

June 2011

Migrants, 'Schengen area' and European solidarity

The 'Schengen area', which is both an old and symptomatic achievement of European integration, is today in the firing line to the extent that its management and its 'reform' are on the agenda of the European Council of 23 and 24 June. The arrival of migrants on the Italian coast is the source of this criticism but there had already been difficulties along the Greek-Turkish border and also concern in the perspective of the Bulgarian and Romanian accessions.

In this context, we must first point out that the Schengen area is based on simple principles:

- The elimination of 'internal' fixed border checks in the area of free movement created by its **25 member countries** (for example between France and Belgium);
- Keeping mobile checks, presumed to be more effective, and which can be joint ones (depicted humorously in the Dany Boon film "Rien à déclarer -Nothing to Declare")
- The possibility of invoking 'safeguard clauses' to reestablish fixed checks at national borders on targeted basis, for example for sports or political events (these clauses have already been activated many times since 1985, under the EU's control);
- Finally, the joint management of external borders, which are *ipso facto* 'our' borders, as those that cross them can freely enter other member countries as long as they respect European rules in terms of visas and resources.

Every day, the application of these principles allows tens of thousands of people to go and work, to study, to meet people close to them and have fun in a huge geographic area, without administrative formalities or long queues at border posts. So safeguarding 'Schengen' is first about protecting the rights of the Europeans in a period featuring proposals for a return to checks at national borders, whose budgetary cost would not be negligible, especially given their relatively modest efficiency.

The 'Schengen area' is also about monitoring our common external borders in an 'asymmetric' context: the land and sea borders of some countries are indeed more exposed to major migration flows given the geography (e.g. Greece) and sometimes the history (e.g. Malta following the Arab revolutions). This 'asymmetry', **particularly visible in terms of asylum seeking**, is partly the source of tension in recent times, in connection with issues relating to solidarity with neighbouring countries, theoretically just as concerned.

It is then also necessary to underline that several European solidarity mechanisms exist between Schengen area member states to take account of this asymmetry:

- Financial adjustment mechanisms first of all, via **four European funds** that are not very well known: the European External Borders Fund, the European Refugees Fund, the European Integration Fund and the European Return Fund. Each member state receives a fixed share of these funds as well as a share proportional to his degree of exposure to migratory flows, which is the concrete expression of European solidarity.
- This European solidarity is also expressed via **the FRONTEX agency**, which can offer technical assistance to member states facing considerable migratory pressure. This assistance leads to the funding of joint sea patrol operations ('Operation Hermes' off Italy in 2011); it also leads to sending 'rapid intervention teams to borders (or 'Rabits', i.e. 'Rapid Border Intervention Teams'), made up of border guards from all or some of the member states, acting under the authority of the host country but financed by their country of origin. These **European teams** were, for example, successfully used in November 2010 when Greece asked for help to improve its handling of migration flows at the border it shares with Turkey.
- European solidarity can also be expressed in terms of its hosting refugees seeking asylum in Europe: the **Temporary Protection Directive** adopted in 2001 stipulates that, where a country

hosts a number of asylum-seekers exceeding its hosting capacities, neighbouring countries can take on some of them.

All these solidarity mechanisms have been put in place in the last ten years, as part of a gradual Europeanisation of the management of migration flows, which has traditionally been the remit of member states. It is then hardly surprising that they can still be deepened and improved, including because they were designed to deal with 'standard' migration flows and are no doubt ill-suited to crisis situations. These improvements include in particular a big increase in European funding as part of the big upcoming budget negotiations, as well as putting in place a common system to manage huge flows of illegal immigrants (outside asylum-seekers).

The deepening of this European solidarity would no doubt contribute to making the management of the external borders of the 'Schengen area' more efficient and more balanced - in any case much more so than a hypothetical return to national borders. It is an infinitely more promising path than the expression of national responses that may fuel conflicts between neighbouring countries and the **legality of which is uncertain in terms of European rules**. As such, the deepening of this European solidarity seems to have to go hand in hand with more responsibility of Schengen area member states, which in particular implies that:

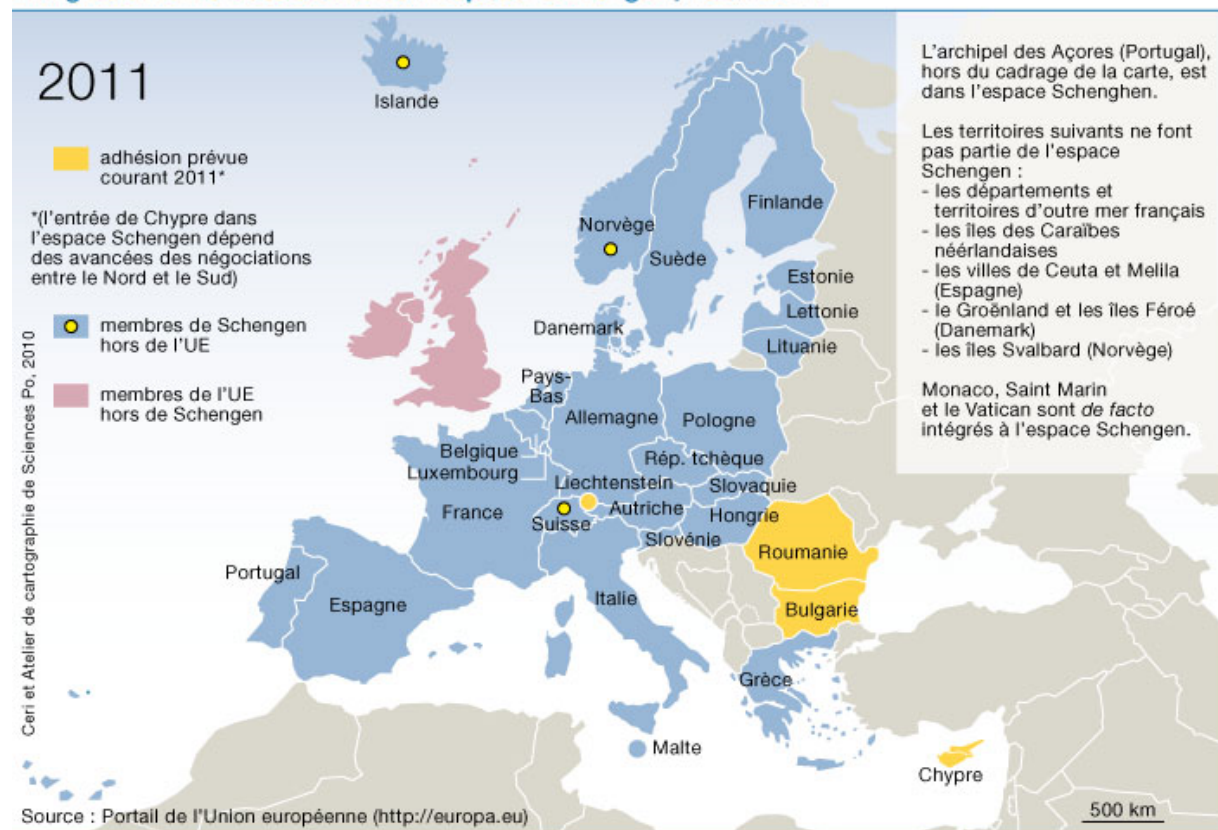
- National authorities take on their tasks and do not systematically call for the solidarity of neighbouring countries when they are faced with migration flows of a limited size by comparison with their total population: this is why Italy and its 60 million inhabitants were not deemed to require help when they were hosting a little over 20,000 migrants from Tunisia;
- Asylum policies run by Schengen area countries are harmonised further : the **levels and rates of acceptance of asylum requests** vary considerably from one country to another such that those making substantial efforts in terms of openness and hosting can balk at helping those whose efforts are much lower;
- It is also necessary for national authorities to be able to trust each other and for countries that are presumed to be failing to accept the scrutiny and assistance of their neighbours: it is, for example, because Bulgaria and Romania for a long time denied the insufficient reliability of their border checks that the prospect of their joining the 'Schengen area' was greeted with some reluctance.

These aspects of the debate on the 'Schengen area' are echoed in broader discussions on a number of solidarity mechanisms put in place in the EU in old areas of action (for example the **CAP (Common Agricultural Policy)** and cohesion policy) as well as more recent ones (in particular in the eurozone or in the field of energy). These mechanisms are at the heart of European integration, based on the Jacques Delors 'competition that stimulates, cooperation that strengthens and solidarity that unites' formula. Notre Europe is today launching a first **series of publications** on these central issues, on which we intend to fuel common reflections in the coming months.

Yves Bertoncini
Secretary General of Notre Europe

The Schengen Area in 2011

Élargissements successifs de l'espace Schengen, 1995-2011



Source : www.ceriscope.sciences-po.fr

Asylum applications in the EU countries in 2010

Countries	Number of asylum applications	Number of asylum applications for a million of inhabitants
Cyprus	2 875	3 580
Sweden	31 875	3410
Belgium	26 130	2410
Luxembourg	780	1 555
Austria	11 050	1320
Denmark	5 070	915
Netherlands	15 100	910
Greece	10 275	910
France	51 595	795
Germany	48 490	595
Finland	3 090	575
EU 27	257 815	515
Ireland	1 940	435
Malta	175	425
United Kingdom	23 715	380
Hungary	2 095	210
Poland	6 540	170
Italy	10 050	165
Lithuania	495	150
Bulgaria	1 025	135
Slovenia	245	120
Slovakia	540	100
Czech Republic	780	75
Spain	2 740	60
Romania	885	40
Latvia	65	30
Estonia	35	25
Portugal	160	15

Source : Data from Eurostat - Notre Europe (June 2011)

European funds designed to borders and migration management

	Sum in million of Euros for one year	Part in the EU's budget
European Refugee Fund (Improving reception conditions, supporting fair and effective asylum procedures)	54	0,03%
European Integration Fund (Support EU countries to enable a better integration of third country nationals)	117	0,08%
External Borders Fund (Improving coordination between border crossing points, uniform implementation of the EU legislation)	260	0,18%
Return Fund (Support EU countries' cooperation on return management, implementation of integrated return plans)	12	0,07%
Total	543	0,36%

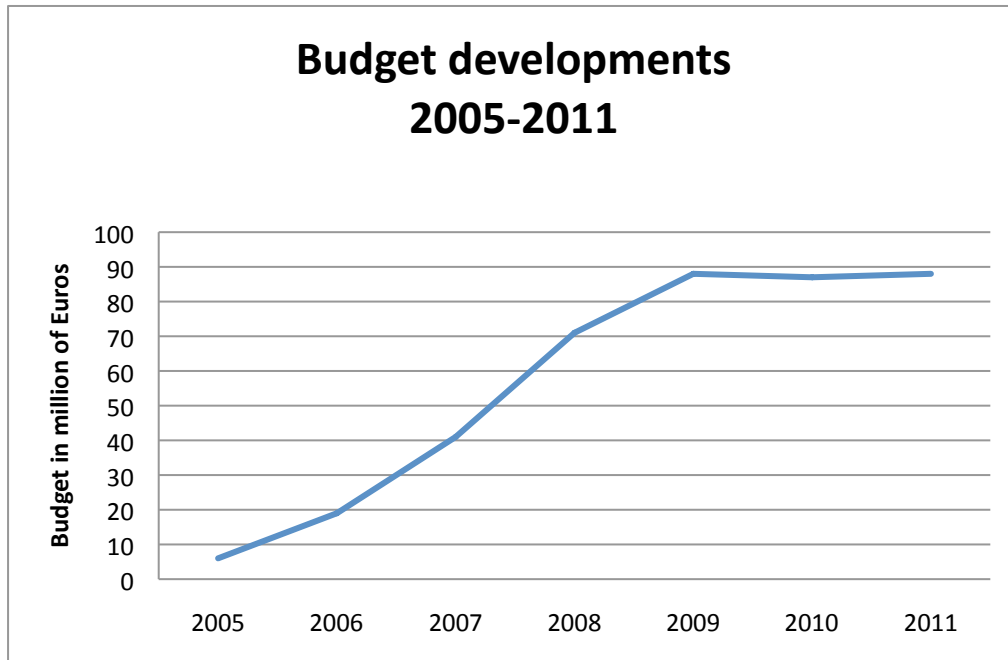
Data from the European Commission

Calculations done by *Notre Europe*

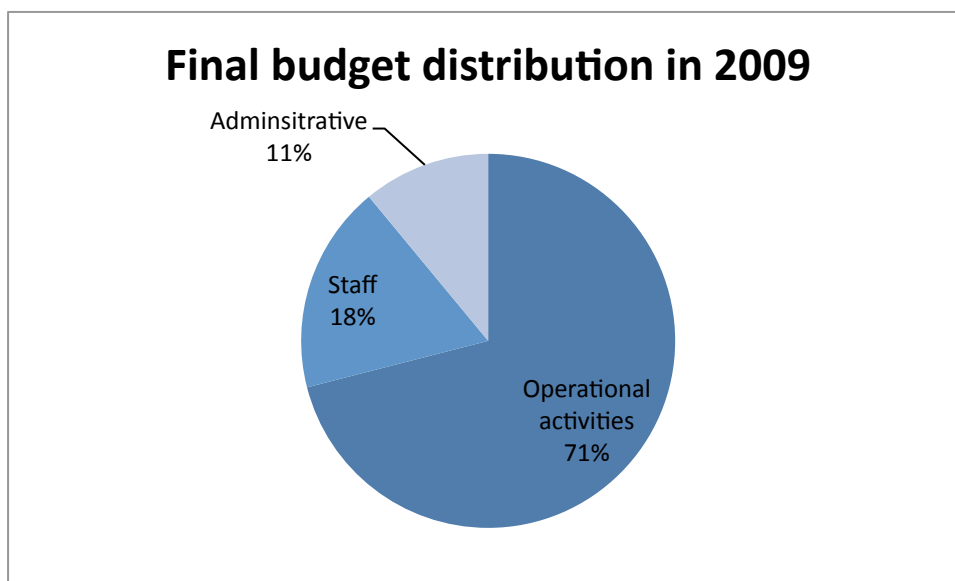
Nota Bene: The European budget amounts to 124 billion of euros in 2011.

These four European funds belong to the General programme "Solidarity and Management of Migration Flows". The budget of Frontex amounts to 88 million of euros in 2011.

Frontex's budget: key figures

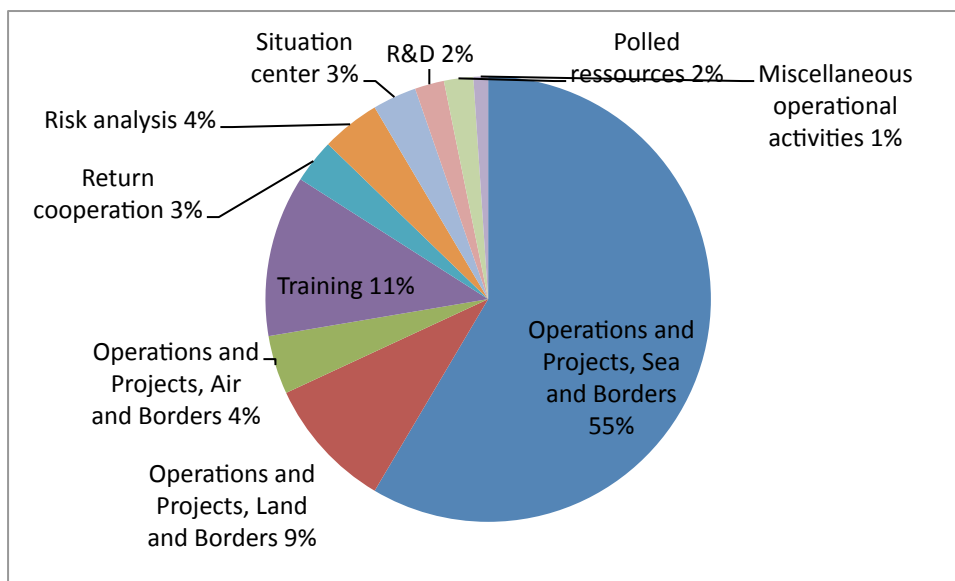


Source : www.frontex.europa.eu



Source : Annual Report of FRONTEX (2010)

Final operational budget distribution in 2009



Source : Annual Report of FRONTEX (2010)



**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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point 2(a) and (b) of Article 63 thereof,

Having regard to the proposal from the Commission ⁽¹⁾

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Having regard to the opinion of the Committee of the Regions ⁽⁴⁾,

Whereas:

(1) The preparation of a common policy on asylum, including common European arrangements for asylum, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union.

(2) Cases of mass influx of displaced persons who cannot return to their country of origin have become more substantial in Europe in recent years. In these cases it may be necessary to set up exceptional schemes to offer them immediate temporary protection.

(3) In the conclusions relating to persons displaced by the conflict in the former Yugoslavia adopted by the Ministers responsible for immigration at their meetings in London on 30 November and 1 December 1992 and Copenhagen on 1 and 2 June 1993, the Member States and the Community institutions expressed their concern at the situation of displaced persons.

(4) On 25 September 1995 the Council adopted a Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis ⁽⁵⁾, and, on 4 March 1996, adopted Decision 96/198/JHA on an alert and emergency procedure for burden-sharing

with regard to the admission and residence of displaced persons on a temporary basis ⁽⁶⁾.

(5) The Action Plan of the Council and the Commission of 3 December 1998 ⁽⁷⁾ provides for the rapid adoption, in accordance with the Treaty of Amsterdam, of minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and of measures promoting a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons.

(6) On 27 May 1999 the Council adopted conclusions on displaced persons from Kosovo. These conclusions call on the Commission and the Member States to learn the lessons of their response to the Kosovo crisis in order to establish the measures in accordance with the Treaty.

(7) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.

(8) It is therefore necessary to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and to take measures to promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons.

(9) Those standards and measures are linked and interdependent for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements. They should therefore be enacted in a single legal instrument.

(10) This temporary protection should be compatible with the Member States' international obligations as regards refugees. In particular, it must not prejudice the recognition of refugee status pursuant to the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967, ratified by all the Member States.

⁽¹⁾ OJ C 311 E, 31.10.2000, p. 251.

⁽²⁾ Opinion delivered on 13 March 2001 (not yet published in the Official Journal).

⁽³⁾ OJ C 155, 29.5.2001, p. 21.

⁽⁴⁾ Opinion delivered on 13 June 2001 (not yet published in the Official Journal).

⁽⁵⁾ OJ C 262, 7.10.1995, p. 1.

⁽⁶⁾ OJ L 63, 13.3.1996, p. 10.

⁽⁷⁾ OJ C 19, 20.1.1999, p. 1.

- (11) The mandate of the United Nations High Commissioner for Refugees regarding refugees and other persons in need of international protection should be respected, and effect should be given to Declaration No 17, annexed to the Final Act to the Treaty of Amsterdam, on Article 63 of the Treaty establishing the European Community which provides that consultations are to be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy.
- (12) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons.
- (13) Given the exceptional character of the provisions established by this Directive in order to deal with a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, the protection offered should be of limited duration.
- (14) The existence of a mass influx of displaced persons should be established by a Council Decision, which should be binding in all Member States in relation to the displaced persons to whom the Decision applies. The conditions for the expiry of the Decision should also be established.
- (15) The Member States' obligations as to the conditions of reception and residence of persons enjoying temporary protection in the event of a mass influx of displaced persons should be determined. These obligations should be fair and offer an adequate level of protection to those concerned.
- (16) With respect to the treatment of persons enjoying temporary protection under this Directive, the Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.
- (17) Member States should, in concert with the Commission, enforce adequate measures so that the processing of personal data respects the standard of protection of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾.
- (18) Rules should be laid down to govern access to the asylum procedure in the context of temporary protection in the event of a mass influx of displaced persons, in conformity with the Member States' international obligations and with the Treaty.
- (19) Provision should be made for principles and measures governing the return to the country of origin and the measures to be taken by Member States in respect of persons whose temporary protection has ended.
- (20) Provision should be made for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx. The mechanism should consist of two components. The first is financial and the second concerns the actual reception of persons in the Member States.
- (21) The implementation of temporary protection should be accompanied by administrative cooperation between the Member States in liaison with the Commission.
- (22) It is necessary to determine criteria for the exclusion of certain persons from temporary protection in the event of a mass influx of displaced persons.
- (23) Since the objectives of the proposed action, namely to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons, cannot be sufficiently attained by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (24) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 27 September 2000, of its wish to take part in the adoption and application of this Directive.
- (25) Pursuant to Article 1 of the said Protocol, Ireland is not participating in the adoption of this Directive. Consequently and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Directive do not apply to Ireland.
- (26) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of this Directive, and is therefore not bound by it nor subject to its application,

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

General provisions

Article 1

The purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

Article 2

For the purposes of this Directive:

- (a) 'temporary protection' means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection;
- (b) 'Geneva Convention' means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;
- (c) 'displaced persons' means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:
 - (i) persons who have fled areas of armed conflict or endemic violence;
 - (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;
- (d) 'mass influx' means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme;
- (e) 'refugees' means third-country nationals or stateless persons within the meaning of Article 1A of the Geneva Convention;

- (f) 'unaccompanied minors' means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States;
- (g) 'residence permit' means any permit or authorisation issued by the authorities of a Member State and taking the form provided for in that State's legislation, allowing a third country national or a stateless person to reside on its territory;
- (h) 'sponsor' means a third-country national enjoying temporary protection in a Member State in accordance with a decision taken under Article 5 and who wants to be joined by members of his or her family.

Article 3

1. Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.
2. Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement.
3. The establishment, implementation and termination of temporary protection shall be the subject of regular consultations with the Office of the United Nations High Commissioner for Refugees (UNHCR) and other relevant international organisations.
4. This Directive shall not apply to persons who have been accepted under temporary protection schemes prior to its entry into force.
5. This Directive shall not affect the prerogative of the Member States to adopt or retain more favourable conditions for persons covered by temporary protection.

CHAPTER II

Duration and implementation of temporary protection

Article 4

1. Without prejudice to Article 6, the duration of temporary protection shall be one year. Unless terminated under the terms of Article 6(1)(b), it may be extended automatically by six monthly periods for a maximum of one year.
2. Where reasons for temporary protection persist, the Council may decide by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, to extend that temporary protection by up to one year.

Article 5

1. The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

2. The Commission proposal shall include at least:

- (a) a description of the specific groups of persons to whom the temporary protection will apply;
- (b) the date on which the temporary protection will take effect;
- (c) an estimation of the scale of the movements of displaced persons.

3. The Council Decision shall have the effect of introducing temporary protection for the displaced persons to which it refers, in all the Member States, in accordance with the provisions of this Directive. The Decision shall include at least:

- (a) a description of the specific groups of persons to whom the temporary protection applies;
- (b) the date on which the temporary protection will take effect;
- (c) information received from Member States on their reception capacity;
- (d) information from the Commission, UNHCR and other relevant international organisations.

4. The Council Decision shall be based on:

- (a) an examination of the situation and the scale of the movements of displaced persons;
- (b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures;
- (c) information received from the Member States, the Commission, UNHCR and other relevant international organisations.

5. The European Parliament shall be informed of the Council Decision.

Article 6

1. Temporary protection shall come to an end:

- (a) when the maximum duration has been reached; or
- (b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

2. The Council Decision shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted tempo-

rary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement. The European Parliament shall be informed of the Council Decision.

Article 7

1. Member States may extend temporary protection as provided for in this Directive to additional categories of displaced persons over and above those to whom the Council Decision provided for in Article 5 applies, where they are displaced for the same reasons and from the same country or region of origin. They shall notify the Council and the Commission immediately.

2. The provisions of Articles 24, 25 and 26 shall not apply to the use of the possibility referred to in paragraph 1, with the exception of the structural support included in the European Refugee Fund set up by Decision 2000/596/EC ⁽¹⁾, under the conditions laid down in that Decision.

CHAPTER III

Obligations of the Member States towards persons enjoying temporary protection*Article 8*

1. The Member States shall adopt the necessary measures to provide persons enjoying temporary protection with residence permits for the entire duration of the protection. Documents or other equivalent evidence shall be issued for that purpose.

2. Whatever the period of validity of the residence permits referred to in paragraph 1, the treatment granted by the Member States to persons enjoying temporary protection may not be less favourable than that set out in Articles 9 to 16.

3. The Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.

Article 9

The Member States shall provide persons enjoying temporary protection with a document, in a language likely to be understood by them, in which the provisions relating to temporary protection and which are relevant to them are clearly set out.

Article 10

To enable the effective application of the Council Decision referred to in Article 5, Member States shall register the personal data referred to in Annex II, point (a), with respect to the persons enjoying temporary protection on their territory.

⁽¹⁾ OJ L 252, 6.10.2000, p. 12.

Article 11

A Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision referred to in Article 5. Member States may, on the basis of a bilateral agreement, decide that this Article should not apply.

Article 12

The Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to engage in employed or self-employed activities, subject to rules applicable to the profession, as well as in activities such as educational opportunities for adults, vocational training and practical workplace experience. For reasons of labour market policies, Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third-country nationals who receive unemployment benefit. The general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Article 13

1. The Member States shall ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain housing.

2. The Member States shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care. Without prejudice to paragraph 4, the assistance necessary for medical care shall include at least emergency care and essential treatment of illness.

3. Where persons enjoying temporary protection are engaged in employed or self-employed activities, account shall be taken, when fixing the proposed level of aid, of their ability to meet their own needs.

4. The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.

Article 14

1. The Member States shall grant to persons under 18 years of age enjoying temporary protection access to the education system under the same conditions as nationals of the host

Member State. The Member States may stipulate that such access must be confined to the state education system.

2. The Member States may allow adults enjoying temporary protection access to the general education system.

Article 15

1. For the purpose of this Article, in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx, the following persons shall be considered to be part of a family:

- (a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted;
- (b) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time.

2. In cases where the separate family members enjoy temporary protection in different Member States, Member States shall reunite family members where they are satisfied that the family members fall under the description of paragraph 1(a), taking into account the wish of the said family members. Member States may reunite family members where they are satisfied that the family members fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship they would face if the reunification did not take place.

3. Where the sponsor enjoys temporary protection in one Member State and one or some family members are not yet in a Member State, the Member State where the sponsor enjoys temporary protection shall reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(a). The Member State may reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship which they would face if the reunification did not take place.

4. When applying this Article, the Member States shall taken into consideration the best interests of the child.

5. The Member States concerned shall decide, taking account of Articles 25 and 26, in which Member State the reunification shall take place.

6. Reunited family members shall be granted residence permits under temporary protection. Documents or other equivalent evidence shall be issued for that purpose. Transfers of family members onto the territory of another Member State for the purposes of reunification under paragraph 2, shall result in the withdrawal of the residence permits issued, and the termination of the obligations towards the persons concerned relating to temporary protection, in the Member State of departure.

7. The practical implementation of this Article may involve cooperation with the international organisations concerned.

8. A Member State shall, at the request of another Member State, provide information, as set out in Annex II, on a person receiving temporary protection which is needed to process a matter under this Article.

Article 16

1. The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.

2. During the period of temporary protection Member States shall provide for unaccompanied minors to be placed:

- (a) with adult relatives;
- (b) with a foster-family;
- (c) in reception centres with special provisions for minors, or in other accommodation suitable for minors;
- (d) with the person who looked after the child when fleeing.

The Member States shall take the necessary steps to enable the placement. Agreement by the adult person or persons concerned shall be established by the Member States. The views of the child shall be taken into account in accordance with the age and maturity of the child.

CHAPTER IV

Access to the asylum procedure in the context of temporary protection

Article 17

1. Persons enjoying temporary protection must be able to lodge an application for asylum at any time.

2. The examination of any asylum application not processed before the end of the period of temporary protection shall be completed after the end of that period.

Article 18

The criteria and mechanisms for deciding which Member State is responsible for considering an asylum application shall apply. In particular, the Member State responsible for examining an asylum application submitted by a person enjoying temporary protection pursuant to this Directive, shall be the Member State which has accepted his transfer onto its territory.

Article 19

1. The Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while applications are under consideration.

2. Where, after an asylum application has been examined, refugee status or, where applicable, other kind of protection is not granted to a person eligible for or enjoying temporary protection, the Member States shall, without prejudice to Article 28, provide for that person to enjoy or to continue to enjoy temporary protection for the remainder of the period of protection.

CHAPTER V

Return and measures after temporary protection has ended

Article 20

When the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply, without prejudice to Articles 21, 22 and 23.

Article 21

1. The Member States shall take the measures necessary to make possible the voluntary return of persons enjoying temporary protection or whose temporary protection has ended. The Member States shall ensure that the provisions governing voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity.

The Member State shall ensure that the decision of those persons to return is taken in full knowledge of the facts. The Member States may provide for exploratory visits.

2. For such time as the temporary protection has not ended, the Member States shall, on the basis of the circumstances prevailing in the country of origin, give favourable consideration to requests for return to the host Member State from persons who have enjoyed temporary protection and exercised their right to a voluntary return.

3. At the end of the temporary protection, the Member States may provide for the obligations laid down in CHAPTER III to be extended individually to persons who have been covered by temporary protection and are benefiting from a voluntary return programme. The extension shall have effect until the date of return.

Article 22

1. The Member States shall take the measures necessary to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with due respect for human dignity.

2. In cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.

Article 23

1. The Member States shall take the necessary measures concerning the conditions of residence of persons who have enjoyed temporary protection and who cannot, in view of their state of health, reasonably be expected to travel; where for example they would suffer serious negative effects if their treatment was interrupted. They shall not be expelled so long as that situation continues.

2. The Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period.

CHAPTER VI

Solidarity

Article 24

The measures provided for in this Directive shall benefit from the European Refugee Fund set up by Decision 2000/596/EC, under the terms laid down in that Decision.

Article 25

1. The Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity. They shall indicate – in figures or in general terms – their capacity to receive such persons. This information shall be set out in the Council Decision referred to in Article 5. After that Decision has been adopted, the Member States may indicate additional reception capacity by notifying the Council and the Commission. This information shall be passed on swiftly to UNHCR.

2. The Member States concerned, acting in cooperation with the competent international organisations, shall ensure that the eligible persons defined in the Council Decision referred to in

Article 5, who have not yet arrived in the Community have expressed their will to be received onto their territory.

3. When the number of those who are eligible for temporary protection following a sudden and massive influx exceeds the reception capacity referred to in paragraph 1, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected.

Article 26

1. For the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral.

2. A Member State shall communicate requests for transfers to the other Member States and notify the Commission and UNHCR. The Member States shall inform the requesting Member State of their capacity for receiving transferees.

3. A Member State shall, at the request of another Member State, provide information, as set out in Annex II, on a person enjoying temporary protection which is needed to process a matter under this Article.

4. Where a transfer is made from one Member State to another, the residence permit in the Member State of departure shall expire and the obligations towards the persons concerned relating to temporary protection in the Member State of departure shall come to an end. The new host Member State shall grant temporary protection to the persons concerned.

5. The Member States shall use the model pass set out in Annex I for transfers between Member States of persons enjoying temporary protection.

CHAPTER VII

Administrative cooperation

Article 27

1. For the purposes of the administrative cooperation required to implement temporary protection, the Member States shall each appoint a national contact point, whose address they shall communicate to each other and to the Commission. The Member States shall, in liaison with the Commission, take all the appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

2. The Member States shall, regularly and as quickly as possible, communicate data concerning the number of persons enjoying temporary protection and full information on the national laws, regulations and administrative provisions relating to the implementation of temporary protection.

CHAPTER VIII

Special provisions*Article 28*

1. The Member States may exclude a person from temporary protection if:

- (a) there are serious reasons for considering that:
 - (i) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 - (ii) he or she has committed a serious non-political crime outside the Member State of reception prior to his or her admission to that Member State as a person enjoying temporary protection. The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators;
 - (iii) he or she has been guilty of acts contrary to the purposes and principles of the United Nations;
- (b) there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State.

2. The grounds for exclusion referred to in paragraph 1 shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality.

CHAPTER IX

Final provisions*Article 29*

Persons who have been excluded from the benefit of temporary protection or family reunification by a Member State shall be entitled to mount a legal challenge in the Member State concerned.

Article 30

The Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

Article 31

1. Not later than two years after the date specified in Article 32, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. The Member States shall send the Commission all the information that is appropriate for drawing up this report.

2. After presenting the report referred to at paragraph 1, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every five years.

Article 32

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002 at the latest. They shall forthwith inform the Commission thereof.

2. When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 33

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 34

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 20 July 2001.

For the Council

The President

J. VANDE LANOTTE

ANNEX I

Model pass for the transfer of persons enjoying temporary protection**PASS**

Name of the Member State delivering the pass:

Reference number (*):

Issued under Article 26 of 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 effort between Member States in receiving such persons and bearing the consequences thereof.

Valid only for the transfer from (1) to (2).

The person in question must present himself/herself at (3) by (4).

Issued at:

SURNAME:

FORENAMES:

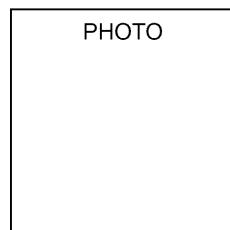
PLACE AND DATE OF BIRTH:

In case of a minor, name(s) of responsible adult:

SEX:

NATIONALITY:

Date issued:



SEAL

Signature of the beneficiary: For the competent authorities:

The pass-holder has been identified by the authorities (5) (6)

The identity of the pass-holder has not been established

This document is issued pursuant to Article 26 of Directive 2001/55/EC only and in no way constitutes a document which can be equated to a travel document authorising the crossing of the external border or a document proving the individual's identity.

(*) The reference number is allocated by the country from which the transfer to another Member State is made.

(1) Member State from which the transfer is being made.

(2) Member State to which the transfer is being made.

(3) Place where the person must present himself/herself on arrival in the second Member State.

(4) Deadline by which the person must present himself/herself on arrival in the second Member State.

(5) On the basis of the following travel or identity documents, presented to the authorities.

(6) On the basis of documents other than a travel or identity document.

ANNEX II

The information referred to in Articles 10, 15 and 26 of the Directive includes to the extent necessary one or more of the following documents or data:

- (a) personal data on the person concerned (name, nationality, date and place of birth, marital status, family relationship);
- (b) identity documents and travel documents of the person concerned;
- (c) documents concerning evidence of family ties (marriage certificate, birth certificate, certificate of adoption);
- (d) other information essential to establish the person's identity or family relationship;
- (e) residence permits, visas or residence permit refusal decisions issued to the person concerned by the Member State, and documents forming the basis of decisions;
- (f) residence permit and visa applications lodged by the person concerned and pending in the Member State, and the stage reached in the processing of these.

The providing Member State shall notify any corrected information to the requesting Member State.

A Race against Solidarity

The Schengen Regime and the Franco-Italian Affair

**Sergio Carrera, Elspeth Guild, Massimo Merlino
and Joanna Parkin**

April 2011

Abstract

In April 2011, France reintroduced internal border checks with Italy to prevent mobility by North African immigrants who hold temporary residence permits issued by Italy and who had entered the EU from Tunisia as a result of revolutions and war in the southern Mediterranean region. This has caused a diplomatic row between the two countries, as well as reactions by other EU member states and at the EU levels. This paper examines the compatibility of the Italian and French measures with EU border legislation and legal principles as well as the foundations of the Schengen regime. It argues that the Franco-Italian affair illustrates a 'race to the bottom' on European principles of solidarity, loyal cooperation and fundamental rights. The affair ultimately reveals the very limits and unfinished elements of the EU's immigration and border policies. Finally, the paper puts forward policy recommendations to the parties involved.

The CEPS 'Liberty and Security in Europe' publication series offers the views and critical reflections of CEPS researchers and external collaborators on key policy discussions surrounding the construction of the EU's Area of Freedom, Security and Justice. The series encompasses policy-oriented and interdisciplinary academic studies and commentary about the internal and external implications of Justice and Home Affairs policies inside Europe and elsewhere throughout the world.

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A Race against Solidarity

The Schengen Regime and the Franco-Italian Affair

Sergio Carrera, Elspeth Guild, Massimo Merlino and Joanna Parkin*

CEPS Paper in Liberty and Security in Europe, April 2011

Introduction

The effects of the turmoil in North Africa on human movements and displacements, both in North Africa and towards Europe, have been well documented by the media and politicians during the last months. Certain member states of the EU have most visibly faced the challenges of migratory movements from North Africa because of their territorial location as ‘gatekeepers’ of the common EU external border in the Mediterranean.

Italy has been a case in point, with Interior Minister Roberto Maroni repeatedly expressing concerns to Italy’s Schengen counterparts and the European Commission, and calling for more ‘European solidarity’ in handling the entries of asylum seekers and undocumented immigrants through its territory, particularly through the island of Lampedusa. The presumed isolation and lack of assistance from the EU even prompted Maroni to question the value of Italy continuing to be a member of the EU.¹

These past weeks have witnessed yet again another test of the capacity of Europe’s immigration and border policies to provide a legitimate, common and fundamental rights-compliant answer to the dilemmas posed by migratory flows in this period of reform and instability in North Africa. Since the beginning of April 2011, Italian authorities have issued temporary residence permits for humanitarian protection to undocumented North African immigrants from Tunisia who arrived in Italy before 5 April 2011.² These residence permits grant them an automatic right to move freely within the Schengen territory and other EU member states. In response to the Italian measure, France introduced internal border checks between the two countries, which have resulted in pushing back hundreds of immigrants holding these permits during the last three weeks³ and the blocking of trains from Ventimiglia, the last Italian town before the French border, carrying some 300 migrants and NGO representatives on 17 April 2011.⁴

* Sergio Carrera is Senior Research Fellow and Head of Section at the Justice and Home Affairs Section at the Centre for European Policy Studies, where Elspeth Guild is Associate Senior Research Fellow, Massimo Merlino is a researcher and Joanna Parkin is a research assistant.

¹ See V. Pop, “Italian minister questions value of EU membership”, *EUobserver.com*, 11 April 2011 (<http://euobserver.com/22/32155?print=1>).

² See the press release of the Italian ministry of interior, “Maroni: ‘Ai migranti un permesso di soggiorno temporaneo’” http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stamp/notizie/immigrazione/000069_2011_04_07_informativa_Maroni_alla_Camera.html_661262205.html).

³ Refer to the report by La Repubblica TV, “A Ventimiglia gli immigrati che sognano la Francia”, 21 March 2011 (<http://www.tg1.rai.it/dl/tg1/2010/articoli/ContentItem-4055960b-e68d-49a0-a28d-310906c5d49f.html>) and http://tv.repubblica.it/home_page.php?playmode=player&cont_id=65313&ref=search).

⁴ See “France angers Italy after blocking migrants at border”, *Euronews.net*, 17 April 2011 (<http://www.euronews.net/2011/04/17/france-angers-italy-after-blocking-migrants-at-border>); see also “France blocks pro-migrant protest”, *Euronews.net*, 17 April 2011 (<http://www.euronews.net/2011/04/17/france-blocks-pro-migrant-protest>); and “France blocks Italian

This has caused a bilateral diplomatic row between the Italian and French governments, which is persisting at the time of writing and whose final solution is likely to come from the EU level in Brussels, and potentially before the Court of Justice in Luxembourg. Other EU member states, such as Germany and Belgium, have also expressed concerns about the Italian measures, but unlike France they have not reintroduced internal border controls with Italy so far. A harsh reaction came for example from the Netherlands, where Prime Minister Mark Rutte declared that “[a]ny Tunisian who got in through the Berlusconi arrangement, must leave the Netherlands”.⁵ Other EU member states, such as Austria, Germany and Belgium, have also expressed concerns about the Italian measures.⁶ The case has finally attracted the attention of the European Commission, which according to information provided in a press briefing on 18 April 2011,⁷ is waiting for an official letter to be issued by the French government providing detailed information on the reintroduction of internal border controls with Italy.

The Franco-Italian affair raises several EU-relevant issues in need of reflection and critical assessment, not least in view of their effects on the legal commitments that both France and Italy have under the EU’s migration policy and border law. Yet also and more generally are the wider implications of the affair for the political legitimacy of the Schengen border regime within and outside Europe, in a case presenting such significant foreign affairs consequences for Europe’s ‘southern neighbourhood’ and Africa.

A first question relates to the legality of the Italian measures and the French border practices in light of European legislation. Both countries are members of the Schengen regime, and consequently they are bound to respect the rules stipulated in the Schengen *acquis* when managing the common EU external borders and guaranteeing the principle of free movement of persons within their internal territories. The Franco-Italian affair especially calls for a test of the consistency of the national immigration measures and actions with the common corpus of legislation on border crossings harmonized by the Schengen Borders Code (SBC).

Beyond these legalistic considerations, a second important aspect is that of the negative repercussions of the case on the general principles of law at the foundations of Europe’s immigration policy and the Schengen system as a whole. More specifically, these are the principles of solidarity and fair sharing of responsibility, and sincere and loyal cooperation, as well as respect of the fundamental human rights of persons on the move.

This paper examines the compatibility of the Italian and French measures with EU border legislation. It tests the national laws and practices in the Franco-Italian affair against EU rules and principles. On the basis of the results stemming from our assessment, the paper argues that the Franco-Italian affair illustrates a ‘race to the bottom’ on European solidarity as well as a challenge to the legitimacy of the Schengen regime and the EU’s border policy.

trains carrying migrants”, *BBC News*, 17 April 2011 (<http://www.bbc.co.uk/news/world-europe-13109631>).

⁵ See P. van der Ploeg, “Tunesiërs uit Italië niet welkom in Nederland”, *NRC Handelsblad*, 8 April 2011 (<http://www.nrc.nl/nieuws/2011/04/08/tunesiers-met-italiaanse-verblijfsvergunning-niet-welkom-in-nederland/>).

⁶ See S. Pignal and J. Chaffin, “Italy’s release of EU migrants strains EU ties”, *Financial Times*, 12 April 2011 (<http://www.ft.com/cms/s/0/0c7f70cc-646e-11e0-a69a-00144feab49a.html#axzz1K9R77IoD>); see also D. Mara, “Germany tells Italy to ‘solve its own problems’ in Tunisian refugee row”, *Deutsche Welle*, 10 April 2011 (<http://www.dw-world.de/dw/article/0,,14980272,00.html>).

⁷ Refer to the European Commission’s Midday Press Briefing of 18 April 2011 (<http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=178405>).

The scope of the case goes beyond an anecdotal example of the temporary reintroduction by an EU member state of internal border controls in the Schengen area. It rather needs to be interpreted as a tangible instance of repressive policy responses emerging in a context of widespread anti-immigration and xenophobic political discourses expressed by certain EU national leaders, which artificially link human mobility (and especially that labelled as ‘illegal immigration’), with insecurity and criminality.

Additionally, it has visible impacts on the fundamental rights and freedoms of those hundreds of persons who have faced ‘the borders’ imposed by France. It also affects the EU’s foreign relations because of the message being sent from these EU member states about the kind of solidarity that the countries and populations in North Africa experiencing democratic uprisings and violence can expect from the EU.

From this viewpoint, not only does the Franco-Italian affair entail several legal and political questions that directly challenge the principles of solidarity and sincere/loyal cooperation between member states in a dispute. It also reveals the very limits and unfinished elements of the EU’s immigration policy.

1. Testing legality in the Franco-Italian affair

The relevance of the affair at the EU level stems directly from France and Italy’s membership in the Schengen regime. Almost 25 years after its inception,⁸ and 16 since its formal implementation, Schengen continues to be one of the central political components of the EU’s Area of Freedom, Security and Justice (AFSJ). The AFSJ has been established and to a large extent developed on the basis of achieving a common external border policy along with a common internal space exempted from internal border controls, where the right to free movement of persons is duly guaranteed and promoted.

The Schengen regime relies on the absence of any controls on persons (independent of their nationality),⁹ “in conjunction with appropriate measures with respect to external border controls”. Membership of the EU does not fully correspond with that of Schengen. Currently, there are 22 EU member states in the Schengen area,¹⁰ to which we need to add 4 non-EU member states (Iceland, Norway, Switzerland and Liechtenstein).

The operability of the Schengen system and the Europeanization of border and immigration policies have led to various important consequences for its members, which are also of special significance when examining the background of the Franco-Italian affair.

First, certain member states, especially those in southern (Mediterranean) and south-eastern Europe have become the territorial external borders of the Union. Their own external borders have been transformed into those of the Schengen territory. They now hold the main responsibility for checking the entry conditions and determining the lawfulness of crossing the territorial external borders for the entire ‘Schengenland’. This transformation has been particularly apparent in relation to the migration movements from Africa to Europe through the Atlantic and the Mediterranean, and their dramatic and humanitarian considerations.

⁸ See the Agreement between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen, 14 June 1985. This was succeeded by the 1990 Convention Implementing the Schengen Agreement of 14 June 1985, OJ L 239, 22.09.2000.

⁹ Refer to Art. 77.1 of the Treaty on the Functioning of the European Union (TFEU).

¹⁰ Five EU member states currently do not participate in Schengen: Bulgaria, Cyprus, Ireland, Romania and the UK.

Second, Schengen relies heavily on a high degree of confidence among the participant states at times of automatically recognizing the positive or negative decisions (border checks)¹¹ taken by any member country to allow entry into the common territory and the crossing of the external border. It is firmly embedded in a profound level of solidarity and cooperation among the participating states.¹² The system has also been founded on a premise of imagining the Schengen system as equivalent to an internal space, where the divide between the internal and external borders of the nation-state (and differentiation between inside and outside) are no longer supposed to be relevant and internal frontier controls constitute an exception to the general rule, which is free mobility.

Third, the abolition of internal border controls has led to a situation whereby immigration policy measures and border control practices by one member state have immediate (or potential) knock-on effects for the other members of the ‘Schengen club’. Border checks are no longer in the exclusive interest of the member state at whose external borders ‘the control’ is supposed to occur, but in that of all EU member states having abolished internal border controls and participating in a common space of free circulation.¹³

Schengen now has a set of consolidated legal contours. Since 2006, the previously fragmented and obscure Schengen *acquis* has benefitted from a common corpus of legislation that has taken the shape of a Community Code on the rules governing the movement of persons across the borders – the SBC. It provides a common and transparent set of harmonized rules and procedures for crossing the external borders of the EU, which are legally binding for (and enforceable upon) all Schengen members.¹⁴ The European Commission has recently presented a revision of the SBC, designed to improve the clarity of the Schengen rules and the efficiency of border crossing procedures.¹⁵

Indeed, no longer can France or Italy behave as freely as they would like to when it comes to powers to control of the admission, expulsion and access to rights by non-EU nationals. The SBC constitutes the materialization of a common set of European rules, standards and general (rule of law) principles that have reduced the margin of manoeuvre and sovereignty of EU member states over the management of human mobility and frontiers.

The next two sections of this paper examine the consistency of the measures taken in the Franco-Italian affair with the SBC, in particular the lawfulness of the Italian residence permits granting an automatic right to free movement and the reintroduction by France of internal border controls.

¹¹ According to Art. 2.10, border checks are to be understood as “checks carried out at border crossing point[s], to ensure that persons, including their means of transport and the objects in their possession, may be authorized to enter the territory of the Member States or authorized to leave it”.

¹² Art. 3.2 TEU states that “[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

¹³ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105/1, 13.4.2006, Recital 6 of the Preamble.

¹⁴ *Ibid.*

¹⁵ See European Commission, *Proposal amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement*, COM(2011) 118 final, Brussels, 10 March 2011.

2. The lawfulness of the Italian temporary-residence permits

The decree of the President of the Council of Ministers (DPCM) adopted in Italy on 5 April 2011 provides for the issue of temporary residence permits for humanitarian reasons in favour of “citizens of North African countries” who arrived in Italy from 1 January 2011 to 5 April 2011.¹⁶

The decree was adopted on the basis of Art. 20 of the Italian Single Text on Immigration, which establishes measures of temporary protection in cases of “exceptional events”.¹⁷ In an attempt to provide grounds for the decree, the Italian authorities passed a second DPCM, which declared in rather contradictory terms a “state of humanitarian emergency in the territory of North Africa in order to effectively contrast the exceptional flow of migrants in the Italian territory”.¹⁸ So, while acknowledging that a humanitarian state of emergency was taking place in North Africa, the decree proposed action to mitigate its effects solely on the Italian territory, whereas – and as discussed in section 3.1 – there was no such emergency in terms of the total number of entries into the Italian territory compared with those taking place in North Africa.

These acts need to be seen in conjunction with the bilateral agreement signed on 5 April 2011 by the Italian government with the Tunisian authorities.¹⁹ Even though the precise content of the agreement has not been made publicly available, it seems that it allows for the “swift repatriation” of migrants from Tunisia who landed on Italian shores after 5 April.²⁰ On 18 April 2011, according to Roberto Maroni, 330 of the approximately 800 Tunisians who were still in Lampedusa had been repatriated.²¹

The modalities through which these returns have been carried out may give rise to tensions in light of the procedural guarantees foreseen by the Returns Directive (2008/115/EC)²² as well as fundamental rights. For a start, those migrants who are pending forced removal have been kept in provisional structures (such as gyms, harbour hangars, stations and other public places) whose compatibility with the safeguards provided by the Returns Directive on specialized detention facilities remains contested. Furthermore, it appears that the migrants have not been

¹⁶ DPCM del 5 aprile 2011 – Protezione temporanea, *Gazzetta Ufficiale*, n. 81 dell’8 aprile 2011.

¹⁷ Dlgs 286/1998, Art. 20, states that “extraordinary measures for the reception [of third-country nationals] in case of exceptional events” establishes the possibility to adopt through a DPCM measures of temporary protection in instances of relevant humanitarian needs, conflicts, natural disasters or other events of special gravity occurring in countries that are not EU member states.

¹⁸ Decreto Del Presidente Del Consiglio Dei Ministri, 7 aprile 2011, Dichiarazione dello stato di emergenza umanitaria nel territorio del Nord Africa per consentire un efficace contrasto all’eccezionale afflusso di cittadini extracomunitari nel territorio nazionale, *Gazzetta*, n. 83 del 11 aprile 2011 (<http://www.gazzettaufficiale.biz/atti/2011/20110083/11A04894.htm>).

¹⁹ Refer to the article “Franco-Italian row over Tunisian migrants escalates”, *EUobserver.com*, 18 April 2011 (<http://euobserver.com>); refer also to “Italy accord with Tunisia, repatriation for new immigrants”, *ANSA.IT*, 6 April 2011 (http://www.ansa.it/web/notizie/rubriche/english/2011/04/06/visualizza_new.html_1526558772.html).

²⁰ On the basis of the agreement, Italy will also donate 6 motorboats, 4 patrol boats and 100 off-road vehicles to the Tunisian police force, to help re-launch regular patrols of the coast (http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/00006_5_2011_04_12_Audizione_Maroni_Commissione_Camera.html_661262205.html).

²¹ See “Tunisia, saranno rimpatriati 800 migranti”, *Rai News 24*, 8 April 2011 (<http://www.rainews24.rai.it/it/news.php?newsid=151696>).

²² See 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, OJ L 348/98, 24.12.2008. In particular these are envisaged in Arts. 12, 13 and 14.

properly notified of the expulsion decisions and final destination of return (or ‘deferred pushback’) adopted by the *quaestor*. Finally, it is also apparent that they have not been offered the possibility to obtain legal advice and lodge an appeal against the adopted decision (Vassallo, 2011).

In any case, one of the most contested issues concerning these temporary residence permits has been the recognition by the Italian authorities of an automatic right of free movement for the holders and the issuance of travel documents to the applicants in addition to the residence permits.²³

In a circular disseminated by the French Minister of Interior Claude Guéant on 6 April 2011,²⁴ the French government implicitly challenged the legality of the temporary residence permits issued by Italy. The circular orders a strict interpretation of the Schengen rules underpinning free movement for third-country nationals (TCNs) in France, effectively blocking the settlement of Tunisian migrants holding the temporary Italian permits. The circular gives strict instructions to regional police authorities when carrying out checks on immigrants, stating that TCNs must hold a valid travel document and emphasizing that the inability of an immigrant to prove s/he has sufficient (financial) resources is a legitimate ground for return. Two weeks after the publication of the circular, the French authorities justified border controls and the blocking of a train carrying immigrants and political activists across the French-Italian border as a response to public order concerns resulting from an “undeclared and unauthorised” demonstration planned by activists to support the free circulation of these immigrants.²⁵

As mentioned in the introduction, the contestation by France of the legality of the Italian permits was accompanied by expressions of concern by Germany and other northern European countries. The interior ministers of Germany, Belgium and Austria have all made threats to reinstate border checks.²⁶ Austrian Interior Minister Maria Fekter warned that Italy’s actions risked the “collapse of the Schengen system”, while German Interior Minister Hans-Peter Friedrich called Italy’s actions “a violation of the Schengen spirit”, accusing Italy of “politicis[ing] the whole Tunisian immigration issue so that everyone in the EU is affected by it”.²⁷ Similar accusations regarding the illegality of Italy’s actions have been echoed by the Belgian Secretary of State for migration,²⁸ and more general fears over the potentially damaging impact on Schengen cooperation are shared by member states including the Netherlands, Finland and Slovakia. That notwithstanding, according to declarations by Roberto Maroni, “[w]e have given the migrants travel documents, and...everything [else] needed, and the European Commission recognized that, it has said that Italy is following the Schengen rules”.²⁹

²³ Art. 2.3 expressly states that the permit allows the concerned person, who is holding travel documents, to freely move across EU member states.

²⁴ Ministère de l’intérieur, de l’outre-mer, des collectivités territoriales et de l’immigration, Autorisations de séjour délivrées à ressortissants de pays tiers par les Etats membres de Schengen, 6 avril 2011 (<http://www.lefigaro.fr/assets/pdf/110407-circulaire-gueant.pdf>).

²⁵ See « Regain de tension entre Rome et Paris au sujet d’un train d’immigrés tunisiens », *France24.com*, 18 April 2011 (<http://www.france24.com/fr/20110417-italie-france-immigration-clandestine-tunisie-train-dignite-bloque-gare-vintimille-frontiere-migrants>).

²⁶ See Pignal and Chaffin (2011) op. cit. and Mara (2011), op. cit.

²⁷ Refer to V. Pop, “Italian minister questions value of EU membership”, *EUobserver.com*, 11 April 2011 (<http://euobserver.com/22/32155?print=1>).

²⁸ See C. Spillman, “North Africa migration tests EU open border system”, *AFP*, 20 April 2011.

²⁹ Quotation derived from Italy’s Sky TG24 TV.

In a press briefing on 18 April 2011,³⁰ the Commission seemed to support the French position by confirming that while the Italian authorities are free to issue temporary residence permits for humanitarian considerations, the latter cannot grant an automatic right of free travel in the Schengen area. That, the Commission argued, is because the applicants must in any case comply with all first-entry conditions stipulated by the SBC, such as that alleged by France on sufficient financial means for subsistence.

Therefore, who is right in this dispute? Have the Italian authorities violated the SBC when issuing the temporary residence permits? The following three aspects need to be taken into consideration when assessing the legality of the Italian decree and the nature of the temporary residence permits for humanitarian protection: first, the significance of compliance with the first-entry conditions when moving within the Schengen territory; second, the nature and scope of the temporary residence permit; and third, the intended public goal pursued by the Italian measures.

2.1 The relevance of first-entry conditions

The abolition of internal border controls and freedom of movement are based on the obligation of the country that is the first point of entry to verify compliance by the individual with a series of criteria determining the legality of the act of crossing the common external border. According to Art. 5.1 of the SBC, the Italian authorities were required to examine the following entry conditions applying to TCNs “for stays not exceeding three months per six-month period”:

- 1) possession of a valid travel document or documents authorizing the crossing of the border;
- 2) possession of a valid visa, in light of the conditions stipulated in the Community Code on Visas;
- 3) justification of the purpose and conditions of the intended stay and “sufficient means of subsistence for the duration of the intended stay and for the return to their country of origin”;
- 4) whether the individual is subject to an alert in the Schengen Information System (SIS) for the purpose of refusing entry into the Schengen territory; and
- 5) whether the person is considered a “threat to public policy, internal security, public health or the international relations of any of the member states”.³¹

Art. 5.4(b) of the SBC states that those TCNs who fulfil all the conditions stipulated in Art. 5.1, except that concerning a visa, and who present themselves at the common EU external border “may be authorized to enter the territories of the Member States if a visa is issued at the border” in light of Council Regulation No. 415/2003 on the issue of visas at the border of 27 February 2003.³²

³⁰ See Pignal and Chaffin (2011) *op. cit.* and Mara (2011), *op. cit.*

³¹ Identifying a way for derogation, Art. 5.4(a) establishes that those TCNs not fulfilling all those conditions but who hold a residence permit or a re-entry visa by one of the member states “shall be authorized to enter the territories of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or re-entry visa”.

³² See Council Regulation (EC) No. 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, OJ L 64/1, 07.03.2003. Art. 1 of the Regulation states that “[b]y way of derogation from the general rule that visas shall be issued by diplomatic and consular authorities...a third-country national who is required to be in possession of a visa when crossing the external borders of the Member States, may exceptionally be issued with a visa at the border”.

When assessing the compliance of the Italian measures with the SBC, both France and the European Commission have agreed that the temporary residence permits issued by Italy cannot grant an automatic right of free movement to the holders, as they will still need to comply with the above-mentioned first-entry conditions stipulated in Art. 5 of the SBC.

It could be argued, however, that these conditions exclusively apply (and therefore can be verified by the competent national border/police authorities) at the first point of entry when crossing the common external border, and not when exercising the freedom of movement within the Schengen area. Thus there should be a legal presumption that those persons crossing the internal borders between Italy and France do comply with the rules provided in Art. 5.

As we point out in section 3, when examining the legality of the reintroduction of internal border checks by France, the SBC does allow member countries to exercise “police powers” in relation to internal borders as long as they do not amount to systematic checks of equivalent effect to the border checks carried out at the common external borders.³³ In our view it is clear that EU member states cannot carry out systematic checks at internal border-crossing points in order to verify that persons on the move comply with first-entry conditions (on this point see a similar position taken by the Court of Justice in section 3 below).

Art. 5.4(c) of the SBC also emphasizes that TCNs who do not fulfil these conditions of entry may be authorized to enter “on humanitarian grounds, on [the] ground of national interest or because of international obligations”. The fact that the Italian residence permits have been issued for humanitarian considerations may shed light as regards the appropriateness of this last provision of the Code and the legality of the right to move by the holders of these permits while still not fully complying with the criteria stipulated in Art. 5 of the SBC. This possibility is also envisaged in the scope of the Returns Directive (2008/115/EC), which states in Art. 6.4 that “Member States may at any moment decide to grant an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued.”³⁴

2.2 Validity of the temporary residence permit

In view of the above-mentioned DPCM of 5 April 2011, a temporary residence permit for humanitarian reasons can be issued to “citizens of North African countries” who entered Italy between 1 January and 5 April 2011. The permit is free of charge and lasts for six months. It can be used to move freely in the Schengen area together with a travel document – either a passport or an ‘alien’s travel document’ issued by the police authorities.

This exception is nonetheless subject to satisfying certain conditions, including the inability of the TCN to apply for a visa in advance and assurance of his or her return to a non-EU country or country of transit.

³³ Still, according to Art. 21(c), the abolition of border controls at the internal borders shall not affect “the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents”.

³⁴ Moreover, this provision continues by saying, “[w]here a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay”. Refer to 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, OJ L 348/98, 24.12.2008.

The decree specifies that “socially dangerous persons” or those who had been notified of an expulsion order before 1 January 2011 cannot be granted the temporary permit.³⁵ Despite the explanatory note issued by the Italian interior ministry, many doubts remain about the personal scope of the measure. First, it is clear that the scope goes beyond those individuals holding Tunisian nationality. But which countries fall under the definition of “North African countries”? Second, could individuals who arrived in Italy without being stopped and identified by the authorities have been granted the permit? If that were the case, how would they prove the date of arrival?

The decree stipulates that “foreigners who have not been issued the residence permit (or to whom it has been withdrawn) should be pushed back or expelled”.³⁶ Individuals who arrived in Italy a few hours after midnight on 5 April sadly will fall in this category. It remains difficult to understand how the “state of emergency in North Africa” that justified the use of the temporary residence permit can cease to exist from that date onwards.

As stated above, the Commission has not contested the legality of the residence permits per se, but rather the granting of an automatic right of free movement in the Schengen area. With respect to the validity of the residence permits issued by Schengen member countries under EU law, following Art. 34 of the SBC, Italy was required to notify in advance the European Commission about the issue of the decree, especially given the potential repercussions that the latter could be expected to have on the entire Schengen membership, and most directly for neighbouring countries like France. It appears that Italy did comply with this obligation by informing the Commission about it. Furthermore, while Italy retains national competence in issuing residence permits,³⁷ the latter must also comply with Decision 2006/688/EC on asylum and immigration information exchange. This Decision calls on member states to communicate national measures in the area of asylum and immigration “likely to have a significant impact on several member states or on the European Union as a whole”.³⁸

2.3 The intended public goal

What was the intended public goal driving the adoption of the decree granting temporary residence permits to undocumented North African immigrants from Tunisia? Was the purpose to grant humanitarian protection to these individuals for a period during which return to their country of origin was not practically possible? Or, was the intention rather a political strategy by Italian authorities to force (or plumb the depths of) European solidarity by delivering administrative documents encouraging their holders to leave Italy and travel to other Schengen countries such as France?

³⁵ The limitations established in Art. 2.2 concern: a) “socially dangerous” persons according to Art. 1 of Law No. 27/1956, b) addressees of an expulsion order notified before 1 January 2011, and c) individuals denounced for a crime included in Arts. 380-381 of the penal code.

³⁶ See Art. 2.8.

³⁷ Yet refer here to Council Regulation (EC) No. 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ L 157/1, 15.06.2002, which stipulates the categories of data that must be contained within residence permits issued by member states and the range of technical specifications necessary to prevent forgery. See also Art. 2 and the Annex of this Regulation, and Council Regulation (EC) No. 380/2008 of 18 April 2008 amending Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ L 115/1, 29.4.2008.

³⁸ According to Art. 1, information must be transmitted “as soon as possible, and at the latest when it becomes publicly available”. See the Council Decision of 5 October on the establishment of a mutual information mechanism concerning Member States’ measures in the areas of asylum and immigration, OJ L 283/40, 14.10.2006.

As stated above, the adoption of the decree first needs to be understood in a national political context, in which the Italian ministry of interior has continually raised complaints concerning the lack of solidarity of other European countries and Brussels. In addition, Italian politicians close to the government have fuelled anti-immigration and xenophobic discourses, justifying the implementation of ever-more restrictive policy measures for immigration control. By way of illustration, two politicians from Maroni's anti-immigrant Lega Nord party even suggested that weapons should be used in order to protect Italy against "the invasion".³⁹

Beyond the façade of the residence permits for humanitarian protection, the primary goal pursued by the Italian authorities has been to promote the mobility of those TCNs holding the permits. This was initially made evident by the declarations of the interior minister when he presented the decree before the Chamber of Deputies: "A temporary residence permit will be given to those migrants who have expressed their intention to go to another EU Member State."⁴⁰ Moreover, the real objective of the decree emerges quite transparently when reading the text of act, which includes an express reference to the automatic right that it confers to the holder to circulate freely in all the EU member states.⁴¹ This goes along with the Italian practice of additionally issuing travel documents to those Tunisian immigrants who lacked them.⁴²

Can the Italian residence permits entail an automatic right to move freely in the Schengen area? The SBC recognizes a right of free movement for everyone in the EU's Schengen area. While EU nationals and their TCN family members acquire this right directly from the provisions of the Treaty on the Functioning of the European Union (TFEU) on citizenship of the Union, TCNs in the Union acquire it from those provisions of the EU Treaties dealing with the internal market. The SBC places restrictions on this internal market right, limiting the right of TCNs resident in any one member state to free movement for a maximum of three months out of any six in the territory of other member states. To enjoy this right the TCN must have been admitted at the common external frontier in accordance with the SBC and subsequently entitled to move from one member state to another for a maximum of three months out of every six (Guild, 2005). The SBC permits member states to issue residence permits to those who otherwise do not meet the requirements for entry at the external borders, but once the residence permit has been issued and the member state that issued it has notified the Commission under Art. 34 of the SCB, the document has the equivalence of a visa for automatic entry anywhere in the Schengen space.

Yet if indeed the main public goal intended by the decree has been to encourage North African immigrants to leave the country, it could be concluded that the decree does stand at odds with the principle of sincere and loyal cooperation enshrined in Art. 4.3 of the new version of the Treaty on the European Union (TEU), which states that

³⁹ See V. Pop, "Barroso warns of extremism in immigration debate", *EUobserver.com*, 14 April 2011 (<http://euobserver.com/22/32181>).

⁴⁰ See the full speech of the minister on the website of the ministry of interior (http://www.interno.it/mininterno/export/sites/default/it/assets/files/20/0011_Informativa_Ministro_Lampedusa_Camera.pdf).

⁴¹ Art. 2.3 states that the residence permit allows the holder, who is provided with travel documents, to move freely within the EU member states, in conformity with the provisions of the Schengen Agreement of 14 July 1995 and of the communitarian law.

⁴² For instance, according to a press release, the police office (*Questura*) in Terni released 79 temporary permits together with travel documents. See "Immigrazione: da questura terni 79 permessi soggiorno a Tunisini", *AGI News*, 19 April 2011 (http://www.agi.it/perugia/notizie/201104191430-cro-rt10141-immigrazione_da_questura_terni_79_permessi_soggiorno_a_tunisini).

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.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

In the scope of the Schengen regime, and as we have highlighted in section 1 above, this principle is of fundamental relevance because of the high degree of mutual trust and close (and constant) cooperation that is supposedly required among member states for it to effectively function (and continue to be legitimate) in practical terms.⁴³

3. French reintroduction of internal border controls

In response to the Italian decree and the issue of temporary residence permits, France reintroduced internal border checks between the two countries. The controls have materialized in the 'pushing back' of several hundred immigrants holding the Italian temporary-residence permits to Italian territory, and lately also in the blocking of NGO representatives from crossing the French-Italian border.

Although, and as discussed below, France is not the first member state to temporarily reimpose internal border controls since the implementation of the Schengen regime at the start of the 1990s, the significance of the Franco-Italian affair has implications for the principles of solidarity and loyal cooperation, along with the fundamental rights and freedoms of individuals. It likewise has a foreign affairs dimension and sends a 'message abroad' by the EU on its immigration and border policies in the post-revolutionary and war context of the southern Mediterranean neighbourhood.

Similar to the situation in Italy, the French practices are also taking place during a period in which the French national government has publicly announced (ahead of regional elections) a central policy priority to expel thousands of irregular immigrants from the country. An announcement that 25,500 irregular immigrants had been removed from French territory in the first three months of 2011⁴⁴ preceded the passing of a new immigration law in April 2011, which included measures to strengthen the detection, detention and expulsion of undocumented migrants.⁴⁵ It is against this background of increasingly stringent controls on irregular migration that the French government has reiterated in several declarations its refusal to accept undocumented immigrants from Tunisia.⁴⁶

⁴³ Art. 16 of the SBC on "Cooperation between Member States" notes that "1. The Member States shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border controls, in accordance with Articles 6 to 15. They shall exchange all relevant information."

⁴⁴ See the article, « Brice Hortefeux au Figaro: L'immigration illégale doit baisser et elle baissera » on the website of the French ministry of interior, 1 April 2011 (http://www.interieur.gouv.fr/sections/a_la_une/toute_1_actualite/immigration/brice-hortefeux-au-figaro-immigration-illegale/view).

⁴⁵ See the article, « Adoption par le Sénat, en deuxième lecture, du projet de loi relatif à l'immigration, à l'intégration et à la nationalité française », on the website of the French ministry of interior, 14 April 2011 (http://www.interieur.gouv.fr/sections/a_la_une/toute_1_actualite/immigration/adoption-senat-projet-loi-immigration-integration/view).

⁴⁶ Refer for instance to the press release of the French ministry of interior, « Politique migratoire européenne – Brice HORTEFEUX : Il n'y a pas d'avenir pour les immigrés clandestins », 24 February 2011 (http://www.interieur.gouv.fr/sections/a_la_une/toute_1_actualite/immigration/point-presse-politique-migratoire-europeenne-rome/view) or the response of Minister of Interior Brice Hortefeux to the parliamentary question of Deputy Philippe Meunier of 17 February 2011.

The issue of whether the French practices are consistent with EU border laws, and particularly the SBC, needs to be scrutinized from the perspective of the legality of reintroducing internal border checks with Italy. One of the core features substantiating (and giving an identity to) the Schengen regime is the absence of internal border controls. According to the SBC, the internal borders of the Schengen territory may be crossed at any point without a border check on persons “irrespective of their nationality”.⁴⁷

The official dismantling of internal frontiers has gone hand in hand with the creation and further consolidation of the principle of free movement of persons, which is now stipulated in Arts. 67.2 and 77 TFEU and is recognized as a fundamental right in Art. 45 of the EU Charter of Fundamental Rights.⁴⁸

This general rule of free movement has nonetheless been accompanied by several exceptions and derogative clauses in the hands of EU member state authorities. The SBC still permits the exercise of some “police powers” by competent national authorities in relation to “checks within the territory”, as long as this exercise “does not have an effect equivalent to border checks”⁴⁹ and the checks “do not have border control as their objective”.⁵⁰ These police powers must not constitute systematic border checks either and should be carried out on the basis of ‘spot-checks’.⁵¹

The limits of the exercise of police powers by France when implementing the SBC were (by coincidence) subject to a recent ruling by the Court of Justice in Luxembourg. In the *Melki* case (C-188/10),⁵² the contested measure was French national legislation allowing police authorities, within an area of 20 km from the land border of a Schengen member state, to check the identity of any person not ‘at the borders’ but rather circulating within its national territory. The Court ruled against France and considered these police checks disguised border controls. The Court held that the SBC precludes

national legislation which grants to the police authorities of the Member States in question the power to check, solely within an area of 20 km from the land border of that State..., the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.⁵³

It is evident that the French practices in the Franco-Italian affair go beyond sporadic police controls within the French territory or ‘spot-checks’ at the border with Italy. They rather constitute a systematic reintroduction of internal border checks with Italy, whose main objective is border control at the French-Italian border of Tunisian immigrants holding the Italian temporary-residence permit.

⁴⁷ See Art. 20 of the SBC.

⁴⁸ Art. 45 of the EU Charter states that “1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.”

⁴⁹ See Art. 21(a) SBC.

⁵⁰ *Ibid.*, paragraph (i) SBC.

⁵¹ *Ibid.*, paragraphs (iii) and (iv) SBC.

⁵² Court of Justice, Joined Cases C-188/10 *Aziz Meki* and C-189/10 *Sélim Abdeli*, 22 June 2010.

⁵³ See paragraph 75 of the judgment.

Concerning the possibilities conferred by the SBC to national authorities to derogate from the general rule of freedom of movement, the Code does in fact offer the possibility to member states to reintroduce border controls “exceptionally” at internal borders, subject to a number of rules provided in Arts. 23-31. The temporary reintroduction of border controls is justified in those situations where “there is a serious threat to public policy or internal security...[and for] no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days”.⁵⁴

Art. 24 of the SBC provides for the procedure to be applied for “foreseeable events”. Art. 25 confers the possibility to Schengen member states to “exceptionally and immediately reintroduce border control[s] at internal borders” in those cases where considerations of public policy or internal security call for “urgent action”.

As the appendix to this paper illustrates, the reintroduction of internal border controls in the Schengen territory is not peculiar to the Franco-Italian affair. Since the beginning of the 1990s, several EU member states have introduced internal border controls, for instance during large-scale sporting events as in the case of Germany for the 2006 football World Cup, and for international political meetings, including Italy’s reinstatement of border checks during the 2009 G8 summit in L’Aquila.⁵⁵ While sensitive political demonstrations, ‘terrorist threats’ and ceremonies of national importance have all been cited as grounds for reimposing border controls, only a small handful of cases since the 1990s have been linked to the desire to restrict the immigration of TCNs (Groenendijk, 2004).⁵⁶

It is striking to note that one such incident that occurred at the same place along the French-Italian border (Ventimiglia) bears a strong resemblance to the recent Franco-Italian affair. In March 1999 France closed the border to prevent the entry of large numbers of Italians and Albanians arriving by train with the aim of participating in a demonstration in Paris to support undocumented migrants. In this case, however, the French actions did not provoke the political tensions observed recently. Indeed, it is surprising that the Franco-Italian affair of April 2011 provides only the second example in the history of Schengen whereby the temporary reintroduction of border controls has elicited a negative response from another member state.⁵⁷

That notwithstanding, and as the SBC expressly states, “in an area where persons may move freely, the reintroduction of border controls at internal borders should remain an exception”.⁵⁸ The legality of the French border practices needs to be determined with respect to compliance with the criteria established by the SBC on the exceptional reintroduction of systematic, internal border checks, especially in relation to the following four factors: i) public policy and state-of-emergency considerations; ii) the principle of proportionality; iii) procedural requirements; and iv) fundamental rights and non-discrimination.

⁵⁴ See Art. 23(1) SBC; moreover, in accordance with Art. 23(2),

[i]f the serious threat to public policy or internal security persists beyond the period provided for in paragraph 1, the Member State may prolong border control[s] on the same grounds as those referred to in paragraph 1 and, taking into account any new elements, for renewable periods of up to 30 days, in accordance with the procedure laid down in Article 26.

⁵⁵ See European Commission, *Report on the application of Title III (Internal Borders) of Regulation (EC) No. 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, COM(2010) 554 final, Brussels, 13 October 2010.

⁵⁶ Refer to the appendix of this paper.

⁵⁷ The only other occasion stemmed from France’s refusal to lift its internal border controls in 1995, owing to its concerns about Dutch policy on drugs.

⁵⁸ See Recital 16 of the SBC.

3.1 Public policy and the politics of emergency

The first factor to be examined is the appropriateness of the French view of the case as one requiring “urgent and immediate action”, as well as that of classifying it as a “serious threat to public policy and internal security”. Can the actual volumes of migratory flows at stake and the nature of the planned demonstration by civil society representatives be considered threats to public policy or internal security and in need of emergency action?

How many immigrants are we talking about? In 2011 fewer than 28,000 persons have landed in Italy, among whom 23,000 are Tunisians and 4,680 are asylum seekers from Libya.⁵⁹ According to information provided by the media, the total number of immigrants subject to the French border controls have been a few hundred – no more than 400 individuals. When comparing this data with, for instance, the total number of entries by non-EU nationals across the common EU external borders through airports and other borders, the amount is insignificant.

Based on data gathered by the Council of the European Union, in *one-week's time* the total number of entries (external border crossings) through the EU external borders is 1,955,178!⁶⁰ When looking at these statistics on a yearly basis, and being aware of the caveats involved in making such calculations, it could be estimated that around 61 million TCNs with no visa and 44 million TCNs with visas entered the EU in 2009. This would amount to a total of approximately 105 million entries by TCNs during 2009.

Indeed, as the statistics offered by the United Nations High Commissioner for Refugees (UNHCR, 2011) reveal, the real ‘emergency’ has been that taking place not in Europe but rather on the other side of the Mediterranean, where 550,680 persons moved from Libya to neighbouring countries (and almost half of them went to Tunisia).

Doubts concerning the extent to which the migratory flows from Italy could constitute a “serious threat to public policy” for France were also raised by Commissioner for Home Affairs Cecilia Malmström, at her press briefing on 1 April 2011.⁶¹ Following her visit to Tunisia, the Commissioner answered in the following manner the question of whether the French authorities were entitled to send people back to Italy: “There are no borders so they can’t. Schengen is there so you are not allowed to do checks at the border. Because there is Schengen, [internal border controls] can only be evoked if there is a serious threat to public security and for the moment that is not the case, so in principle no.”

The low number of entries from North Africa to Italy, and even more so those from Italy to France, justify the non-application of the EU Temporary Protection Directive (2001/55/EC).⁶² This Directive, which has not been used since its adoption, provides common minimum standards “for giving temporary protection in the event of a mass influx of displaced persons

⁵⁹ See the declaration by Interior Minister Roberto Maroni of 12 April 2011 on the website of the Italian ministry of interior (http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stamp/notizie/immigrazione/000065_2011_04_12_Audizione_Maroni_Commissione_Camera.html).

⁶⁰ Council of the European Union, Results of the Data Collection Exercise, 13267/09, Brussels, 22 September 2009.

⁶¹ Refer to the statement by Commissioner Malmström following her visit to Tunisia, in the European Commission Midday Press Briefing of 1 April 2011 (<http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=177156>).

⁶² 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, OJ L 212/12, 7.8.2001.

from third countries”.⁶³ The main reason it has not been applied is that so far the numbers of displaced persons coming from North Africa to the EU have not been large enough for the situation to be considered a “mass influx”.

The French minister of interior was said to have taken the decision to suspend train services on the basis of a request by the police chief of the Alpes-Maritime, who cited “*risques de trouble manifeste a l’ordre public*”.⁶⁴ Here the French authorities appear to take a wide interpretation of (intentions of) civil disobedience or public disorder. Flyers circulated on the Internet ahead of the event, dubbed the ‘Train of Dignity’, called on French and Italian human rights activists, lawyers and media representatives to board the train from Ventimiglia in order to “accompany and protect” migrants as they crossed the French-Italian border.⁶⁵ The demonstration, primarily organized by the association ‘Ya Basta’, a network of Italian pro-immigrant rights organizations, also called on activists to form “welcome groups” to meet migrants as they arrived in Nice and Marseille.⁶⁶ Ultimately, the event gathered 200-300 French and Italian demonstrators to accompany 60-100 Tunisian immigrants. Upon the suspension of train services, the demonstrators attempted to march to the French consulate but were blocked by riot police. There were no reports of violence during the episode.⁶⁷

While France holds a certain margin of discretion to determine what constitutes ‘public policy’, French authorities are not completely free to put into practice any interpretation of this concept. The proportionality test, which we discuss in the next subsection, closely applies in this respect as well. Furthermore, the entry into force of the Treaty of Lisbon implies an expansion of the jurisdiction of the Court of Justice in Luxembourg to rule on public order measures/exceptions by member states concerning checks on persons at internal borders.⁶⁸

3.2 Proportionality

The principle of proportionality is of especial relevance when testing the adequacy, suitability and necessity of the French measures. Art. 23.1 of the SBC provides that “[t]he scope and duration of the temporary reintroduction of border control[s] at internal borders shall not exceed *what is strictly necessary to respond to the serious threat*”. (Emphasis added.)

⁶³ Art. 2(a) clarifies that this will be the case especially if “there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection”.

⁶⁴ See the article « Train bloqué à Vintimille: l’UE conforte la décision de Paris », *Le Figaro*, 18 April 2011 (<http://www.lefigaro.fr/international/2011/04/18/01003-20110418ARTFIG00444-train-bloque-a-vintimille-l-ue-conforte-la-decision-de-paris.php>).

⁶⁵ See for instance the website ‘Citoyens des Deux Rives’, http://www.citoyensdesdeuxrives.eu/better/index.php?option=com_content&view=article&id=2189:le-17-avril--genes--vintimille--marseille--train-de-la-dignite&catid=59:agenda&Itemid=94

⁶⁶ See the website ‘Ya Basta’ (http://www.yabasta.it/spip.php?article1510&var_recherche=train%20dignite).

⁶⁷ A. Coppola, “French Border Police Block Italian Trains”, *Corriere della Sera*, 18 April 2011 (<http://www.corriere.it/International/english/articoli/2011/04/18/coppola-french-block-italian-migrants-trains.html>).

⁶⁸ Art. 68.2 of the former Treaty Establishing the European Community had stated that “[i]n any event, the Court of Justice shall not have jurisdiction to rule [on] any measure or decision taken pursuant to Article 62.1 relating to the maintenance of law and order and the safeguarding of internal security”.

Moreover, Art. 5.1 of the Directive adds that “[t]he existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council”.

Here again, it is far from evident the extent to which the movement of a few hundred people and the planned demonstration by NGO representatives could actually constitute a “serious threat” to France’s public policy and internal security. Nor is it obvious that the systematic reintroduction of internal border controls on human movement from Italy was “strictly necessary” or whether there were other less restrictive (and onerous) options for the persons involved. A similar position concerning the disproportionate attention and concern raised by this affair was expressed by European Council President Herman Van Rompuy, when he declared that “of course there’s a risk of migration, but we must not exaggerate it”.⁶⁹ Warnings against inflating the scale of the migration have been echoed by Commissioner Cecilia Malmström.⁷⁰

The note delivered by the French ministry of interior on 6 April 2011⁷¹ argued that the reintroduction of border checks was based on the fact that the permit holders failed to meet the following conditions: first, being in possession of a valid travel document; second, being a holder of a valid residence permit notified by the issuing member state to the European Commission; third, having sufficient means of subsistence; and fourth, not being considered a threat to public policy and internal security. Among these requirements, that related to the financial means of subsistence has been of particular relevance for the French authorities.

According to some media reports, it appears that the financial subsistence condition is being applied at the French Italian border, with police demanding that holders of the Italian temporary-residence permit prove that they have €31 per day (a total of around €900 a month) for their entry into French territory.⁷² The concordance of this requirement with proportionality is also questionable. Does the SBC allow all Schengen members to apply different thresholds of financial coverage? We are of the opinion that this financial requirement is not lawful if Italy properly notified the European Commission about the issue of the temporary residence permits in accordance with Art. 34 of the SBC (see subsection 2.2 above).

3.3 Procedural requirements

The reintroduction of internal border checks equally needs to comply with a number of procedural requirements. In accordance with Art. 25.2 of the SBC, France was under the obligation to notify the other EU member states and the European Commission “without delay” about the reintroduction of internal border checks “requiring urgent action” and to supply “the reasons justifying the use of this procedure”. More specifically, the French authorities needed to provide the following information: the reasons for the reintroduction (giving details of the

⁶⁹ Quoted in V. Pop, “Franco-Italian row over Tunisian migrants escalates”, *EUobserver.com*, 18 April 2011 (<http://euobserver.com/?aid=32199>).

⁷⁰ See F. Ewers, M. von Rohr and C. Schult, “Refugee Influx Exposes Limitations of European Solidarity”, *Spiegel Online*, 23 April 2011 (<http://www.spiegel.de/international/europe/0,1518,757666,00.html>).

Refer also to the previous version of the Protocol integrating the Schengen *acquis* into the framework of the European Union, which was added by the Amsterdam Treaty and which stipulated in Art. 2.1 that “[i]n any event, the Court of Justice shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security”. It is interesting to note that it was on the initiative of France that Art. 68.2 was introduced during the negotiations of the Amsterdam Treaty.

⁷¹ Ministère de l’intérieur, de l’outre-mer, des collectivités territoriales et de l’immigration, Autorisations de séjour délivrées à ressortissants de pays tiers par les Etats membres de Schengen, 6 avril 2011 (<http://www.interieur.gouv.fr>).

⁷² See for example, “Migrant spat puts strain on EU open borders”, *France24.com*, 23 April 2011 (<http://mobile.france24.com/en/20110419-tunisia-migrant-train-blockade-comes-under-legal-attack-ventimiglia-french-police-italy>).

events said to constitute “a serious threat to public policy or internal security”), its scope and the names of authorized crossing points, as well as its date and duration.⁷³

France (or the Council) is also under the obligation to inform the European Parliament “as soon as possible of the measures taken”.⁷⁴ The French authorities will be required to present a report on the reintroduction of the border controls before the European Parliament, the Council and the Commission outlining “the operation of the checks and the effectiveness of the reintroduction of border control[s]”.⁷⁵

It is at present difficult to determine the extent to which France has complied with all these procedural steps, a majority of which are deemed central from the perspective of accountability and democratic scrutiny of the national measures derogating the principle of free movement of persons. The European Commission has declared that France is intending to send an official letter providing this information, which in principle will not be made public.⁷⁶

3.4 Fundamental rights, non-discrimination and administrative guarantees

The border checks carried out by the French authorities at Ventimiglia have mainly targeted undocumented North African immigrants from Tunisia holding an Italian temporary-residence permit. The compatibility of this kind of control with the principle of non-discrimination constitutes another issue of concern from a legal point of view. The SBC highlights a number of obligations that national border guards must fulfil in the performance of their duties in the implementation of the SBC. In particular, Art. 6 of the Code (on the conduct of border checks) stipulates that

1. Border guards shall, in the performance of their duties, fully respect human dignity. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.
2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁷⁷

The focus on this specific category of immigrants and the presumption that only they do not comply with the set of first-entry conditions (especially that of financial subsistence) stipulated in Art. 5 of the SBC reveals a tension between the French border practices and the principle of non-discrimination on the basis of racial or ethnic origin, which is also enshrined in the EU Treaties, the EU Charter of Fundamental Rights and secondary legislation.⁷⁸

⁷³ According to Art. 24 of the SBC, “Member States may even prolong border control at internal borders after having notified the Commission and the other member states”. See also Art. 26 of the SBC.

⁷⁴ See Art. 27 of the SBC.

⁷⁵ Refer to Art. 29 of the SBC.

⁷⁶ According to Art. 31 of the SBC, “[a]t the request of the Member State concerned, the other Member States, the European Parliament and the Commission shall respect the confidentiality of the information supplied in connection with the reintroduction and prolongation of border controls”.

⁷⁷ Refer also to Recital 7 of the SBC, which states that “[b]order checks should be carried out in such a way as to fully respect human dignity. Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued.”

⁷⁸ See Art. 19 TFEU and Art. 21 of the Charter of Fundamental Rights of the European Union, OJ C 83/02, 30.03.2010; see also paragraph 31 of the Preamble to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30.04.2004.

Furthermore, any assessment of the legality of the French reintroduction of internal border controls and the Italian decree granting temporary residence permits should not distract our attention from the impact of these national measures and practices on the fundamental rights (e.g. human dignity) and freedoms of those targeted by coercive measures – especially given the humanitarian considerations underlying their migratory background.

It is to be hoped that the French border checks have complied with the set of administrative guarantees envisaged by the SBC in the treatment of TCNs when refusing entry. Art. 13 of the SBC sets out the following obligations for national authorities in refusing entry: first, the issue of a substantiated decision stating the precise reasons for refusal in a standard form; and second, the right to lodge an appeal (which shall have no suspensive effect on the decision to refuse entry), along with a written indication of the contact points able to provide information or representatives competent to act on the individual's behalf.⁷⁹

Nor should we forget the repercussions of the French measures on the rights and freedoms of the representatives from civil society groups who accompanied the migrants on the trains blocked by the French authorities during the events of 17 April 2011, and especially their rights to freedom of movement and freedom of assembly and demonstration as enshrined in Art. 12 of the EU Charter of Fundamental Rights. As noted above, the planned demonstration was of a peaceful nature and might be difficult to categorize as a threat to public policy and public security. Indeed, following the event, France's primary justification for blocking the demonstration was that it had not been declared and authorized by the authorities in advance.⁸⁰

4. A race against solidarity: Conclusions

This paper has tested the legality of actions taken in the Franco-Italian affair with respect to the Schengen regime and has found that neither Italy nor France are exempted from difficulties in justifying the compliance of their national measures and practices with EU border law and the general principles of the Schengen regime. The actions of both countries raise several concerns from the viewpoint of EU law and their obligations under the SBC.

As regards the temporary residence permits issued by Italy for humanitarian considerations, we have argued that their lawfulness depends not on the systematic verification of the conditions of first entry through the common external borders (such as that of sufficient financial resources for subsistence), but rather on their compliance with the principle of sincere and loyal cooperation. Their legality is conditioned upon the extent to which the intended public goal of the Italian decree has been to offer proper humanitarian protection and access to fundamental rights to those Tunisian immigrants who cannot be returned to their country of origin, and not to force 'European solidarity' through the back door by encouraging them to leave the country and exercise freedom of movement to other Schengen states.

It is evident in our view, however, in light of the political discourses backing up the enactment of the decree and the emphasis given by its wording to the granting of an automatic right to move elsewhere in the EU, that the decree constitutes a violation of the principle of sincere and loyal cooperation.

⁷⁹ Art. 13.2 of the SBC continues by saying that "[w]ithout prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry".

⁸⁰ See « Regain de tension entre Rome et Paris au sujet d'un train d'immigrés tunisiens », *France24.com*, 18 April 2011 (<http://www.france24.com/fr/20110417-italie-france-immigration-clandestine-tunisie-train-dignite-bloque-gare-vintimille-frontiere-migrants>).

Concerning the reintroduction of internal border controls by France, in our assessment the French authorities have practised systematic border checks targeting those North African immigrants holding the residence permits granted by Italy since the adoption of the decree in the first week of April. We have doubts as to whether this migratory flow and the planned demonstration in Ventimiglia provide appropriate grounds for France to label them as serious threats to public order and internal security, given the volume of human movement (a few hundred persons) and the pacific nature of the planned demonstration supporting the claims of immigrants. France would also have difficulties in properly justifying the urgency of the situation in order to use the emergency procedure envisaged by the SBC for the reintroduction of border checks..

The relation between the French measures and the principle of proportionality is also a difficult one. The kinds of border checks that have been carried out appear to us to be disproportionate and exaggerated when considering the actual nature of the events. It remains to be seen how France will provide convincing grounds for defending their 'strict necessity' or whether there could have been other less restrictive and intrusive options for the freedom of movement and access to solidarity by the persons involved.

The reimposition by France of internal border controls can be said to amount to an excessive burden upon a fundamental EU right and freedom, i.e. the free movement of persons, which should always prevail as the general rule over the application of very well justified exceptions by EU member state authorities.

Sadly, the French practices also send a clear message concerning the lack of solidarity, not only with respect to its neighbour Italy, but also and perhaps more importantly towards the fundamental rights and freedoms of those North African immigrants who are holders of Italian administrative documents and who seek to exercise their legitimate right of freedom of movement in the Schengen territory. A similar message is also being sent by the French authorities abroad to the countries and populations of the North African states in the midst of democratic reform or war. The targeting of the border checks against this particular group of people is problematic in relation to the principle of non-discrimination on the basis of ethnic origin and nationality as well as the administrative guarantees envisaged by the SCB for the conduct of border guards while carrying out border checks.

The Franco-Italian affair therefore reveals a rather shameful 'race to the bottom' by two Schengen members (one of which belonged to the original five Schengen members, i.e. France) as regards the principles of solidarity, mutual respect, loyal cooperation and fundamental rights protection. One would not expect these sorts of policies 25 years after the kick-off of Schengen. It is not just the legal commitments of both EU member states that are at stake in this case, but also the overall consistency and legitimacy of Europe's migration policy, both internally and abroad.

The democratic uprisings in the North African states and the subsequent war in Libya should instead constitute a unique opportunity for all Schengen member states and the EU as a whole to develop common policy responses that put solidly into practice the principles of solidarity and the fair sharing of responsibility in migratory policy affairs. The entry into force of the Treaty of Lisbon has provided that opportunity by positioning these principles at the heart of the common EU immigration, asylum and border policies. Notably, Art. 80 of the TFEU now stipulates that

[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts

adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.⁸¹

It is time for the EU and its member states to give practical shape to the principle and notion of ‘solidarity’ beyond formalistic political statements and nice words. While the EU Treaties do not provide a definition of solidarity and fair sharing of responsibility, nor of their goals or fundamentals (Vanheule et al., 2011), it is in our view central that their development should broadly transcend strengthening border controls and FRONTEX (the EU Border Agency), support in the return of undocumented immigrants and EU funding resources. The Franco-Italian affair (yet again) shows how ineffective and counterproductive security (border control)-focused measures and restrictive immigration policies are with respect to dealing with the management of human flows in way that fully complies with EU basic, general principles.

Freedom of movement and labour immigration should not be seen as ‘a burden to share’ for the EU and its member states, but rather as an opportunity for all the parties involved. A wider and multidimensional understanding of solidarity needs to encompass the consolidation and further development of a common EU labour immigration policy, which would be coherent with Europe’s labour market needs and competitiveness. Such a policy should be driven by a rights- and fair treatment-based approach, ensuring openness, flexibility, compatibility with other policies (such as employment, non-discrimination and social inclusion) and effectiveness (Carrera et al., 2011).⁸²

National measures and practices such as those witnessed between France and Italy undermine basic legal rules and principles of the EU’s AFSJ and the Schengen regime. They also exert negative repercussions on the EU’s relations with the non-EU countries whose nationals are being subject to repressive immigration policies and discourses at various governance levels, and more widely with Africa.

The European Commission should therefore react more strongly and ‘on time’ – by making swift use of current enforcement mechanisms for non-compliance with EU law and potentially devising new ones ensuring an automatic suspensive effect of contested national measures having an impact on European fundamental freedoms and rights (Carrera and Atger, 2010) – when disputes take place, such as those occurring at the Franco-Italian border. It should show stronger leadership and a communication strategy against populist and nationalist anti-immigration rhetoric (policies and practices) by European leaders. The promotion and scrutiny of the proper implementation of existing standards on fundamental human rights in other international and regional arenas across the EU member states should become a central priority. The EU should devise an appropriate monitoring system, ensuring the daily implementation of European border laws (and their compliance with fundamental rights and EU freedoms) across common external borders (air, land and sea), and meeting the principles of impartiality, objectivity and transparency (Carrera, 2010). The European Parliament should also be immediately and fully informed about all the details of such cases by the relevant parties involved, to ensure full democratic scrutiny and accountability.

The current version of the Schengen system as outlined by the 2006 SBC must not be revised following the nationalistic and opportunistic goals expressed by the French and Italian

⁸¹ Refer also to Art. 2 of the TEU, which identifies solidarity as one of the key values of the EU, and Art. 3.3 TEU, which stipulates that the EU “shall promote economic, social and territorial cohesion, and solidarity among Member States”.

⁸² This would also be in line with Art. 67.2 TFEU, which calls for the development of a common immigration policy “based on solidarity between Member States, which is fair towards third country nationals”.

governments in their bilateral meeting of 26 April 2011.⁸³ As an outcome of that summit, Silvio Berlusconi and Nicolas Sarkozy issued a joint letter to Herman Van Rompuy and European Commission President Jose Manuel Barroso, calling for the upcoming June 2011 European Council to examine new measures to reinforce ‘security’ in Schengen, such as “the possibility to temporarily re-establish internal border controls in case of exceptional difficulties in the management of common external borders”.⁸⁴

This proposal is surprising. As discussed in this paper, the SBC already envisages the possibility for a member state to temporarily reintroduce internal border controls in cases where “there is a serious threat to public policy or internal security”. This possibility, however, is an ‘exception’ in the hands of national authorities and it is firmly subject to a number of procedural requirements and subject to the principles of proportionality, solidarity, accountability and fundamental rights. A new legislative reform exclusively destined to widen (even further) the room for manoeuvre by EU member state governments to abolish the current Schengen rules and the principle of freedom of movement (and evade their current legal commitments) would not just contravene these basic rule of law principles, and more generally, the EU Treaties. Such legislative reform would also constitute a major step backwards in European integration, the very foundations of Schengen and the principle of free movement, which has been correctly considered one of the “great success stories of the EU” (Groenendijk, 2009). It would also represent a strengthening of ‘intergovernmentalism’ in an area that currently falls under EU competence/law and endanger the sustainability of the EU’s AFSJ and the internal market.

As demonstrated in this paper, this affair not only concerns a formalistic ‘legal check’ of the application of one of the main components and general principles of the EU’s AFSJ, the SBC, but also has major implications for the fundamental rights and freedoms of many individuals in Europe as enshrined in the Treaties and the EU Charter of Fundamental Rights. It is the very legitimacy of one of the EU’s political cornerstones that is at stake when EU member states engage in a race to the bottom in migration and border control standards.

⁸³ See the articles “Berlusconi and Sarkozy to seek tightening of EU border controls”, *EUobserver.com*, 26 April 2011 (<http://euobserver.com/9/32229>) and “Sarkozy, Berlusconi to propose Schengen ‘upgrade’”, *Euractiv.com*, 26 April 2011 (<http://www.euractiv.com/en/future-eu/sarkozy-berlusconi-propose-schengen-upgrade-news-504292>).

⁸⁴ The full text of the joint letter is available from the website of the Italian ministry of foreign affairs (http://www.esteri.it/MAE/IT/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110426_ItaliaFrancia.htm).

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Appendix. Reintroduction of internal border controls

Methodological note

There is no systematic, official EU record of all instances involving the temporary reinstatement of internal border controls since 1995. Consequently, Table A1 is not exhaustive but aims at demonstrating, through the data available, a general overview of the member states involved and the grounds invoked when internal border controls have been temporarily reintroduced over the past 15 years.

Entries occurring from October 2006 onwards (since the entry into force of the Schengen Borders Code) are complete and are taken from the European Commission's *Report on the application of Title III (Internal Borders) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*.⁸⁵

Entries occurring between January 2000 and June 2003 are taken from the *Statewatch European Monitor*.⁸⁶ The sources of all other entries are provided in the table or table notes, and are primarily derived from the individual, ad hoc notifications available in the public register of Council documents. Justifications relating to immigration control objectives are shown in green shading, and those relating (explicitly) to political activism/organized demonstrations are in blue.

Table A1. Instances of the temporary reintroduction of border controls at internal borders between 1995 and 2011

Member state	Duration	Justification
Netherlands	March 1995–December 1995	Construction activities at Schiphol airport obstructing separate handling of Schengen and non-Schengen passengers (cited in Groenendijk, 2004, p. 158)
France	July 1995–1998 (approximate)	Concerns about Dutch policy on drugs caused France to delay its lifting of internal border controls ^{a)}
France	March 1999	Demonstration in support of undocumented immigrants in Paris (controls reinstated at French–Italian border to prevent the crossing of Albanians and Italians to participate in the demonstration) (cited in Groenendijk, 2004, p. 158)
Netherlands	April 1997	Demonstrations of Kurdish and Turkish immigrants in Germany (concerns about violence spreading across the Dutch-German border) (cited in Groenendijk, 2004, p. 158)
Belgium Netherlands	June 2000	European Football Championship, Euro 2000 (cited in Groenendijk, 2004, p. 158)
Belgium	10–31 January 2000	Immigrant regularization programme
Luxembourg	Not specified	Belgian restoration of border checks
Germany	7–12 July 2000	Visit of the Iranian President Mohammed Khatami

⁸⁵ See European Commission, COM(2010) 554 final, Brussels, 13 October 2010.

⁸⁶ More specifically, see the *Statewatch European Monitor*, Vol. 3, No. 4, February 2003.

Table A1. cont'd

France	10–14 October 2000	Biarritz European Council meeting, 12–14 October 2000
Spain	11–14 October 2000	Biarritz European Council meeting, 12–14 October 2000
Luxembourg	25–29 November 2000	Visit of Prime Minister Jose Maria Aznar from Spain, 28–29 November 2000
France	2–10 December 2000	Nice European Council, 7–8 December 2000
Belgium	26 December 2000–10 January 2001	Risk of a sudden, temporary increase in asylum seekers owing to new asylum restrictions from 10 January 2001
Austria	25 June–3 July 2001	European economic summit, Salzburg, 1–3 July 2001
Sweden	15–16 June 2001	European summit, Gothenburg, 15–16 June 2001
Italy	14–21 July 2001	G8 meeting, Genoa, 20–22 July 2001
Norway	5–12 December 2001	Nobel prize ceremony, including Palestinian leader Yassar Arafat and Prime Minister Ariel Sharon, Oslo
Spain	30 January–4 February 2002	Events scheduled by the Spanish presidency
Iceland	1 February 2002	Checks among passengers on two planes from Copenhagen for members of a suspected organized crime group
Austria	11–13 March 2002	Visit of the Iranian President Mohammad Khatami, 11–13 March 2002
Spain	9–18 March 2002	Barcelona European Council meeting
Spain	21–23 March 2002	Informal meeting of EU defence ministers, Zaragoza
Iceland	7–16 May 2002	NATO meeting in Reykjavik, 14–15 May 2002
Spain	14–22 June 2002	EU summit, Seville, 21–22 June 2002
Norway	15–27 June 2002	World Bank Conference, Oslo, 24–26 June 2002
Austria	9–17 September 2002	European economic summit, 15–17 September 2002
France	19 October 2002	Batasuna meeting/rally, Bayonne (Pyrenees)
Italy	1–10 November 2002	European Social Forum, Florence
Denmark	6–12 December 2002	Copenhagen European Council, 12–13 December 2002
Sweden	6–14 December 2002	Copenhagen European Council, 12–13 December 2002
Spain	20 December 2002–7 January 2003	Movement of eminent persons during the Christmas holidays to the area of the Arán Valley (Lleida)
France	22 May–3 June 2003	Summit of heads of state or government of the G8 member states, Evian-les-Bains, 1–3 June 2003
France	1–8 June 2004	Ceremonies marking the 60 th anniversary of the D-Day landings ^{b)}
Spain	15–24 May 2004	Wedding of Prince Felipe ^{c)}

Table A1. cont'd

Portugal	26 May–4 July 2004	Music festival “Rock in Rio” and the European Football Championship, Euro 2004 ^{d)}
France	9 July–9 August 2005 (Prolonged for successive one month periods until 9 February 2006)	Concern over potential terrorist attacks following the London bombings of 7 July 2005 ^{e)} and attempted terrorist bombings in London on 21 July 2005 ^{f)}
Finland	16 August–14 August 2005	World Championship in Athletics held in Helsinki
Spain	25–29 November 2005	Barcelona Euro-Mediterranean summit of 26–28 November 2005 ^{g)}
France	9 February–28 February 2006	Olympic games in Turin
Spain	25 February 2006	Demonstration by Batasuna in Cibourne (France) ^{h)}
France	9–12 May 2006	Conference of Western Mediterranean Ministers of the Interior, Nice, 11–12 May 2006 ⁱ⁾
Germany	1 June–10 July 2006	2006 Football World Cup ^{j)}
Finland	25 August–12 September 2006	ASEM summit, Helsinki, 10–11 September 2006 ^{k)}
France	21 October 2006	Youth Days of radical young Basques in Saint Pée-sur-Nivelle and demonstration organized in Bayonne by the support committee of Philippe Bidart
Finland	9–21 October 2006	Informal meeting of heads of states and government, Lahti
Finland	13–29 November 2006	EUROMED meeting, Tampere
France	12–16 February 2007	Conference of heads of states of Africa and France, Cannes, 13–16 February 2007
Germany	25 May–9 June 2007	G8 summit in Heiligendamm/Mecklenburg Western Pomerania, 6–8 June 2007
Iceland	2–3 November 2007	Participation of MC Hells Angels at the inauguration of the Icelandic Motorcycle club, Reykjavik, 1–4 November 2007
Austria	2 June–1 July 2008	European Football Championship Euro 2008
France	27 September 2008	Demonstration on 27 September at 16:00 in Bayonne, supervised by Batasuna
Finland	24 November–5 December 2008	Meeting of OSCE Council of Ministers, Helsinki, 4–5 December 2008
Iceland	5–7 March 2009	Visit of MC Hells Angels to the Icelandic Motorcycle club, Reykjavik
Germany	20 March–5 April 2009	NATO summit in Strasbourg, Baden-Baden and Kehl, 3–4 April 2009
France	30 March–5 April 2009	NATO summit, Strasbourg, 3–4 April 2009
Italy	28 June–15 July 2009	G8 summit, L’Aquila, 10–12 July 2009
France	19 September 2009	Demonstration by Batasuna in Bayonne

Table A1. cont'd

Spain	26–27 September 2009	Celebration of ‘Basque Warrior Day’ in the Basque Country and Navarra (ES) and in Pyrénées-Orientales (FR)
France	27 September 2009	50 th anniversary of ETA
Norway	27 November 2009–12 December 2009	Nobel Peace Prize ceremony, Oslo, 10 December 2009
Denmark	1–18 December 2009	UN Climate Change Conference, Copenhagen, 7–18 December 2009
Malta	5–18 April 2010	Visit of Pope Benedict XVI, 17–18 April 2010
Estonia	17–23 April 2010	Informal meeting of NATO foreign ministers, Tallinn, 22–23 April 2010
France	28 May–2 June 2010	Franco-African summit, Nice, 31 May–1 June 2010
Latvia	24 May–1 June 2010	NATO Parliamentary Assembly, Riga, 28 May–1 June 2010
Portugal	16–20 November 2010	NATO summit, Lisbon, 19–20 November 2010



Justification relating to immigration control objectives



Justification relating (explicitly) to political activism/organized demonstrations

^{a)} Schengen Annual Report 1996, SCH/C (97) 22; Council document 19846/1/99 REV 1.

^{b)} Council of the European Union, Note on the “Reintroduction of border checks pursuant to Article 2.2 of the Convention implementing the Schengen Agreement”, 10071/04, Brussels, 2 June 2004.

^{c)} Council of the European Union, Note on the “Application by Spain of Article 2(2) of the Schengen Convention”, 9181/04, Brussels, 4 May 2004.

^{d)} Council of the European Union, Note on the “Application by Portugal of Article 2(2) of the Schengen Convention”, 9804/04, Brussels, 25 May 2004.

^{e)} Council of the European Union, Note on the “Reintroduction of border checks on the basis of Article 2(2) of the Schengen Convention”, 11098/05, Brussels, 11 July 2005.

^{f)} Council of the European Union, Note on the “Extension of the reintroduction of border checks on the basis of Article 2(2) of the Schengen Convention”, 11909/05, Brussels, 2 September 2005; Council of the European Union, Note on the “Extension of the reintroduction of border checks on the basis of Article 2(2) of the Schengen Convention”, 5148/06, Brussels, 9 January 2006.

^{g)} Council of the European Union, Note on the “Introduction of border checks on the basis of Article 2(2) of the Schengen Convention”, 14823/05, Brussels, 24 November 2005.

^{h)} Council of the European Union, Note on the “Reintroduction of border controls on the basis of Article 2(2) of the Schengen Convention”, 6825/06, Brussels, 28 February 2006.

ⁱ⁾ Council of the European Union, Note on the “Reintroduction of border checks on the basis of Article 2(2) of the Schengen Convention”, 8839/06, Brussels, 2 May 2006.

^{j)} Council of the European Union, Note on “Border controls on the basis of Article 2(2) of the Schengen Convention”, 8543/06, Brussels, 2 April 2006.

^{k)} Council of the European Union, Note on the “Reintroduction of border controls on the basis of Article 2(2) of the Schengen Convention”, 12349/06, Brussels, 30 August 2006.

Sources: Authors’ compilation based on the sources specified.



ABOUT CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

Goals

- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today,
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process, and
- Provide a regular flow of authoritative publications offering policy analysis and recommendations,

Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts,
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach,
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals.

Programme Structure

In-house Research Programmes

Economic and Social Welfare Policies
Financial Institutions and Markets
Energy and Climate Change
EU Foreign, Security and Neighbourhood Policy
Justice and Home Affairs
Politics and Institutions
Regulatory Affairs
Agricultural and Rural Policy

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)

Research Networks organised by CEPS

European Climate Platform (ECP)
European Network for Better Regulation (ENBR)
European Network of Economic Policy
Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)

Rejection and acceptance of asylum applications in the EU in 2010

Rejection of asylum applications in absolute value and in percentage

Countries	Number of rejections	Percentage of rejections
Malta	125	35,7
Latvia	25	50
Netherlands	9575	55,8
Portugal	75	57,7
Denmark	1935	59
Italy	7 015	61,9
Estonia	25	62,5
Finland	2 665	62,6
EU 27	167 010	65
Czech Republic	330	66
Sweden	19 140	69,3
Slovakia	205	69,5
Bulgaria	375	72,8
Austria	10 325	75
Hungary	785	75,5
United Kingdom	20 250	75,9
Germany	34 865	76,9
Spain	2 175	78,1
Belgium	12740	78,4
Cyprus	2 015	82,6
Slovenia	95	82,6
Romania	355	83,5
Luxembourg	405	85,3
France	32 505	86,4
Poland	3 910	88,5
Lithuania	175	92,1
Greece	3 350	97
Ireland	1 575	98,4

Source : Data from Eurostat - Notre Europe (June 2011)

Countries rejecting less than 65% of the applications

Countries rejecting less than 80% of the applications

Contries rejecting more than 80% of the applications

Rejection and acceptance of asylum applications in absolute value

	Number of final decisions	Number of rejections	Number of acceptances
EU 27	222105	167010	55095
Germany	45310	34865	10445
Sweden	27630	19140	8495
Netherlands	17145	9575	7565
United Kingdom	26690	20250	6440
France	37260	32505	5115
Italy	11325	7015	4305
Belgium	16 245	12740	3510
Austria	13770	10325	3445
Finland	4260	2665	1595
Denmark	3280	1935	1345
Spain	2785	2175	610
Poland	4420	3910	510
Cyprus	2440	2015	425
Hungary	1040	785	260
Malta	350	125	210
Czech Republic	500	330	175
Bulgaria	515	375	140
Greece	3455	3350	105
Slovakia	295	205	90
Luxembourg	475	405	70
Romania	425	355	70
Portugal	130	75	55
Ireland	1600	1575	25
Latvia	50	25	25
Slovenia	115	95	25
Estonia	40	25	15
Lithuania	190	175	15

Source : Data from Eurostat - Notre Europe (June 2011)

Countries which have accepted more than 5000 applications

Countries which have accepted between 1000 and 5000 applications

Countries which have accepted less than 1000 applications