 77 TFEU

1. The Union 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;
- (c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, 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;
- (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

1. Efficient Border Monitoring (Article 77(1) TFEU)

The newly formulated Treaty objective for entry and border controls in Article 77(1) TFEU emphasises that the EU's activities are meant to support the 'efficient monitoring of the crossing of external borders' (part B) on the basis of 'an integrated management system' (part C). In short, **'efficient'²³ and well organised border controls** are to be

²³ While the English language version employs the process oriented term 'efficient' (not the outcome oriented word 'effective'), other language versions, which are equally valid, use the term 'effective' or wording that can mean both; cf. the German '*wirksam*', the French '*efficace*' or the Spanish '*eficaz*'.

strived for by the EU legislature, thereby emphasising that border control cooperation is no longer linked to the single market and has become a self sufficient end in itself as an integral part of the area of freedom, security and justice (see above MN 3). In a similar way as other Treaty objectives, Article 77(1) TFEU is legally binding at an abstract level that does not translate into judicable standards for the review of EU legislation or national implementing measures in regular circumstances (see Hailbronner/Thym, Constitutional Framework, MN 5 7).²⁴ The twofold instructions for border controls and visas in one article show that the EU Treaty pursues a **multilevel entry control concept** that comprises activities at the territorial borders in the same way as it encompasses extraterritorial control activities. These include activities on the high seas (see below MN 38 41) and the cooperation with third states in the field of border controls (see below MN 28 30) and visas, which are handed out by the consulates of the Member States in third states as the ‘border abroad’.²⁵

2. Scope of EU Competences (Article 77(2) TFEU)

- 7 As a shared competence, legislation on entry and border controls must comply, like immigration and asylum policy, with the **principles of subsidiarity and proportionality** (see Thym, Legal Framework for EU Immigration Policy, MN 9). Although it should be acknowledged, that the Treaty objective of efficient border monitoring on the basis of an integrated management system (see above MN 6) stipulates a certain generosity in the application of the principles of subsidiarity and proportionality. Since most Member States have lost the ability to control their own territorial borders in the Schengen area, the principle of subsidiarity will not usually stand in the way of common action. EU action adds value by doing something that Member States alone cannot any longer achieve effectively. The term ‘measure’ in the introductory part of Article 77(2) TFEU indicates, in line with established EU terminology, that directives, regulations and decisions can be adopted: corresponding measures can provide for legislative harmonisation, enhance transnational administrative cooperation, establish financial support or provide for other activities.²⁶ The broad Treaty objective implies, moreover, that the interpretation of legal bases in Article 79(2) TFEU, which expressly relates to the purposes of paragraph 1, should consider the Treaty objective.²⁷
- 8 EU legislation on entry and border controls can embrace rules on administrative procedure and judicial protection which supplant, as *leges speciales*, the principle of national procedural autonomy that applies in the absence of express legislative prescriptions (see Hailbronner/Thym, Constitutional Framework, MN 34 37). Given that entry and border control policies have a **tangible procedural dimension**, corresponding EU rules are generally permissible, although one should bear in mind that the diversity of national administrative and judicial systems call for a certain flexibility on the side of the Member States in line with the principle of subsidiarity (see above MN 7). In accordance with the EU’s constitutional structure, the supranational level concentrates on legislative harmonisation and administrative support measures, while decisions affecting individuals are usually taken at national level by domestic authorities.²⁸ The

²⁴ See also Müller Graff, ‘Der Raum der Freiheit, der Sicherheit und des Rechts in der Lissabonner Reform’, *Europarecht Special Issue No. 1/2009*, p. 105, 111–112; and Weiß, Article 77 TFEU para 4.

²⁵ See Thym, *Migrationsverwaltungsrecht*, p. 335–341; and Guild, ‘The Border Abroad’, in: Groenen dijk et al. (eds), *In Search*, p. 87–104.

²⁶ By way of example, see Regulation (EU) No 515/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa (OJ 2014 L 150/143).

²⁷ See von Bogdandy/Bast, ‘The Federal Order of Competences’, in: *ibid.* (eds), *Principles of European Constitutional Law*, 2nd edn (Hart, 2009), p. 271, 288; see also Weiß, Article 77 TFEU para 4.

²⁸ See Article 291(1), (2) TFEU; and Articles 4(2), 5(1) TEU.

move towards a federal administration that applies EU law directly towards individuals requires a foundation in the EU Treaties.²⁹ Whether such basis exists, is to be assessed with regard to specific Treaty articles on the basis of general interpretative criteria,³⁰ which should be subject to strict scrutiny in order to prevent vaguely formulated Treaty provisions from undermining the general constitutional structure of the European Union. The examples of Frontex (see below MN 20) and visa policy (see below MN 11) illustrate that it is possible for Member States to cooperate extensively below the threshold of a federal administration.

a) **Visas.** Certain aspects of visa policy have been subject to a supranational competence ever since Article 100a EC Treaty as amended by the Treaty of Maastricht, which was replaced by more extensive competences on visa issues in the Treaties of Amsterdam and Nice.³¹ The complexity of previous Treaty provisions entailed a number of intricate questions of legal interpretation most of which have become moot because of the **simplification and complementation of EU competences** in the Treaty of Lisbon.³² It is inherent in the proviso of a ‘common policy’ on visas that Article 77(2)(a) TFEU allows for a comprehensive policy approach towards short term residence permits and does not limit itself to the codification of pre existing competences under the Treaties of Amsterdam and Nice. This entails, more specifically, that nowadays the EU legislature holds an unequivocal competence for the harmonisation of rules on **airport transit visas**, although the holders of such visas do not usually cross the external Schengen borders for immigration purposes, since they remain within the transit area of international airports.³³

Article 77(2)(a) TFEU covers rules on both visa requirements and procedure. The EU legislature benefits from a principled discretion when determining countries whose nationals require a visa for entry into the Schengen zone. **Visa requirements can have different rationales** that are legitimate from a legal point of view: the legislature can pursue, among other things, strategic foreign policy considerations³⁴ or be guided by migration policy objectives, such as the prevention of illegal migration.³⁵ Moreover, the aim of efficient border monitoring (see above MN 6 7) supports a broad reading of Article 77(2)(a) TFEU which embraces **detailed procedural or substantive prescriptions**, such as the use of biometric identifiers during visa applications, application fees or security features that can help to prevent abuse. This conclusion extends to the Visa Information System which supports effective transnational cooperation among Member States; additional recourse to Article 74 TFEU may be required only for independent supranational databases reaching beyond the transnational connection among national systems.³⁶ Of course, EU legislation has to comply with human rights (see below MN 31 41), including guarantees for data protection in the European Convention and the EU Charter.³⁷ If access to these databases is granted to Europol or domestic

²⁹ Simply allowing for ‘measures’ will not be enough in light of the constitutional design described above.

³⁰ Cf. Article 2(6) TFEU.

³¹ See Meloni, Visa Policy, p. 43 120 et seq. und Pastore, Visas, Borders, Immigration, p. 89 107.

³² Today’s Article 77(2)(a) TFEU is the result of a conscious choice, during the European Convention drafting the erstwhile Constitutional Treaty, to simplify and complement existing provisions; see the Final Report of Working Group X, doc. CONV 426/02 of 2 December 2002.

³³ See Article 3 Visa Code Regulation (EC) No 810/2009; see also, Peers, EU Justice, p. 236; and Weiß, Article 77 TFEU para 19.

³⁴ Cf. Article 21(3) TEU.

³⁵ On the corresponding practice, see Meloni, Visa Policy, p. 100 107.

³⁶ Storage of personal data at EU level may be considered the demarcation line; see also Peers, EU Justice, p. 151; and Bast, Aufenthaltsrecht, p. 157 158.

³⁷ Cf. Brouwer, *Digital Borders and Real Rights* (Martinus Nijhoff, 2008), p. 127 et seq.; and Heussner, *Informationssysteme im Europäischen Verwaltungsverbund* (Mohr Siebeck, 2007), p. 190 et seq.

authorities, Articles 87 or 88 TFEU may be used as a legal basis, not the immigration related provision of Article 77 TFEU.

- 11 It follows from constitutional considerations (see above MN 8) that national consulates will regularly process visa applications. Nevertheless, Article 77(2)(a) TFEU allows for the adoption of a wide range of different measures through which the EU can support the effective application of common rules or **better transnational cooperation among Member States** (see above MN 7). The principle of subsidiarity will not usually stand in the way of such measures which contribute to the overall objective of efficient border monitoring (see above MN 6). On this basis, an enhanced degree of practical cooperation can be achieved, for instance through the joint accommodation of consulates from different Member States in a single building, representation arrangements or the so called local Schengen cooperation.³⁸ Such enhanced transnational cooperation can achieve widespread practical convergence, but stays short of the threshold of **federal EU consulates** from a constitutional perspective in which EU officials would decide individual visa applications for the Schengen area as a whole.³⁹ In the absence of any textual indication to the contrary (see above MN 8), it is to be assumed that neither Article 77 TFEU nor the proviso for the External Action Service⁴⁰ provides a sufficient legal basis for a move in this direction: EU consulates would require a formal Treaty change under Article 48 TFEU.
- 12 Article 77(2)(a) TFEU does not confine itself, in contrast to previous versions, to visas for intended stays of no more than three months⁴¹ employing the **open formula 'short stay'** instead. The EU legislature retains a certain flexibility, as a result, to lay down other time limits for the definition of short stays, which could concern, for instance, a period of five months.⁴² The interpretation of the term 'short stay' should be oriented at the historic example of the Schengen visa for three months, while acknowledging that today's open formulation grants more flexibility. A period of a few months is therefore covered by Article 77 TFEU with the exact delimitation remaining the prerogative of the legislature. In any case, the general scheme of Treaty rules demonstrate that, read in conjunction, the provisos for 'short stay' permits in Article 77(2)(a) TFEU and 'long term' permits in Article 79(2)(a) TFEU allow for the **seamless regulation of immigration statuses** (see Thym, Legal Framework for EU Immigration Policy, MN 11). Rules on **economic migration**, by contrast, are always covered by Article 79 TFEU as *lex specialis* irrespective of whether admission for purposes of employment concern longer or shorter stays, such as in the case of the Seasonal Workers Directive 2014/36/EU.⁴³ It is generally irrelevant for the delimitation of Articles 77 and 79 TFEU

³⁸ Cf. Articles 8, 37 48 Visa Code Regulation (EC) No. 810/2009.

³⁹ See Thym, *Migrationsverwaltungsrecht*, p. 347 352; and Laas, *Die Entstehung eines europäischen Migrationsverwaltungsraumes* (Nomos, 2008), p. 139 144.

⁴⁰ Article 27(2) TEU contains no indication that joint visa application centres with EU officials acting on behalf of the Member States are covered by the legal basis for the European External Action Service, which, as an integral part of the Common Foreign and Security Policy, must be interpreted in line with Article 40 TEU not to undermine supranational policies, such as immigration and asylum; at present, Decision 2010/427/EU (OJ 2010 L 201/30) on the European External Action Service does not cover visas anyway.

⁴¹ Cf. Article 63(2) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173).

⁴² Similarly, see Weiß, Article 77 TFEU para 7; Peers, EU Justice, p. 236, 172 173; Muzak, Article 77 TFEU para 14; and Weber, 'Migration im Vertrag von Lissabon', *Zeitschrift für Ausländerrecht* 2008, p. 55, 56; before the entry into force of the Lisbon Treaty, the Commission had proposed a six month definition which caused some legal debates; cf. COM(2001) 388 (repealed in accordance with OJ 2006 C 64/3).

⁴³ This conclusion rests upon the place of the opening clauses in Article 79(5) TFEU and the historic distinction between short stay Schengen visas for tourists and entries for other purposes, including access to the labour market that resonates with the term 'immigration' (see Thym, Legal Framework for EU Immigration Policy, MN 7 and the legal base mentioned in the introductory paragraph of the Seasonal Workers Directive 2014/36/EU); in practice, the distinction has little relevance, since the ordinary

whether a permit is handed out by a consulate in a third state as a 'visa' or granted by domestic immigration authorities as a 'permit'.⁴⁴

Article 77(2)(a) TFEU concerns abstract rules on visas, including the rejection of an application for reasons of public policy or security (see Meloni, Regulation (EC) No 810/2009 Article 32 MN 3). By contrast, the **denial of entry to individuals on foreign policy grounds** on the basis of Resolutions of the UN Security Council or autonomous sanctions agreed upon by the EU institutions, does not come within the reach of Article 77 TFEU, since there is a *lex specialis* for restrictive measures against individuals and third states in Article 215 TFEU and corresponding Treaty rules on the Common Foreign and Security Policy.⁴⁵ Such foreign policy decisions apply to all Member States, including the United Kingdom, Ireland and Denmark (see above MN 5); they must be respected when applying the Visa Code Regulation or respective national rules in the UK, Ireland or Denmark.

It is settled ECJ case law that the EU acquires an exclusive external treaty making power whenever international treaties may affect common rules or alter their scope.⁴⁶ Member States cannot conclude any longer, without an express authorisation by the EU legislature,⁴⁷ international agreements with third states on visa exemptions.⁴⁸ Existing agreements continue to apply, but can no longer be amended (see Hailbronner/Thym, Constitutional Framework, MN 58). This entails that the occasionally protracted, diplomatic **negotiations with third states on reciprocal visa waivers** have become an exclusive EU competence for the Schengen area.⁴⁹ Whenever the negotiations lead towards the joint conclusion of readmission and visa facilitation agreements, Article 79(3) TFEU must be activated as a complementary legal basis (see Thym, Legal Framework for EU Immigration Policy, MN 22 23). The EU institutions retain a principled discretion, like in the case of unilateral visa requirements (see above MN 10), whether and, if yes, under which conditions a visa waiver shall be granted; they can, in particular, insist upon reciprocal exemptions or embrace strategic foreign policy considerations in line with the Common Foreign and Security Policy.

In accordance with settled ECJ case law, the demarcation of different legal bases follows the aims and components of the measure in question; whenever there are multiple aims and components, the central elements prevail over incidental aspects if the measure has an identifiable focus.⁵⁰ This entails that **corollary rules on migration in bi or multilateral trade agreements**, such as the General Agreement on Trade in Services (GATS), are covered by the exclusive Union competence for the Common Commercial Policy.⁵¹ In the case of the GATS, the Annex on Movement of Natural Persons lays down expressly that it shall not prevent states from applying measures

legislative procedure applies to Articles 77 and 79 TFEU; see also Weiß, Article 77 TFEU para 28; Muzak, Article 77 TFEU para 33; and Bast, Aufenthaltsrecht, p. 152 154.

⁴⁴ Article 77(2)(a) and 79(2)(a) TFEU cover both 'visas' and 'permits,' both provisions are to be distinguished on the basis of the length of stay.

⁴⁵ Peers, EU Justice, p. 155 does not really explain why he wants to apply Article 77 TFEU instead.

⁴⁶ See Article 3(2) TEU; and Martenczuk, 'Visa Policy and EU External Relations', in: *ibid./van Thiel* (eds), External Relations, p. 36 42.

⁴⁷ Cf. Article 2(1) TFEU.

⁴⁸ See Martenczuk, *ibid.*, p. 44 45; and Kuijper, 'Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis', CML Rev. 37 (2000), p. 345, 365.

⁴⁹ On political difficulties, see the contributions to Bigo/Carrera/Guild (eds), *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas* (Ashgate, 2013).

⁵⁰ Cf. ECJ, *Commission vs. Council (ECOWAS)*, C 91/05, EU:C:2008:288, para 73.

⁵¹ See Articles 206 207 TFEU; and Martenczuk, 'Visa Policy and EU External Relations', in: *ibid./van Thiel* (eds), External Relations, p. 36, 48 49.

regulating the entry and stay of natural persons including visa requirements.⁵² Similar corollary rules on migration in other agreements on trade or development cooperation⁵³ will be covered by Articles 206–210 TFEU as well, while the move towards legally binding mobility partnerships with extensive rules on visa waivers or related questions would have to be based on Articles 77 and 79 TFEU (see Thym, *Legal Framework for EU Immigration Policy*, MN 23). By contrast, legislation on the status of service providers from third countries will be covered by Article 78(2)(a) TFEU for short stays or Article 79(2)(a) for longer periods if the legislation concentrates on the immigration status of the persons concerned (not on trade related rules).⁵⁴ Whenever international treaties concluded by the EU command visa free access, they have **precedence over secondary Union legislation** in cases of conflict (see Hailbronner/Thym, *Constitutional Framework*, MN 56–57).

- 16 **b) External Border Controls.** The original Schengen Implementing Convention contained detailed rules on external border controls which, as so called flanking measures, were meant to compensate states for the loss of control over their internal borders (see above MN 3). An interpretation of the term ‘external border’ in the light of the historic context exhibits that it refers to the Member States participating in the Schengen cooperation (see above MN 5) – not the geographic scope of Union law in accordance with Articles 52 TEU and 355 TFEU.⁵⁵ This entails that, for the purposes of entry control, the border between France and the United Kingdom has to be qualified as an ‘external border’ with regard to which Article 77(2)(b) TFEU allows for the adoption of common control standards which can mainly be found in the Schengen Borders Code Regulation (EC) No 562/2006. Nothing in the wording of the Treaty provision suggests that border controls should be conducted in the territorial waters nor at the international border only, i. e. they can extend to the **contiguous zone or the high seas** whenever this is necessary for border control purposes.
- 17 The EU legislature benefits from a **principled discretion** when deciding upon the intensity of border control standards. It can prescribe, as it can be the case of visas (see above MN 10), detailed procedural and substantive guidelines, such as security features for passports, that contribute to the overall objective of efficient border monitoring (see above MN 6). Of course, EU rules must comply with human rights in the EU Charter, which apply to domestic control activities in accordance with ECJ case law only when Member States are implementing Union law (see below MN 31).⁵⁶ Moreover, the EU legislature may decide that border control activities can contribute simultaneously to **search and rescue measures** on the high seas beyond the territorial borders of the Member States,⁵⁷ while autonomous search and rescue operations that are not connected to border controls in a wider sense cannot be based upon Article 77(2)(b) TFEU alone.⁵⁸ More stringent requirements exist for **Union citizens** and third country

⁵² See OJ 1994 L 336/205; and Charnovitz, ‘Trade Law Norms on International Migration’, in: Aleinikoff/Chetail (eds), *Migration and International Legal Norms* (T.M.C. Asser, 2003), p. 241–255.

⁵³ This was explicitly confirmed by ECJ, *Commission vs. Council*, C 377/12, EU:C:2014:1903, paras 58–59.

⁵⁴ Cf. the indication of a possible proposal by COM(2015) 240, p. 15.

⁵⁵ Similarly, see Muzak, Article 77 TFEU para 38; and Weiß, Article 77 TFEU para 20.

⁵⁶ Specifically for border controls, see ECJ, *Commission vs Spain*, C 503/03, EU:C:2006:74; and ECJ, *MRAX*, C 459/99, EU:C:2002:461.

⁵⁷ Cf. Articles 3 and 7 Sea Borders Regulation (EU) No. 656/2014 on search and rescue operations *during or in the context of* border control activities.

⁵⁸ In practice, search and rescue operations in the Mediterranean or the Black Sea will almost always be sufficiently close to the external EU borders to be covered by Article 77(2)(b) TFEU for as long as search and rescue does not become an end in itself with autonomous personnel and equipment; one may consider to activate Article 352 TFEU for independent search and rescue units.

nationals family members that command precedence over the border control regulations in cases of conflict, since they emanate from the fundamental freedoms enshrined at Treaty level (see Thym, Legal Framework for EU Immigration Policy, MN 31). Differential control requirements for other status groups are permissible for as long as all Union citizens, including British and Irish nationals, are treated equally irrespective of nationality at the external Schengen borders.⁵⁹

c) **Intra European Free Movement.** The original Schengen Agreements and today's 18 EU immigration policy are defined by a continued asymmetry: despite the abolition of internal border controls, rules on the entry and residence are not fully harmonised; residence permits for third country nationals are often confined to the territory of one Member State.⁶⁰ Foreigners residing legally in a Member State do not have, as a result, a generic right to visit other Member States. Article 77(2)(c) TFEU addresses this gap and allows the EU legislature to regulate 'travel within the Union for a short period.' Such rules on **temporary free travel within the Schengen area** complement the common visa policy, which, in contrast to Article 77(2)(c) TFEU, concerns third country nationals living outside of the Schengen area.⁶¹ The corresponding legislation replacing earlier provisions of the Schengen Implementing Convention was adopted a few months after the entry into force of the Treaty of Lisbon, which established an unequivocal legal basis for such measures.⁶² While Article 77 TFEU covers short term travel, Article 79 TFEU must be activated for legislation on longer stays in another Member State (see Thym, Legal Framework for EU Immigration Policy, MN 18).

d) **Integrated Border Management System.** It was a deliberate decision to introduce 19 a specific legal basis for the gradual establishment of an integrated border management system in Article 77(2)(d) TFEU complementing rules on standards and procedures for border controls, including corollary search and rescue obligations in the environment of the external borders (see above MN 16 17).⁶³ The introduction of a new Treaty provision reflects the **will of the High Contracting Parties to integrate national border control systems**;⁶⁴ it was meant to supplement prior competences in order to allow for the 'gradual establishment' of a higher degree of cooperation.⁶⁵ The open formulation underlines that cooperation is not confined to the external Schengen borders and can embrace, in line with the **multilevel control concept** (see above MN 6), extraterritorial activities and cooperation with third states (see below MN 30). EU activities on the basis of Article 77(2)(d) TFEU can embrace legislative harmonisation, support for transna

⁵⁹ In accordance with Article 18 TFEU, nationals of the Member States with an opt out (see above MN 5) must be treated equally when entering the Schengen area, i. e. they can use the control line for EU citizens (not: Schengen citizens); see Thym, *Ungleichzeitigkeit und Europäisches Verfassungsrecht* (Nomos, 2004), p. 254–258, available online at <http://www.ungleichzeitigkeit.de> [last accessed 1 November 2015].

⁶⁰ This applies both to residence permits for which no EU harmonisation exists and for rights to reside in accordance with EU immigration directives, since the latter do not embrace a generic right to free movement within the EU; see Thym, Legal Framework for EU Immigration Policy, MN 18.

⁶¹ Residence in the UK or Ireland counts as an extra Schengen residence for the purposes of Article 77 TFEU, while Denmark is bound by the rules as a matter of public international law (see above MN 5); third country nationals living in the UK or Ireland (not: Denmark) must, therefore, apply for a Schengen visa to visit France, since they are covered by Article 77(2)(a) TFEU, not part C.

⁶² See Regulation (EU) No. 265/2010 (OJ 2010 L 85/1).

⁶³ By contrast, Article 62(2)(a) EC Treaty as amended by the Treaty of Amsterdam of 2 October 1997 (OJ 1997 C 340/173) contained only a generic provision for control standards and procedures.

⁶⁴ Cf. the political debate in the European Convention that led to the new provision summarised in the Final Report of Working Group X, doc. CONV 426/02 of 2 December 2002.

⁶⁵ See Ladenburger/Verwirlghen, 'Policies Relating to the Area of Freedom, Security and Justice', in: Amato/Bribosia/de Witte (eds), *Genèse et destinée de la Constitution européenne* (Bruylant, 2007), p. 743, 763.

tional cooperation, the coordination of public procurement, financial support or other measures with an impact upon border controls (see above MN 7).

- 20 It is well known that the borders agency Frontex is the most tangible expression of a move towards an integrated border management system. The **Frontex Regulation (EC) No 2007/2004** realises many of the instruments mentioned above, including the Rapid Border Intervention Teams (RABITs) when border guards from different Member States collaborate with regard to a specific challenge. It is a common feature of the existing forms of cooperation to be confined to enhanced transnational cooperation (see above MN 8). With the active support of Frontex, national authorities join forces horizontally instead of merging into a federal border service.⁶⁶ It can moreover be argued that unlike the provision on visas (see above MN 11) the ambitious formulation of Article 77(2)(d) TFEU to allow for ‘any measure necessary for the gradual establishment’ of an integrated management system (French: *toute mesure nécessaire pour l’établissement progressif*; German: *schrittweise ... eingeführt werden soll*) establishes a **sufficient legal basis for at least certain features of a federal border guard**.⁶⁷ Indeed, abstract visions of a ‘border corps’ were on the table during the drafting process in the European Convention.⁶⁸ Closer inspection shows, however, that such abstract calls did not necessarily imply the creation of a federal bureaucracy:⁶⁹ the reference to an ‘integrated border management system’ was widespread in political debates at the time but was used, in essence, to describe the move towards Frontex and RABITs.⁷⁰ The drafting history demonstrates, therefore, that Article 77(2)(d) TFEU establishes a legal basis for the progressive evolution of the Frontex agency and related instruments that can, also in future, provide for enhanced transnational cooperation short of the move towards a federal EU border guard.⁷¹ By contrast, the creation of a truly federal European border guard replacing national authorities would require Treaty change in accordance with Article 48 TEU.
- 21 In line with the classification of Article 77 TFEU as a shared competence (see above MN 7), the Member States retain the option to cooperate bilaterally in order to support the effective functioning of the multilevel border control system. **Protocol (No. 31) on External Relations of the Member States** with regard to the Crossing of External Borders mandates, in this respect, that Article 77 TFEU ‘shall be without prejudice to the competences of Member States to negotiate or conclude agreements with third countries...’⁷² This entails that the EU does not possess, in contrast to other areas (see

⁶⁶ See Schöndorf Haubold, ‘Europäisches Sicherheitsverwaltungsrecht’, in: Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos, 2011), § 35 paras 85–97; Thym, *Migrationsverwaltungsrecht*, p. 347–352; and Costello, ‘Administrative Governance and the Europeanisation of Asylum and Immigration Policy’, in: Hofmann/Türk (eds), *EU Administrative Governance* (Elgar, 2006), p. 287, 322.

⁶⁷ Remember that, in line with general principles (see above MN 8), specific legal bases can provide for a move towards a federal administration replacing, in part at least, domestic authorities.

⁶⁸ See, again, the Final Report of Working Group X, doc. CONV 426/02 of 2 December 2002, p. 17; and the explanation to the initial proposal of today’s Article 77(2)(d) TFEU by the Convention Presidium in doc. CONV 614/03 of 14 March 2003, p. 19.

⁶⁹ Cf. the synthesis report of the plenary meeting of the European Convention on 3 and 4 April 2003 in doc. CONV 677/03 of 9 April 2003, p. 5–6.

⁷⁰ Cf. the title and the contents of Commission Communication, COM(2002) 233 as well as the action plan in Council doc. 10019/02 of 13 June 2002, p. 11 et seq.; Monar, ‘Die Vertragsreformen von Lissabon in den Bereichen Inneres und Justiz’, *Integration* 2008, 379, 385 shows how the political debate at the time influenced the thinking in the European Convention in a comparable way as in the case of the European Defence Agency, which Article 45 TEU codified in parallel to ongoing political discussions.

⁷¹ Similarly, see Weber, ‘Migration im Vertrag von Lissabon’, *Zeitschrift für Ausländerrecht* 2008, p. 55, 56; and Peers, *EU Justice*, p. 156–157; in contrast to ter Steeg, *Einwanderungskonzept*, p. 416 et seq.; for a study on different options, see Ryan, *Frontex Regulation*, Article 1 MN 5.

⁷² See OJ 2008 C 115/304; protocols are an integral part of primary law in accordance with Article 51 TEU.

above MN 14), an *exclusive* competence for agreements concerning border controls with third states; it has the power to conclude such agreements, but cannot prevent Member States from doing the same. In other words, the said Protocol (No. 31) pre-empted the emergence of an exclusive external Community competence.⁷³ It stipulates, moreover, that agreements of the Member States must ‘respect Community law and other relevant international agreements’, i. e. the Commission could start infringement proceedings whenever they fall foul of EU law, including human rights (see below MN 36). The latter caveat may be particularly relevant in situations where Member States cooperate with third states that serve as transit countries for asylum seekers trying to reach Europe (see below MN 28–30).

e) **Absence of Internal Border Controls.** The abolition of internal border controls 22 was the historic starting point of justice and home affairs cooperation (see above MN 1). Given that Article 26 TFEU does not mandate in itself the abolition of internal border controls,⁷⁴ today’s Article 77(1)(a) TFEU lays down an original and **explicit obligation for border free travel**.⁷⁵ Corresponding rules can be adopted in accordance with Article 77(2)(e) TFEU which serves as a legal basis for the relevant aspects of the Schengen Borders Code Regulation (EC) No 562/2006, including provisions for the phased abolition of border controls towards new Member States after accession (see above MN 1). The term ‘internal border’ should be understood as the counterpart of the ‘external border’ and remains limited, therefore, to borders within the Schengen countries (see above MN 16). The abolition of border controls concerns administrative control procedure only and does **not establish a universal right to cross the internal borders**, in particular with regard to third country nationals; rules governing the right of third country nationals to cross internal borders can be adopted by the EU legislature and, whenever there are no supranational standards, by the Member States on the basis of their residual competences (see above MN 18).

It is inherent in the objective to ‘develop a policy’ (Article 77(1) TFEU) on the basis 23 of the ordinary legislative procedure (Article 77(2) TFEU) that the abolition of internal border controls can be subject to certain caveats to be decided upon during the legislative process, in particular the **temporary reintroduction of internal border controls**. Corresponding rules limiting the discretion of the Member States and establishing a supranational oversight procedure can be found in the Schengen Borders Code (see Epiney/Egbuna Joss, Regulation (EC) No 562/2006 Articles 23–31) and have been subject to an ECJ judgment limiting the room of manoeuvre for Member States, while confirming, implicitly at least, that rules in EU legislation on the temporary reintroduction of border controls are compatible with Article 77(2)(e) TFEU.⁷⁶

3. Travel Documents (Article 77(3) TFEU)

Article 77(3) TFEU is not directly related to the EU visa policy, since it **concerns 24 Union citizens and not third country nationals**. The provision was originally meant to be integrated into the Treaty chapter on Union citizenship, but was referred to the area of freedom, security and justice at a later stage of the drafting process for reasons that are not immediately clear.⁷⁷ It shall only apply, in line with the express wording, when other

⁷³ Similarly, see Hailbronner, Immigration, p. 65–66; Pastore, Visas, p. 103–104; Muzak, Article 77 TFEU para 6; Peers, EU Justice, p. 222–223; and Weiß, Article 77 TFEU para 25.

⁷⁴ Cf. ECJ, *Wijzenbeek*, C 378/97, EU:C:1999:439, para 40.

⁷⁵ From a legal perspective, the abolition of the Schengen area would require, therefore, a formal Treaty change under Article 48 TEU.

⁷⁶ See ECJ, *Melki & Abdeli*, C 188/10 & C 189/10, EU:C:2010:363.

⁷⁷ Cf. Article III 125(2) Treaty establishing a Constitution for Europe of 24 October 2004 (OJ 2004 C 310/1), which never entered into force; the provision was later referred to the justice and home affairs

legal bases do not provide for supranational measures. If it is correct that the rules on external border controls can embrace far reaching prescriptions, such as security features for passport (see above MN 17),⁷⁸ Article 77(3) TFEU retains a limited scope. It could be activated, for instance, to formalise the existing resolutions of representatives of the Member States' governments on a uniform pattern for EU passports or on security features for ID cards.⁷⁹ The special legislative procedure, which requires unanimity among Member States, ensures that Article 77(3) TFEU will not be activated extensively.

III. Overarching Principles

1. Maintenance of Law and Order

- 25 **Article 72 TFEU** mandates that the Treaty provisions on the area of freedom, security and justice (not only those immigration and asylum) 'shall 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.' The exact meaning of the proviso is subject to some controversy that can be traced back to the predecessor provisions in the Treaties of Maastricht and Amsterdam,⁸⁰ while a provision limiting judicial oversight by the ECJ and an additional emergency clause allowing for the adoption of provisional measures by the Council were discontinued by the Treaty of Lisbon.⁸¹
- 26 Some commentators have argued that the caveat in today's Article 72 TFEU should be construed, in parallel to the public policy exception to the fundamental freedoms,⁸² as a **justification for non compliance with EU legislation** whenever the maintenance of law and order was at stake; the ECJ would be responsible for judicial oversight including a strict proportionality assessment, like in the case of the fundamental freedoms.⁸³ This interpretation is difficult to sustain for a number of reasons (and has not been followed by the practice of the EU institutions so far), although the arguments do not present us with a clear cut answer and the interpretation of the provision therefore remains subject to some uncertainty: Firstly, the wording of Article 72 TFEU differs from the public policy exceptions to the fundamental freedoms.⁸⁴ Secondly, the constitutional context differs, since the Treaty provisions on the area of freedom, security and justice are primarily concerned with the division of competences between the Member States and the EU level not with limits to individual rights in parallel to the fundamental freedoms enshrined at Treaty level.⁸⁵ Thirdly, the provision does not clearly indicate

chapter by the mandate for the Intergovernmental Conference preparing the Treaty of Lisbon in accordance with the annex to Council doc. 11177/07 of 23 June 2007, No. 19(d).

⁷⁸ Cf. Regulation (EC) No. 2004/2252 (OJ 2004 L 385/1); and Peers, EU Justice, p. 152-154.

⁷⁹ The Resolution of the representatives of the Governments of the Member States meeting within the Council of 8 June 2004 (OJ 2004 C 245/1) and on security features for ID cards in accordance with Council doc. 15356/06 of 15 November 2006 are not legally binding as a matter of EU law at present.

⁸⁰ See Article K.2 EU Treaty as amended by the Treaty of Maastricht of 7 February 1992 (OJ 1992 C 191/1) and the Amsterdam version of Articles 64(1) and 68(2) EC Treaty (OJ 1997 C 340/173).

⁸¹ Cf. the previous Article 64(2) EC Treaty, *ibid*.

⁸² See, for the free movement of goods, Article 36 TFEU; and, for workers, Article 45(3) TFEU.

⁸³ See Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006), p.157; Thun Hohenstein, *Der Vertrag von Amsterdam: die neue Verfassung der EU* (Manz, 1997), p. 31; and Weiß, Article 72 TFEU para 2.

⁸⁴ Article 72 TFEU does not employ the well established term 'public policy' in the English language version and speaks instead, rather vaguely, of the 'maintenance of law and order', while the French (*ordre public*) and German (*öffentliche Ordnung*) language version emulate well established terminology.

⁸⁵ See Hailbronner/Thym, Constitutional Framework, MN 15, 20; and Hailbronner, Immigration, p. 100-102, although it should be noted that other Treaty articles, such as Articles 345-347 TFEU contain

that Member State should be allowed to deviate from EU legislation, although such permission would undermine the effet utile of EU legislation and render more difficult to realise the Treaty objectives.

Even if Article 72 TFEU was not interpreted to authorise temporary non compliance with EU rules, it would not be void of meaning. It could be conceived of not as a freestanding exception to EU legislation but as a reminder that detailed rules in corresponding EU legislation should leave breathing space for Member States when it comes to the maintenance of law and order and the safeguarding of internal security.⁸⁶ **Article 72 TFEU could serve as an interpretative guideline** for other Treaty articles and rules in secondary legislation effecting the maintenance of law and order,⁸⁷ thereby reinforcing the impact of the principles of subsidiarity and proportionality (see above MN 7). In practice, existing EU legislation on immigration and asylum regularly provides for provisions concerning the maintenance of law and order, such as rules in the Schengen Borders Code concerning the temporary reintroduction of internal border controls (see above MN 23) or the rejection of visas or residence permits on public policy grounds (see above MN 13).

2. External Relations

In its strategic guidelines for legislative and operational planning in accordance with Article 68 TFEU, the European Council has repeatedly called upon EU institutions to reinforce cooperation with third states. The current Ypres Guidelines by the European Council (see Hailbronner/Thym, Constitutional Framework, MN 8 9) particularly emphasise the relations with third states and stress the relevance of the **Global Approach to Migration and Mobility**.⁸⁸ Corresponding external competences for cooperation with third states exist in all areas covered by Articles 77 80 TFEU, since the EU institutions acquire, in line with settled ECJ case law, an **exclusive external treaty making power** for international agreements with third states or International Organisations after the adoption of secondary legislation insofar as the international treaties may affect supranational rules or alter their scope (see above MN 14). These implied powers are complemented with an express competence for readmission agreements (see Thym, Legal Framework for EU Immigration Policy, MN 22) and are subject to a minor caveat regarding border controls (see above MN 21). The internal decision making procedure follows Article 218 TFEU that provides for the consent of the European Parliament to agreements immigration and asylum.⁸⁹

In practice, the European Union has agreed to the far reaching **association of Norway, Iceland and Switzerland (as well as Liechtenstein) with the Schengen acquis**, including the abolition of internal border controls.⁹⁰ This legal construction implies that the participation of these countries in the Schengen law rests upon international

overarching exceptions, which are not confined to justifying restrictions to individual rights; see also ECJ, *Dory*, C 186/01, EU:C:2003:146, para 31.

⁸⁶ See Hailbronner, Immigration, p. 102

⁸⁷ In extreme scenarios, it could result in the annulment of legislation leaving no leeway whatsoever to Member States in an area that is crucial for the maintenance of law and order, in particular with regard to judicial and police co operation in criminal matters to which Article 72 TFEU applies as well.

⁸⁸ See European Council, doc. EUCO 79/14 of 27 June 2014, para 8.

⁸⁹ In line with Article 218(6)(a)(v) TFEU, the European Parliament must give its consent whenever the ordinary legislative procedure applies internally, like in the case of Articles 77 79 TFEU.

⁹⁰ In the case of Norway and Iceland, Protocol (No. 19) on the Schengen acquis (OJ 2008 C 115/290) provides for a specific legal basis that obliges the EU institutions to agree to an agreement; see Kuijper, 'Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis', CML Rev. 37 (2000), p. 345, 350.

agreements concluded by the EU institutions in recent years,⁹¹ not upon EU membership. During the negotiations, the EU institutions insisted upon an obligation of the associated countries to apply any future EU legislation building upon the Schengen *acquis*, even if it is adopted after the entry into force of the agreement.⁹² Their ministers cannot participate in the deliberations of new instruments at Council level, although the so called Mixed Committee provides a forum for an exchange of views.⁹³ Since the association agreements establishes international legal obligations, the reciprocal commitments rest upon **international legal obligations** and courts from the associated countries cannot refer questions of interpretation to the ECJ, although they are obliged to follow its case law as a matter of principle.⁹⁴

- 30 In the future, more specific agreements concerning various aspects of entry and border control policies could be concluded with third states, in particular those in the immediate neighbourhood of the European Union, as instruments supporting the objective for efficient border monitoring.⁹⁵ In recent years, there have been various **examples of international cooperation** between EU institutions and the borders agency, mostly below the threshold of legally binding commitments.⁹⁶ These supranational initiatives are often complemented by bilateral arrangements at national level with neighbouring third states, such as the former, highly controversial former cooperation of Italy with Libya⁹⁷ or the existing arrangements between Poland and Ukraine.⁹⁸ At the time of writing, the EU was negotiating with Turkey to enhance bilateral cooperation on border control and asylum issues. Such border control initiatives are often integrated into the wider reorientation of European immigration and asylum policy aiming to make international migration governance more effective, among other things through the conclusion of legally binding readmission and/or visa facilitation agreements (see above MN 14) as well as high profile initiatives such as mobility partnerships (see Thym, Legal Framework for EU Immigration Policy, MN 60).

IV. Human Rights and International Law

- 31 EU immigration and asylum law is firmly embedded in the constitutional framework of the EU Treaties, including human rights. From a doctrinal perspective, the rights and

⁹¹ See the Agreement concluded by the Council with Norway and Iceland (OJ 1999 L 176/36), which entered into force on 26 June 2000 (OJ 2000 L 149/36); and the Agreement between the EU, the EC and the Swiss Confederation (OJ 2008 L 53/52), which entered into force on 1 March 2008 (OJ 2008 L 53/18) together with the Protocol No. 1 on the accession of Liechtenstein, which entered into force on 19 December 2011 (OJ 2011 L 333/27); for further comments, see Filliez, 'Schengen/Dublin', in: Martenczuk/van Thiel (eds), *External Relations*, p. 145–186.

⁹² Cf. Article 2(3) of the said agreements, *ibid.*

⁹³ See Articles 3–7 of the Agreement with Switzerland, *ibid.*, and Articles 3–8 of the Agreement with Norway and Iceland, *ibid.*; for the institutional practice, see Wichmann, 'The Participation of the Schengen Associates: Inside or Outside?', *EFA Rev.* 11 (2006), p. 87–107.

⁹⁴ See Articles 8–9 of the Agreement with Switzerland, *ibid.*, and Articles 10–11 of the Agreement with Norway and Iceland, *ibid.*

⁹⁵ On the broader picture, see Thym, 'Towards International Migration Governance?', in: Van Vooren et al. (ed), *The Legal Dimension of Global Governance: What Role for the EU?* (OUP, 2013), p. 289–305.

⁹⁶ See the contributions to Martin (ed), *La gestion des frontières extérieures de l'Union européenne* (Pedone, 2011).

⁹⁷ See Marchetti, 'Expanded Borders: Policies and Practices of Preventive Refoulement in Italy,' in: Geiger/Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan, 2010), p. 160–183.

⁹⁸ See Kaca, 'EU Ukraine Cooperation in Justice and Home Affairs', in: Snyder/Thym (eds), *Europe – A Continent of Immigration? Legal Challenges in the Construction of European Migration Policy* (Bruylant, 2011), p. 197–223.

principles enshrined in the **Charter of Fundamental Rights** serve as the primary yardstick for the judicial review of EU legislation, both where its validity is at stake or where it is interpreted in conformity with human rights. While the EU institutions must respect the Charter in all their activities, the Member States are bound only when implementing Union law (see Hailbronner/Thym, *Constitutional Framework*, MN 47 48). In specific scenarios, the interpretation of the EU Charter by the ECJ typically follows the **case law of the ECtHR on the ECHR**, although the ECJ is not formally obliged to follow the Strasbourg court (see *ibid.*, MN 51). In contrast to international human rights law and the Geneva Convention, **international agreements of the Member States** to which the EU has not formally acceded do not form part of the EU legal order as a matter of principle (see *ibid.*, MN 58 59). On the basis of these general principles, this section focuses on the human rights dimension of EU instruments on entry and border controls discussed in this chapter.

1. (No) Right to Enter EU Territory

As starting point of its case law, the ECtHR maintains to this date that the contracting states enjoy ‘as a matter of well established international law and subject to their treaty obligations [the right] to control the entry, residence and expulsion of aliens.’⁹⁹ This assertion of **state sovereignty over the entry and stay of foreigners** reflects the classic position of public international law, since human rights have traditionally been conceived as guarantees *within* existing states and not for transnational movement;¹⁰⁰ migration related questions had originally been left outside the scope of the European Convention deliberately.¹⁰¹ It is not surprising, therefore, that the Strasbourg institutions remained largely silent on migration in the first 30 years of their existence. This has changed significantly ever since the 1990s when judges in Strasbourg started activating Articles 3 and 8 ECHR to limit the traditional notion of state discretion in migratory matters. 32

At an abstract level, we may distinguish two situations: firstly, Article 3 ECHR serves as the central guarantee against mistreatment in the country of origin asking European states to provide shelter (see Hailbronner/Thym, *Legal Framework for EU Asylum Policy*, MN 57 59); secondly, migrants can bring forward a claim under Article 8 ECHR against European countries they are living in to protect their private or family life without primary consideration of the situation in countries of origin (see Thym, *Legal Framework for EU Immigration Law*, MN 53 55). In short: **refugees are protected against refoulement under Article 3 ECHR**, whereas Article 8 ECHR is based upon legitimate ties migrants developed during the period of residence in their European host state. With regard to entry controls at the external border, Article 3 ECHR serves as the central yardstick (see below MN 34 35), since **Article 8 ECHR** can give rise to the primary right to admission for purposes of family reunion only in exceptional circum 33

⁹⁹ This standard formula was first used in ECtHR, judgment of 18 February 1991, No. 12313/86, *Moustaquim v. Belgium*, para. 43; see also Saroléa, *Droits de l’homme et migrations* (Bruylant, 2006), p. 331 335.

¹⁰⁰ See Hailbronner/Gogolin, ‘Aliens’, in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, online edition, paras 14 22, available at <http://www.mpepil.com> [last accessed 24 November 2015]; and Jennings/Watts, *Oppenheim’s International Law*, Vol. II, 9th edn (OUP, 2008), chs 6 & 9.

¹⁰¹ The *travaux préparatoires* show that the issue of asylum was discussed but not regulated, also with a view to on going discussion on the 1951 Refugee Convention, while legal migration was considered to fall within the *domaine réservée* of state sovereignty, which only carefully drafted international norms – such as Articles 2 and 4 Additional Protocol No. 4 to the ECHR – would selectively limit; see Uibopou, ‘Der Schutz des Flüchtlings im Rahmen des Europarats’, *Archiv des Völkerrechts* 21 (1983), p. 60, 61 64.

stances (see Thym, Legal Framework for EU Immigration Law, MN 51). These considerations can be extended to the EU Charter, since Articles 4 and 7 of the latter have to be interpreted in line with the ECtHR case law.¹⁰²

- 34 International human rights law confirms the principled freedom of states to control their borders and to regulate the entry and stay of foreigners.¹⁰³ Only nationals (and possibly certain categories of long term residents) benefit from a guarantee not to be arbitrarily deprived of the right to enter their 'own country'.¹⁰⁴ Neither treaty obligations nor customary international law have so far brought about an authoritative basis for a generic human right to enter other states or not to be refused entry arbitrarily in situations others than those related to family unity and refugee protection.¹⁰⁵ In short: there is **no generic right to enter foreign states in international human rights law**, while those residing in another country benefit from civil, economic, social and cultural rights.¹⁰⁶ Even those with illegal residence status have certain guarantees on their side.¹⁰⁷
- 35 EU legislation can provide for more far reaching individual rights in situations where human rights do not contain such guarantee. Corresponding **statutory rights of migrants to be allowed entry** to the EU territory have been recognised by the ECJ in various instances, in particular with regard to uniform visas under the Schengen Visa Code (see Meloni, Regulation (EC) No 810/2009 Article 32 MN 3) and for more specific guarantees for family reunion and for students. In so far as these statutory guarantees go beyond human rights requirements, the demarcation of the precise scope remains the prerogative of the EU legislature whose position judges have to identify under recourse to general interpretative standards for EU immigration and asylum law (see Hailbronner/Thym, Constitutional Framework, MN 15). In accordance with Article 47 of the Charter (see Hailbronner/Thym, *ibid.*, MN 37), EU legislation also provides for a **right to appeal against the refusal of entry** at the external borders or the rejection of an application for a uniform visa (see Meloni, Regulation (EC) No 810/2009 Article 32 MN 5), although applicants do not have the right to enter the EU territory provisionally pending the outcome of their application (see Epiney/Egbuna Joss, Regulation (EC) No 562/2006 Article 13 MN 4 5).
- 36 In relation to refugees, the mandatory respect for the Geneva Convention and human rights (see above MN 31) requires Member States not to violate these obligations when implementing EU policies on border controls and visas. In line with Article 51 of the EU Charter, it has to be assessed on a case by case basis whether national border control activities are to be considered an implementation of Union law to which EU fundamental rights standards apply (see Hailbronner/Thym, Constitutional Framework, MN 47 48).¹⁰⁸ Express provisions in EU legislation on the necessary **respect for refugee**

¹⁰² On the parallel interpretation of Article 8 ECHR and Article 7 of the Charter, see ECJ, *McB.*, C 400/10 PPU, EU:C:2010:582, para 53; correspondingly on Article 3 ECHR and Article 4 of the Charter, see ECJ, *N.S. et al.*, C 411/10 & C 493/10, EU:C:2011:865, paras 86 88.

¹⁰³ In classic international law, only complete closure to the outside world by totalitarian regimes could possibly be classified as being illegitimate; see Meloni, *Visa Policy*, p. 7 24.

¹⁰⁴ Article 12(4) ICCPR, which possibly embraces certain long term legal residents (but certainly not all foreigners); similarly, Article 3(2) Additional Protocol No. 4 to the ECHR.

¹⁰⁵ See Martin, 'The Authority and Responsibility of States', in: Aleinikoff/Chetail (eds), *Migration and International Legal Norms* (T.M.C. Asser, 2003), p. 31 46; Perruchoud, 'State Sovereignty and Freedom of Movement', in: Opeskin et al. (eds), *Foundations of International Migration Law* (CUP, 2012), p. 123, 129 136; and the prospective considerations by den Heijer, *Extraterritorial Asylum*, p. 142 160.

¹⁰⁶ See Weissbrodt, *The Human Rights of Non citizens* (OUP, 2008); and Ryan/Mantouvalou, 'The Labour and Social Rights of Migrants in International Law', in: Rubio Marin (ed), *Human Rights*, p. 177 211.

¹⁰⁷ See Carlier, 'Quelles Europes et quel(s) droit(s) pour quels migrants irréguliers?', in: Leclerc (ed), *Europe(s), droit(s) et migrants irréguliers* (Bruylant, 2012), p. XIII XXVI.

¹⁰⁸ This was ascertained for border controls by ECJ, *Zakaria*, C 23/12, EU:C:2013:24, paras 39 41.

law and human rights, such as Article 3(b) Schengen Borders Code Regulation (EC) No 562/2006,¹⁰⁹ confirm that entry and border control policies must be compatible with human rights and refugee law. These human rights guarantees are nowadays considered, by most observers, to include a prohibition, on the side of the states, **to not reject those seeking asylum at the border**.¹¹⁰ Officials are bound to comply with this obligation (see Epiney/Egbuna Joss, Regulation (EC) No 562/2006 Article 2 MN 12 18), which extends unequivocally to control activities at the internationally recognised borders, while the extraterritorial application to border controls on the high seas, in particular, remains disputed (see below MN 40).

In the context of refugee protection, it is important to **distinguish between non refoulement obligations and access to the asylum procedure**, in particular in situations of extraterritorial state action. While the latter (access to the asylum procedure) implies an obligation, on the part of European states, to assess individual claims to asylum in an individualised procedure for the purpose of residence in the Member States after a positive decision, the former (non refoulement) concerns the prohibition to return someone to a territory where he may be treated in violation of the Geneva Convention.¹¹¹ This distinction could be relevant specially for those who are not covered by the EU asylum directives *ratione loci*, because they come within the jurisdiction of European states during extraterritorial border controls (see below MN 39). As long as non refoulement obligations are met, these persons could be returned to a third state, or a certain part thereof, provided that they would not be confronted with a well founded fear of persecution there. Against this background, it would be possible, from a legal perspective, for the EU legislature to establish by means of future legislation the conditions for relocating asylum seekers to a safe country or transit zones on the basis of agreements providing for credible guarantees for fair treatment,¹¹² if necessary by supporting third states or international organisations in guaranteeing an adequate treatment of the returnees through financial or administrative support.¹¹³ On this basis, **asylum reception centres** could be established outside the EU territory but in compliance with the principle of non refoulement (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 35).

2. Extraterritorial Scope

The borders agency FRONTEX has become a symbol for the attempt, on the side of the European Union, to promote the Treaty objective to ensure the 'efficient monitoring of the crossing of external borders' (see above MN 6). It participates in extraterritorial activities that critics denounce as an attempt to bypass the obligations under human rights and refugee law by preventing potential refugees from reaching the territorial

¹⁰⁹ Even without an express provision respect would be mandatory, since EU legislation has to be interpreted in the light of primary law, see Hailbronner/Thym, Constitutional Framework, MN 14.

¹¹⁰ See Goodwin Gill/McAdam, Refugee, p. 206 208; and Kälin/Caroni/Heim, in: Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP, 2011), Article 33, para. 1 MN 105 109.

¹¹¹ Explicitly on the distinction between obligations under Article 3 ECHR and subsidiary protection under the Asylum Qualification Directive 2011/95/EU, see ECJ, *M'Bodj*, C 542/13, EU:C:2014:2452, paras 39 40.

¹¹² On the relevance of diplomatic assurances within the context of Article 3 ECHR, see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 57.

¹¹³ On Australia's controversial 'Pacific Solution', see High Court (of Australia), Judgment of 11 April 2002, *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, paras 42 44 and High Court (of Australia), Judgment of 31 August 2011, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

borders of the European Union.¹¹⁴ While it is beyond doubt that extraterritorial border controls must comply with the established principles of the law of the sea concerning safety and rescue of life,¹¹⁵ it remains unclear to what extent human rights and/or refugee law prescribe certain actions. What is certain is that **Article 1 ECHR** obliges state parties to secure the human rights ‘to everyone within their jurisdiction’ a condition that is not limited to the state territory as such in accordance with settled ECtHR case law. In a number of judgments concerning extraterritorial military activities, judges in Strasbourg held that ‘in keeping with the essentially territorial notion of jurisdiction’ **state activities beyond the territory amount to an exercise of jurisdiction ‘only in exceptional circumstances.’**¹¹⁶ These instances can include situations of effective control of an area as a consequence of military action, authority over an individual through estate agents (e. g. kidnapping) or ‘the activities of its diplomatic or consular agents abroad and on board craft and vessels.’¹¹⁷

- 39 On the basis of the principles above, the ECtHR concluded, in the *Hirsi* judgment, that Italian border guards held **jurisdiction over migrants on board of a coastguard vessel.**¹¹⁸ The judgment presents an authoritative basis that the European Convention applies extraterritorially and that migrants on the board of coastguard vessels benefit from the substantive guarantees of under Articles 3 and 13 ECHR (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 57 60), which in practice will usually require states to allow migrants access to an individualised procedure to analyse whether return would violate Article 3 ECHR.¹¹⁹ It is open to debate if the ECtHR’s statement about migrants on board ships ‘registered in, or flying the flag of, that State’¹²⁰ entails that other forms of de facto control cannot be qualified as an exercise of jurisdiction in the meaning of Article 1 ECHR, particularly in situations when **border control officers are not in physical contact with migrant on coastguard ships.**¹²¹ It remains the prerogative of the ECtHR to decide whether it follows the arguments put forward in favour of a broad reading of Article 1 ECHR, while considering that decisions may have implications for military action. The ECtHR has thus far been careful not to stretch jurisdiction too widely in this matter.¹²²
- 40 In the light of the ECtHR case law, a similarly broad **extraterritorial reach of the Geneva Convention** beyond the obligation not to reject those seeking asylum at the

¹¹⁴ See Goodwin Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non Refoulement’, *IJRL* 23 (2011), p. 443 457.

¹¹⁵ On corresponding obligations of the Member States, see Scovazzi, ‘Human Rights and Immigration at Sea’, in: Rubio Marín (ed), *Human Rights*, p. 212, 225 237; and Beushausen, ‘Völkerrechtliche Pflichten und Rechte von (EU) Küstenstaaten gegenüber Migranten auf See’, *Zeitschrift für Ausländer recht* (2010), p. 45 49.

¹¹⁶ Reaffirmed by ECtHR, judgment of 23 February 2012 (GC), No. 27765/09, *Hirsi Jamaa et al. v. Italy*, para 72 summarising earlier judgments.

¹¹⁷ See, again, the summary of earlier case law by ECtHR, *ibid.*, paras 73 75.

¹¹⁸ See the application of the principles described above by ECtHR, *ibid.*, paras 76 82.

¹¹⁹ For further comments, also on the ECtHR’s traditional recourse to the prohibition of collective expulsions in Article 4 Additional Protocol No. 4 to the ECHR, see den Heijer, ‘Reflections on Refoulement and Collective Expulsion in the *Hirsi* Case’, *IJRL* 25 (2013), 265, 280 285; and Lehnert/Markard, ‘Mittelmeerroulette’, *Zeitschrift für Ausländerrecht* (2012), 194, 197 198.

¹²⁰ ECtHR, *ibid.*, para 75.

¹²¹ Many migration law experts favour a broad reading; cf. den Heijer, *ibid.*, p. 273 274; Moreno Lax, ‘*Hirsi Jamaa and Others v Italy*’, *Human Rights Law Review* 12 (2012), 574, 580 582; and Klug/Howe, ‘The Concept of State Jurisdiction and the Applicability of the Non refoulement Principle to Extraterritorial Interception Measures’, in: Ryan/Mitsilegas, *Extraterritorial Immigration*, p. 69, 96 99.

¹²² See Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’, *American Journal of International Law* 99 (2005), p. 119 141; and Miller, ‘Revisiting Extraterritorial Jurisdiction’, *European Journal of International Law* 20 (2009), p. 1223 1246.

state border (see above MN 36) would have limited practical implications for EU immigration and asylum law, since Article 3 ECHR goes beyond the Geneva Convention both in terms of qualitative criteria for non refoulement and regarding procedural guarantees (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 55–60). In the academic literature, there is a growing support – in contrast to the prevailing state practice – for a dynamic reinterpretation of the Geneva Convention to apply extraterritorially in line with human rights law, while state practice is much more reticent.¹²³ It is well established, though, that situations without effective state control over a person or territory cannot be qualified as an exercise of state jurisdiction involving human rights accountability under the European Convention or other instruments.¹²⁴ This entails that **visa requirements and sanctions for transport carriers**, which are widespread and often criticised politically,¹²⁵ cannot be held liable for violations of non refoulement obligations (see Meloni, Regulation (EC) No 810/2009 Article 1 MN 11).

Express provisions on non refoulement obligations in EU legislation, in particular 41 in the Schengen Borders Code (see above MN 35) and the Sea Borders Regulation (EU) 656/2014, do not in themselves oblige border guards to grant access to EU territory, since they should be understood, in essence, as declaratory confirmations of pre-existing human rights together with corresponding monitoring responsibilities (see Ryan, Regulation (EU) 656/2014 Article 4 MN 3–5).¹²⁶ In a similar vein, **Article 18 of the Charter** does not change the overall picture, since its possible interpretations do not go beyond the level of protection guaranteed by the Geneva Convention or Article 3 ECHR (see Hailbronner/Thym, Legal Framework for EU Asylum Policy, MN 63). With regard to the EU Charter, it remains unclear, moreover, whether it emulates the jurisdictional threshold of Article 1 ECHR in instances of extraterritorial state action.¹²⁷ No matter how precisely one defines **territorial scope of the EU Charter**, it depends on the factual circumstances of the case at hand whether national border control activities can be qualified as an implementation of Union law that entails the applicability of the EU Charter (see Hailbronner/Thym, Constitutional Framework, MN 47–48). If the Charter does not apply, national courts can have recourse to the ECHR and national constitutional guarantees in order to scrutinize state action.

¹²³ See the arguments put forward and the summary of the state practice by Goodwin Gill/McAdam, Refugee, p. 244–256; Gammeltoft Hansen, 'Extraterritorial Migration Control and the Reach of Human Rights', in: Chetail/Baulez (eds), *Research Handbook on International Law and Migration* (Elgar, 2014), p. 113, 116–126; and den Heijer, Extraterritorial Asylum, p. 120–132.

¹²⁴ See McNamara, 'Member State Responsibility for Migration Control within Third States – Externalisation Revisited', EJML 15 (2013), 319, 331–333; for a proposal for progressive reinterpretation of the ECHR, see Spijkerboer, 'Stretching the Limits', in: Maes et al., *External Dimensions*, p. 387, 394–402.

¹²⁵ Cf. Ryan, 'Extraterritorial Immigration Control', in: *ibid./Mitsilegas, Extraterritorial Immigration*, p. 3–38.

¹²⁶ Moreno Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non Refoulement in EU Law', in: Maes et al., *External Dimensions*, p. 415, 437–440, 474–476 can be misunderstood as implying that a declaratory confirmation of human rights obligations implies a statutory right to access.

¹²⁷ For a progressive interpretation, see Costello/Moreno Lax, 'The Extraterritorial Application of the EU Charter of Fundamental Rights', in: Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (C.H. Beck/Hart, 2014), p. 1657–1684; more restrictive is Herdegen, 'Grundrechte der Europäischen Union', in: Isensee/Kirchhof (ed), *Handbuch des Staatsrechts*, Vol. X, 3rd edn (C.F. Müller, 2012), § 211 MN 44–45.