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**The Changing Dynamics of the Effective Protection of  
EU External Borders or/and Forced Migrants**

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### **Abstract**

The experience of a migration crisis (2015 and 2016) on the edge of Schengen and EU territory has demonstrated two divergent development perspectives. From both the EU and its Member States, there has been increasing demand to protect the EU's external borders. This requires trust in both national and EU (Frontex) authorities that are supposed to be the guardians of national and European security. At the same time, however, negative sentiments towards migrants have increased and continue to arise from different cultural backgrounds within Member States. These diverging perspectives are struggling to develop hand in hand with the current and requested role of the Frontex agency. There are rising tensions concerning the legality of measures introduced on external borders in order to protect the EU territory effectively. There is enormous disparity between the requested norms and standards, and EU and international law, which mirrors the strong anti-migrant sentiment within CEE Member States. This paper analyses the disparity between EU and international norms with the measures being introduced on the EU's external border with the Western Balkan states. It also aims to analyze the medium-term impact of this disparity at a national and EU level from the perspective of efficiency, solidarity and legality. The migrant influx may be addressed as an example of crisis management in the context of how these three principles of EU law are implemented within CEE Member States as a part of the (political, geographical and cultural) map of Europe.

*Keywords:* Rule of law, Migration, Frontex, Schengen, Schengen Border Code, International law, EU.

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## *1. Introduction*

Between 2010 and 2015, Hungarian authorities overlooked the fact that asylum-seekers and recognized refugees had not formally left the country and travelled to another Member State (MS) of the EU as a consequence of tightened procedural, reception and integration opportunities that were mainly financed using EU funds. Hence, even in the summer of 2015, hundreds of thousands of migrants and refugees heading to Austria and Germany were allowed into Hungary and assisted with transportation by the authorities, who could not envisage their return to Greece due to the non-application of the Dublin rules (Nagy, 2016). After 2015, Hungary, in an attempt to protect Schengen's external borders, built up fences and legal barriers, as well as atomized and isolated the asylum-seekers/displaced persons in transit zones (Kallius, 2016) to externalize the buffer zone and the burden of refugee admission and offload it onto Serbia and other Balkan countries. In parallel with this, a Turkish-EU agreement was concluded, so the EU did the same - while also giving space to nationalist and intolerant voters and governments wishing to maximize votes. We witnessed these dynamics (in the words of Geddes and Scholten (2016: 282): the 'institutionalization of Europe' and the 'Europeanisation of institutions') that involve the link between migration policy and EU external-relations-related policy, making this migration a definite security issue (securitization),<sup>1</sup> and leading to the development of a new generation of asylum and migration protection rules, the widespread introduction of biometric identifiers, the adoption of the General Data Protection Regulation (GDPR), the extension of the mandate of Frontex and the sending of professionals and resources to Western Balkan countries, increases in the income of human traffickers due to the establishment of alternative Balkan routes, and attempts to combat trafficking in human beings through stronger European action. The authors examine these particular dynamics: namely, how the migration and EU migration policies of the Member States (MS) interact with each other, and what elements were adopted due to recent events, rules and data in CEE.

For the purpose of this article, we identify the years 2015 and 2016 as the crisis period, this time being associated with a huge increase in migrants and refugees crossing the Serbian-Hungarian border. The years 2017 and 2018 we identify as post-crisis period with a focus on the reforms of the Schengen system.

## *2. Contradictions in the System*

The Schengen system is somewhat conflictual in nature. To outsiders, it means that the external borders of the EU are checked in an integrated manner, based on common standards, resulting in those inside not being subject to internal border controls and subsequently being free to travel and move. However, this reality is now fading: five countries have restored their regular internal border controls and at their external borders have erected fences based on national decisions which undermine the principles of common trust and solidarity and have introduced a system of bilateral and unilateral nation-state decisions instead of joint border management. Is this a simple case of bad management of the migration and asylum crisis, or an

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<sup>1</sup> As developed by Buzan, Waever and de Wilde (1998).

indicator of a more profound internal paradox? - It could be argued that the wave of migrants and refugees overwhelmed the security and sovereign discourse and weakened the principles of solidarity and the Schengen regime. However, perhaps it is only the weak integration of the Central and East European (CEE) countries that has hindered the capacity of these states to deal with the crisis and led to a perceived political crisis in the EU.

The migrant crisis of 2015 and 2016 led the EU to undergo significant transformative processes in terms of developing the EU's security institutions in terms of foreign relations, as well as internally. The long-term aim of the EU of developing an integrated security and migration policy has been driven by the need to provide a coordinated response to the ever-increasing complexity of global issues: this has resulted in initiatives to integrate migration into external relations and EU foreign policy (see: the New Partnership Framework, and the Eastern Neighborhood Policy). These initiatives aim to transpose development, cooperation programs and the externalization of asylum processing to the buffer zone in order to remove conflict zones from EU border areas. This is how the role of the Western Balkans has been evaluated. The integration of internal security in the EU has been driven by an understanding that individual Member States are unable to tackle issues such as international organized crime or migration on their own. Therefore, the EU, which was firstly an umbrella framework for cooperation, has been transformed into a guardian of internal security *sui generis*, while still leaving key security competences in the hands of EU Member States (Kaunert, 2011; Bossongl, 2016). The migration crisis has led to breaking point for the aims of integration in the field of internal security. Despite the fact that migration is a global and very complex phenomenon, the response is very political one. Since the political space is still defined by state borders, this isolates effective measures in terms of (national) decision making so that they are political in nature by definition.

These years-old hidden paradoxes or clandestine internal contradictions are becoming more visible due to the recent migrant crisis. That said, the problem is not an issue of security, but of politics. The perception of *internal security* is that it has developed over the past decades into a complicated system in which the EU and Member States seek equilibrium between security and sovereignty. Considering the development of cooperation for the purpose of strengthening internal security, Member States have since the 1970s continuously responded to growing interdependence as well as international threats with increased cooperation. In this context, it should be mentioned that Central and Eastern European countries such as Slovenia, Hungary, and Poland have experienced rapid changes and reorganization since 1989, becoming EU members as well as Schengen countries. Accordingly, they also assumed responsibility for the protection of external Schengen borders - meaning responsibility for the enforcement of the EU legal system. This swift development has created significant pressure on the institutions of CEE countries. As the migrant crisis has shown, it is extremely difficult to enforce norms that are not a matter of political identification. In other words, CEE countries have not felt responsibility for the migrant crisis, which has resulted in a limited ability to enforce

EU norms.<sup>2</sup> At the same time, there has been a rapid rise in the politicization of security issues in domestic politics.

The development of cooperation among Schengen countries is the result of two contradicting trajectories. On one hand, the European Commission (EC) seeks to promote deeper integration and better coordination of the Area of Freedom, Security, and Justice (AFSJ), while Member States still prefer to be the primary actors in guaranteeing the security of their citizens (Mitsilegas et. al., 2003; Carrera and Marko, 2018). These divergent processes have been accelerated by the migrant crisis that has had a significant impact on the understanding of the EU as facilitator of international threats, while individual Member States have developed policies that contradict the legal substance of the AFSJ. That said, the experience of 2015 and 2016 has revealed the unclear competences of Member States and the EU when it comes to Schengen cooperation, as well as both the legal and political implications for the AFSJ as such. This paper thus examines the impact of the migrant crisis from a political and legal perspective regarding political cooperation under Schengen regulations, and from a legal perspective in the case of the implementation of the Schengen Border Code (SBC) and participation in the development of the AFSJ.

This paper aims to analyze the impact of the migrant crisis on the functionality of the Schengen cooperation area. It focuses on substantive cooperation between the European Commission and Member States in the context of the increased political sensitivity of the migrant crisis. The main point of analysis is the issue that within the Schengen cooperation area the system is encountering its limited ability to enforce EU law in contrast to a growing preference for self-oriented solutions.

### *3. The context of the migrant crisis (2014 - 2016)*

Since 2014, the number of migrants entering Hungary via Serbia using so the so-called Balkan Route increased dramatically in comparison to 2013. See the complete overview below:

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<sup>2</sup> Under this term we understand the current legal basis of the Schengen system that incorporates the norms of international law such as the European Convention on Human Rights (1950).

Table 1: Number of Third-Country Nationals (TCN) whose entry was refused to the EU, and asylum-seekers (2014-2017).

Country	Refused entry TCN in 2014	Asylum seekers in 2014	Refused entry TCN in 2015	Asylum seekers in 2015	Refused entry TCN in 2016	Asylum seekers in 2016	Refused entry TCN in 2017	Asylum seekers in 2017
<b>Czech Republic</b>	330	905	465	1 235	365	1 200	230	1 140
<b>Slovakia</b>	455	230	465	270	750	100	1 085	150
<b>Hungary</b>	13 325 (4.6% of EU28)	41 215	11 505 (3.9% of EU28)	174 435 (potential applicants, in part registered)	9 905 (2.6% of EU28)	28 215	14 010 (3.2% of EU28)	3 115 (recognized 1291, and rejected 2880 due to pending cases)
<b>Croatia</b>	8 645 (3% of EU28)	380	9 355 (3.1% of EU28)	140	9 136 (2.4% of EU28)	2 150	10 015 (2.3% of EU28)	880 (recognized 150, and rejected 325)
<b>Slovenia</b>	4 410 (1.5% of EU28)	355	4 411 (1.5% of EU28)	260	4 455 (1.1% of EU28)	1 265	3 680 (0.8% of EU28)	1 476 (recognized 152, and rejected 89)
<b>Serbia</b>								6199 (potential applicants, actually 236, and from these recognized 14 and rejected 11)

Sources: Eurostat and [www.asylum-europe.org](http://www.asylum-europe.org) (AIDA).

The Schengen Border Code determines the reasons why TCN cannot enter EU territory. It can be seen from Table 1 that the number of these TCN, as well as the number of applicants for asylum, is increasing. We can surmise that the corresponding increase in the number of people entering irregularly has not been stopped by physical barriers, and procedures based on the scrutiny of individuals will have to be carried out by migration/asylum authorities to determine this; it is unthinkable that people will make a risky journey of thousands of kilometers and then, failing to receive admission or have recognized their claims for protection, will simply accept that their entry has been denied. Furthermore, those who seek asylum should not be refused at borders, so their case has to be addressed, and the overwhelming majority of those arriving in recent years have a basis for protection under international law. The number of TCNs staying illegally has partly declined, too: in 2017, 618,780 non-EU citizens were found to be illegally present in the EU. This was down by 37 per cent compared with one year before (983,860) and by 71 per cent when compared with the unprecedented levels of 2015 when the total number of non-EU citizens found to be illegally present stood at 2,154,675.<sup>3</sup>

An influx of more than two million people has resulted in the erection of physical barriers on Hungarian-Serbian as well as on Hungarian-Croatian borders. The experience of 2015 and 2016 shifted the broad understanding of Schengen cooperation towards a more national-oriented approach in the context of a

<sup>3</sup> See more details on the Eurostat website: [https://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics\\_on\\_enforcement\\_of\\_immigration\\_legislation#Non-EU\\_citizens\\_found\\_to\\_be\\_illegally\\_present](https://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation#Non-EU_citizens_found_to_be_illegally_present)

significantly redrawn political landscape in the EU and individual Member States. Nonetheless, the increased influx of people in 2014 did not result in any significant political action either domestically or at the EU level. The political response in Hungary in 2015 was significantly different.

The function of the reforms of 2013 concerning external border protection should be questioned, since Member States - in this case, Hungary - have had full competence when it comes to evaluating impacts on internal security. According to the analytical materials provided by the Committee of Civil Liberties, Justice and Home Affairs (LIBE), since 2015 Hungary has not actively notified the EC regarding the very high number of people entering the country. This led to a situation whereby migrants were transferred from Hungary to Austria and Germany in September 2015 using buses. This was neither communicated, nor agreed to by Austria and Germany (Alexander, 2016). Second, this is a very problematic development when it comes to the protection of fundamental and human rights and involved a significant decrease in the involvement of civil society when it comes to asylum-seekers and the systems of protecting the external border.

According to a study prepared by LIBE, the crisis of 2015 and 2016 contained two elements that hindered the functional *modus operandi* of Schengen cooperation. First, the understanding, definition and further use of the terms *threat to public policy* and *responsible for internal security*.<sup>4</sup> Second, the ineffective enforcement or control mechanisms of the EC regarding the evaluation of threats to the above-mentioned items.

#### ***4. The growing competence of the EU in AFSJ as a source of conflict***

Following the substantial reform of Justice and Home Affairs that came into force with the Lisbon Treaty (2009), there were shared expectations about increased cooperation in this policy field. The Amsterdam Treaty rather transformed the intergovernmental policy of Justice and Home Affairs into the AFSJ, which thereby took on some elements of supranational decision-making. Among the most notable achievements of the Amsterdam Treaty was the inclusion of Schengen into the framework of the EU and the introduction of new legal instruments following the logic of decision making regarding the area of the common market.

Guiraudon (2003) argues that this was also a case of increasing the competences of the EU in asylum and migration policies; namely, a Common European Asylum System (CEAS) based on directives, SBC, a return and readmission system, the Dublin regime, and the Asylum, Migration and Integration Fund (AMIF). This argument follows the main logic behind the integration of Justice and Home Affairs over the past 50 years.<sup>5</sup> Security concerns are still very much a sign of state sovereignty,

<sup>4</sup> When it comes to migration, Art. 3 SBC says that migration and the border crossing of third country nationals in large numbers should not, per se, be a threat to public policy or internal security.

<sup>5</sup> Being outside the main aims of integration at the time of the creation of the European Economic Community, cooperation regarding security issues has been driven by MS and their ability to find the common denominators in terms of sharing experience, information and cooperation aims. Under this basis, the TREVI cooperation emerged during the 1970s and, on a similar basis, Schengen cooperation was created. The development of integration after the Maastricht Treaty entered into force was crucial from two perspectives. First, a changed international security environment shifted the focus from a single-

thus states are very reluctant to hand this proof of sovereignty over to a supranational institution. From a broader perspective, two drivers of integration can be identified. According to Kaunert (2011), there is some motivation from national bureaucracies that perceive the EU level as being more capable of defending their security interests, which is difficult to achieve at a national level. Second, there is mutual trust among Member States that has had a significant impact on the cooperation between EU institutions and Member States. The Lisbon Treaty has come up with new legal instruments in the AFSJ that were designed to be in conflict with the exclusive competences of Member States and aimed at developing a newly strengthened supranational platform for cooperation.<sup>6</sup>

EU policy implementation relies on the quality of information provided by Member States, which is again based on the political willingness of Member States to be cooperative about security issues. As mentioned above, starting with the Maastricht Treaty the EU has sought a role as a relevant security player in areas that primarily do not conflict with those in which Member States have unquestionable dominance, such as policing. Therefore, the EU has developed its capacity as well as legislation to tackle issues such as international organized crime, environmental threats, or illegal migration. It is questionable whether the migrant crises of 2015 and 2016 had an impact similar to the terrorist attacks of 2001, 2004, and 2005. Nevertheless, the chain of political implications and consequences for both the EU and Member States has been clearly visible.

The experience of the development of Schengen cooperation since 2006 has demonstrated the serious challenge of maintaining cooperation between Member States and EU institutions.<sup>7</sup> Despite logistical and technical demands for better coordinated and unified border protection, the main issue remains the legal framework of cooperation. In contrast to the period before the Amsterdam Treaty, cooperation within the AFSJ has shifted from solely intergovernmental towards strengthening the competences of supranational institutions. In the case of Schengen

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state-orientation towards complex global threats. Second, with regard to changes in the shared understanding of member states and the EU about the security architecture in relation to the issue above. In this context, the Stockholm program is crucial in relation to how MS tackle global security challenges, such as migration (Kaunert 2011), hand in hand with the EU. In this context, it is worth adding that it is unclear how states are willing to tackle these challenges. Cooperation within AFSJ has been driven by different forms of motivation than in the case of the common market.

<sup>6</sup> Carrera (2012: 5) points out two challenges that, according to him, threaten cooperation within the framework of the AFSJ: 'First, how and to what extent will these new Treaty-based and policy elements be translated into practical and effective outputs? Second, how are the various interests and roles of the different actors going to be balanced under the new decision-making and institutional arrangements?'

<sup>7</sup> The current legal basis for external border control started to be shaped in 2006 and consists of the following elements: i) a common legislative framework (the Schengen border code and Regulation (EC) No. 1931/2006 on local border traffic); ii) a coordination structure for operational action (Frontex); iii) a burden-sharing arrangement among member states more or less affected by the border (a Schengen facility and EU external borders fund); iv) rules and procedures when it comes to Integrated Border management (IBM) (Hobbing 2012: 66). Since 2006, the system of external border protection has been further developed mainly in terms of human resources and technical capacity. This was the case for the following areas: upgrading technical capacity such as providing a system of risk analysis, a handbook relevant for IBM, the development of logistics for joint operations, and the creation of rapid border intervention teams (RABIT). As Hobbing (2012: 67) points out, this framework was a significant advance in terms of coordination, but provided individual MS with a significant share of competences as well as an understanding of the EU legal framework

cooperation, the Court of Justice gained competence in translating Schengen cooperation into reality. This relates to the case of the crucial findings of the Court of Justice judgments *Melki* and *Abdeli* as well as *Adi*, upon which further argumentation of Schengen cooperation has been developed (Peers, 2013). The crucial issue is the perception of *threat of internal security*<sup>8</sup> or *public policy* which has been a matter of different perspectives for both EU institutions and Member States. Going further, the problem lies in the level of analysis and responsibility – upon what conditions is internal security under threat, and who is threatened? As expressed in political action, the problem mainly touches on the issue of re-imposing border checks on internal Schengen borders. Naturally, this is a very complex issue when it comes to sharing responsibility for the future functioning of the Schengen system.<sup>9</sup>

The 2013 reform of the Schengen system led to an increase in demands on the EC in terms of coordination, but the biggest responsibilities remained in the hands of Member States. A very important element of the reform was the clarification of the border regime regarding control of citizens from third countries. This can be seen in the demand for strict unification of exit/entry regimes for third nationals, as well as for defining procedures upon which these individuals can be refused entry to the Schengen area. In addition, increased emphasis was given to protection of fundamental rights and providing refugees with international protection with regard to international law. This is also the case for the non-refoulement principle.<sup>10</sup>

Despite the fact that the reform emphasizes the standardization of training and logistical equipment, it mentions the need for respect and dignity in the treatment of vulnerable persons by border guards only vaguely. This call is developed further, stating that special emphasis should be paid to vulnerable persons such as unaccompanied minors and persons that have been victims of human trafficking. In this respect, the SBC regulates that people crossing the Schengen border should be apprehended and treated under the EU's Returns Directive. In this context, the Returns Directive rejects entry bans on persons subject to human trafficking or requiring special treatment. In this context, persons that have been subject to an entry ban have the right to review the decision according to national law and should be provided with legal assistance free of charge (Peers, 2013: 100).<sup>11</sup> At the same time, the 2013 regulation standardizes notifications regarding third nationals denied entry to the Schengen system, but the emphasis is still given to conformance with national law. Moreover, the regulation increased the competences of border guards regarding the

<sup>8</sup> According to the definition of art. 72 TEU.

<sup>9</sup> This blurred level of responsibility has been discussed, for example, by Pascaou (2012).

<sup>10</sup> The current external border regime stresses the use of the Visa Information System (VIS), the Schengen Information System II (SIS II) and the need for standardized reporting (containing justification) about entry refusals, as well as for appealing refusals according to national law (Peers, 2013: 50-51). In addition to this, the reform set standards for logistical equipment such as surveillance systems, appropriate language skills, and training in accordance with the SBC. The reform stated that border checks should be executed in conformity with national law when it comes appropriate training and equipment according to the standards of Frontex. Nevertheless, it is a crucial provision that the border guards of individual states are representatives of the only institution that enforces both national and EU law. This means that, despite increased pressure when it comes to increasing EC competences, border protection as such remains under the unquestionable control of Member States.

<sup>11</sup> This is regulated by the Asylum Procedure Directive.



provisions by which a person can be denied entry upon clear indication of an intention to a commit criminal offence, given previously stated clear evidence.

The most substantive part of the reform deals with the quality and accuracy of information provided to the Schengen Information System II (SIS II). However, while the EC emphasizes the need for standardization and better communication among the Member States when it comes to entry bans and asylum requests, the quality of information that is provided is still the responsibility of individual Member States. Using a similar logic, the Returns Directive provides individual Member States with significant room to maneuver with regard to the implementation of their own policies, which might be counter to the idea of the Directive (Peers, 2013: 99).<sup>12</sup>

### *5. The crisis as a pretext for unilateral action in Member States*

The migrant crisis partly acted as a pretext for Member States in the CEE countries not to strengthen social control over police and borders guards and their subordination to human rights systems, public administration, and the rule of law. Although technical and IT modernization also occurred in law enforcement, police officers quickly became obedient security forces under populist governments that deployed soldiers to the border. Critical non-governmental organizations and the press were hindered as much as possible from engaging in support and social solidarity for refugees and migrants.

Using the defense of sovereignty that has been granted to them since 1989, many CEE Member States have developed any number of political and legal instruments to defend their policies. Among these are such instruments as referenda, modifications of the constitution, communication campaigns about the threat of refugees and migrants, the construction of fences at their borders, the transfer of applicants to the borders of another Member State, refusal to register and readmit applicants, and restrictions on the admission and integration of refugees and migrants. These measures are of course not just undertaken by CEE Member States. Nevertheless, in this region the politicization of the migrant crisis has reached a very high level in terms of the presence of the issue in political competition. One result of these adopted policies has been the decline in the enforcement of EU norms and implementation of international systems of refugees and migrant protection. This is the case, for example, when re-imposing internal Schengen borders or increasing the measures adopted on external borders. According to the SBC, Member States should send notifications to the EC when there are possible threats to public policy and internal security. The Member State should then act in coordination with the EC to adopt appropriate measures while respecting international migrant and refugee protection as well as EU fundamental rights.

This development has had a significant impact on law enforcement within the EU and in the national context. This can also be demonstrated by the fact that

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<sup>12</sup> In this context, Frontex is given the competence to provide the analytical background and annual risk evaluation. It should serve as a central institution of information exchange and coordination of the national structures involved. The agency has been called on to coordinate its activities in line with fundamental rights and to provide training to border guards in this respect. As will be analyzed later, this task and its assessment is very problematic.

national bureaucrats and law enforcement professionals support the integration of the AFSJ which would result in a coordinated EU approach to the migration crisis. It is important to add that these experts often participated in the implementation of the SBC before the CEE countries joined the Schengen system in 2007.<sup>13</sup> This development is more apparent when it comes to the activities and role of civil organizations whose activity highlights the contradictions between the EU legal system and national policies. As a consequence, the debate is reduced to the issue of accepting refugees and migrants within individual EU countries, leaving aside the conflicting nature of the situation.

The most crucial element of the Schengen system is thus the relationship between the legal and technical coordination and implementation of the SBC as a key legal document. In this regard, it is expected that national law will be brought into line with the SBC, despite the fact that Member States still have wide room for maneuver in terms of the execution of their policies in a national context. This is the case, for example, with providing assistance to victims of human trafficking or providing legal assistance and standardized procedures to people who have illegally entered the Schengen area. Another problem is the understanding of fundamental rights, which are supposed to be harmonized within the EU. The reality shows the resignation of EU authorities when it comes to the enforcement of fundamental rights, since this is still a matter of international law. As a result, the EU disposes of only a very limited capacity to enforce fundamental rights if MS do not respect these norms. The recent development of coordinated protection systems for the external Schengen border through cooperation with third countries will decrease the need for physical barriers such as those which exist on the Hungarian-Serbian border.<sup>14</sup> This will also require proper analysis conducted by the EC to determine if the erection of such physical barriers on external borders is in line with EU law.<sup>15</sup> In addition to this, it is still unclear how the conformity of *modus operandi* on external Schengen borders, such as on the Hungarian-Serbian border, will be brought back in line with the fundamental-rights-related stipulations of the EU (Carrera, 2018).<sup>16</sup>

According to the study developed for the LIBE (Guild, 2016: 68) Committee of the European Parliament, MS are obliged to communicate to the EC when disproportionate pressure exists on the EU's external border. In this particular case, attention should be drawn to the communication of Hungarian authorities with the EC and Frontex regarding whether the situation in 2015 was evaluated as directly threatening the public policy and internal security of the EU. Since the protection of external borders is still in its execution a matter of intergovernmental competence, MS

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<sup>13</sup> From a personal perspective, these experts often experience disillusion with both the administration and political development and the situation results in, among other things, increased fluctuation within public administration.

<sup>14</sup> See more details in: Surk, 2015.

<sup>15</sup> Again, the political dimension of the migration crisis arises. According to the EC, the fence does not violate the EU legal system. However, the method of construction and communication with the EC runs counter to the meaning of the SBC system.

<sup>16</sup> Attention should also be paid to how MS frame the migration crisis. Since 2015 it has become evident that MS very often call people who are on the move 'migrants', which from their perspective allows them to treat their unauthorized entrance to the Schengen territory as an illegal act. According to the FRA, almost a third of the people who entered Hungary in 2015 were criminalized before making a request for asylum.

are to a significant extent freed from oversight by EU institutions. As stated above, this also opens up space for interpretation in intergovernmental decision making when MS make a cooperative approach to the EC regarding the implementation of urgent measures. Finally, it leaves the system of international protection and fundamental rights of the EU in a legal vacuum (Carrera, 2018).

### *6. Political conflict management in the EU versus Member States*

The conflict between the EU and the Member States has been fought in several fields and using various means: relocation and emergency decisions, offering more money and expertise for borders, restoring control at internal borders, disputes before the Court of Justice, border control issues raised during electoral campaigns, and racist propaganda are but a few examples of the diversity of measures and means undertaken.

When focusing on the impact of the migrant crisis situation on the external borders of the EU, the impact of this politicization of the crisis manifests itself in an increase in physical infrastructural development instead of an advance in the use of technology. This is the case mainly on the Slovenian-Croatian, and Hungarian-Croatian-Serbian border. However, similar developments are also visible in different parts of the external Schengen border. From a political perspective, the easiest response to the migrant crisis is to raise physical barriers, increasing border protection. Also, this sends a very clear message to the domestic audience when it comes to introducing measures against illegal migration. Starting in 2015, these measures have been increasingly visible: a significant increase in police and military patrolling within the Schengen territory, the erection of light fences (for example, on the Slovenian-Croatian border)<sup>17</sup> or even multiple barriers like on the Hungarian-Serbian border and an increase in border zones placed under the control of limited law enforcement system.<sup>18</sup> This does not give an entirely clear picture of to what extent and under which framework the cooperation between law enforcement authorities within Schengen and the EU and outside the EU – such as with Serbia, Bosnia and Herzegovina, or Macedonia – operates.<sup>19</sup> At the same time, there is limited willingness to introduce advanced technological measures when it comes to the externalization of Schengen border protection. Following the logic of Schengen cooperation, the deepening of such cooperation relies on the willingness of Member States to act in coordination and under the management of EC/Frontex. Looking at the experience of the post-crisis period (2017-2018), there has not been significant progress when it comes to developing cooperation based on mutual trust among Member States.<sup>20</sup>

Going further, the preference for the politicization of the border protection issue at a domestic level does not lead to the fulfillment of the requirement of having well trained staff responsible for border control. This is the case on the Hungarian-Serbian border, for example. Between 2015 and 2018, this area experienced a

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<sup>17</sup> More details regarding the developments in Croatia: N1, 2018.

<sup>18</sup> More detail regarding the development of Schengen cooperation in the context of bilateral disputes: Euractiv, 2017.

<sup>19</sup> More details about the development: Euobserver: 2018.

<sup>20</sup> According to an interview with representatives of MFA of the Czech Republic, held in August 2018.

substantive increase in border guards who often did not have appropriate knowledge of foreign languages.<sup>21</sup> Focusing on the impact of this increased politicization of the migrant crisis, one can observe a constant disrespect for international norms when it comes to migrant and refugee protection. In practical terms this has meant developing political and legal conditions under which there is a constant increase in the refusal to recognize asylum-seekers' rights to protection and the creation of conditions that implicitly lead to a refusal to provide legal assistance to vulnerable persons. This is also the case with unaccompanied minors, the most vulnerable group.<sup>22</sup> There are also other symptoms connected to increased politicization such as the limited respect for adult training and education, low salaries, limited monitoring capacity for the implementation of rules, and no impact assessment of strategic documents requiring standardization within the Schengen system. This naturally leads to very limited access to data and information for journalists, researchers, and civil society organizations.<sup>23</sup> As a result, within countries such as Slovenia, Croatia, Hungary, and Austria, information regarding the migrant crisis is provided only through a very centralized system.<sup>24</sup> Such policies run counter to the nature of the EU legal system and the SBC specifically.

This struggle between competences in Schengen cooperation has had a significant impact on the EU response to the migrant crisis. As a result of this lack of leadership, the overall response of the EU institutions and Member States has been very blurred.<sup>25</sup> In contrast to a coordinated approach, the Member States have developed their own supplementary policies due to domestic political circumstances. Nevertheless, representatives of Member States have demanded that EU institutions tackle the migrant crisis more effectively, even if the EU only has only limited tools when it comes to law enforcement in terms of the protection of public security. Considering the fact that the management of the migrant crisis overlaps with foreign policy, a coordinated approach is even harder to achieve (Bossong, 2016: 5-7). This opens up a broad space for the politicization of *responsibility* for the crisis and prioritizes policies focused on a domestic audience. An evaluation of the impact of the migrant crisis on the functionality of Schengen system, as well as the consequent reform of the asylum-seeker system known as Dublin III under the above-mentioned conditions, leads to the identification of the following consequences.

In the abovementioned context, the biggest obstacle has been the implementation of compulsory solidarity in praxis, as well as the development of a standardized procedure for defining an emergency situation. Given the fact that Schengen cooperation is primarily based on the willingness of Member States to cooperate, it is very problematic to enforce solidarity using political arguments (European Commission, 2018). Since the EU cannot act based on exclusive competences as it can in the Single Market, Member States exercise their sovereignty over EU institutions. An increase in political pressure to approve the reform of the system for asylum-seekers in September 2015 also shifted the main scope of discussion from the level of experts and practitioners towards a broader public. This shift has had significant consequences on societies and on the actions of political

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<sup>21</sup> According to an interview with a Frontex representative held in March 2018.

<sup>22</sup> According to information provided by Helsinki Committee, Budapest, July 2018.

<sup>23</sup> In-depth analysis provided by the Helsinki Committee in Budapest (Helsinki Budapest, 2018).

<sup>24</sup> According to information provided by representative of EEAS, August 2018.

<sup>25</sup> According to interview with representatives of DG HOME, held in December 2017.

representatives in EU countries.<sup>26</sup> The debate transformed into a discussion about the perceived sovereignty of Member States and about the matter of culture, as opposed to being focused on tackling illegal migration and organized crime (Council of Europe, 2018).<sup>27</sup> As a consequence, it showed the limits of the deeper integration of the AFSJ due to the very sensitive nature of cooperation when it comes to security in a national and European context. That said, responsibility for internal security cannot be transferred to the EU level in the foreseeable future due to the lack of a common understanding about its implementation.

In this sense, the EU only has relatively low-profile responses available to tackle the crisis. As the experience of migrant crisis showed, the most frequent response was to provide additional financial resources, such as funding for increased numbers of personnel to protect the external Schengen border, or direct financial assistance – for example, to Serbia, for running a facility for migrants who stay in the country. In this case, assistance is implemented through instruments of pre-accession cooperation under the control of DG NEAR.<sup>28</sup> The EU has also reacted to the crisis by extending competences to EU agencies and changed decision-making processes. This is the case, for example, with Frontex. According to negotiations with Western Balkan countries, Frontex has the right to execute joint land operations in non-Schengen areas such as Romania and Bulgaria<sup>29</sup> as well as in non-EU countries like Macedonia and Serbia.<sup>30</sup> In addition to this, the EU has provided resources for substantial infrastructure development and the extensive use of existing measures such as the deployment of RABIT teams. At the same time, the EU is trying to implement legal procedures with the aim of imposing effective law enforcement in the field of Schengen cooperation. However, the impact has been of questionable merit given the nature of the regulation. This is the case, for example, with the problematic issue of the compliance of physical barriers on borders with the Schengen Border Code and the EU legal system.

As a result, Integrated Border Management as a part of the Schengen regime has resulted in extended competences using legal measures to a greater extent than prior to the migrant crisis. This is the case with the quicker and more effective exchange of information about third country nationals on their entry/exit to the Schengen system, and closer cooperation with airline companies regarding the operation of flights from third countries.<sup>31</sup> Also, there has been an extended number of joint activities and deployments of RABIT as well as the more effective exchange of skills and expertise under the Frontex framework.<sup>32</sup> Nevertheless, this has no impact on the very limited competence of the EU to enforce EU law on the ground.<sup>33</sup> The most substantial change in external border protection and the Schengen system as

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<sup>26</sup> For more details regarding the development of cooperation in terms of EU external border analyses, see: Lehne (2018).

<sup>27</sup> A different perspective is offered in a study developed by the Heinrich Böll Foundation (2017).

<sup>28</sup> Details about the substance of cooperation in regard of the migration crisis can be found at: Europa.rs (2018).

<sup>29</sup> A detailed overview of measures introduced on the Romanian border can be found at the website of the Romanian Border Police (2018).

<sup>30</sup> For more details about the involvement of Frontex in Serbia and Frontex, see: medium.com (2017).

<sup>31</sup> Key elements of Frontex activities outside the EU: analyses portal statewatch.eu (2017).

<sup>32</sup> More details about Frontex operations provided by Frontex (2018).

<sup>33</sup> According to the information provided by an EEAS representative in July 2018.

such is the expected gain in competences for Frontex as a law enforcement agency. Despite this expected substantial reform, it does not replace the key element which is missing with Schengen cooperation - trust-based cooperation and information-sharing among Member States and between Member States and the EC.<sup>34</sup>

### *7. Conclusions: lessons learnt from dual crisis-management*

The migrant crisis significantly fostered the dynamic of cooperation regarding the protection of the external borders of the EU. The crisis of 2015 - 2016 can be compared with the events during the 1970s and 1980s that initiated cooperation in terms of initiatives for strengthening the protection of public policy. However, the context of cooperation has changed significantly. The migrant crisis posed a complex, multidimensional problem. Migration is not only a security issue, but also an inherent part of EU external relations, development policy, etc. which occurs in a highly globalized environment - Member States are unable to act on their own. Thus follows the motivation of Member States to strengthen the security competences of the EU, as was the case with reforms and primary law, beginning with the Maastricht Treaty and ending with the Lisbon Treaty. In order to accommodate these measures in an appropriate legal framework, the Area of Freedom, Security, and Justice was developed within the EU legal system as a common basis for Member States who are responsible for law enforcement. However, this presumes that there is a common legal framework that Member States are ready to enforce under the umbrella of the AFSJ. This also presumes that the EU, when using the perspective of the AFSJ framework, understands itself as institution based on law enforcement and to a certain extent also on values. Naturally, this makes the system more complex and requires the determination of individual members of the system to act according to the given framework.<sup>35</sup>

The period after the migrant crisis resulted in more significant changes and agreements than political debate (i.e. political dialogue, rational explanations, arguments and opinion instead of blackmail, propaganda and ideological declarations) around relocation mechanisms for asylum applicants, known as Dublin IV. The most significant impact concerns the gradual decline of the rule of law in a situation where the EU portrays itself as a community based on values. In this sense, Member States such as Hungary and Slovenia are neglecting their commitments to international norms, as well as to the primary laws of the EU. This raises the question whether further integration of the AFSJ and further integration of the EU within the current legal framework is possible. The experience of the migrant crisis showed that there is a limited willingness to enact border protection under a trust-based framework of cooperation. Member States are not willing to share sensitive elements of border protection and even prefer to set aside the regulations of the SBC in order to prioritize national political preferences. In this respect, the case of Hungary shows

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<sup>34</sup> According to the information provided by an EEAS representative in July 2018.

<sup>35</sup> For an example of case C-643/15 and C-647/15 *Slovak Republic and Hungary vs. Council of the European Union* regarding the reallocation mechanism of asylum applicants, see details at: [asylumlawdatabase.eu](http://asylumlawdatabase.eu) (2018).

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how the rule of law and dedication to EU standards can be swiftly changed if the national political narrative does not match the narrative of the EU. Since enforcement procedures, according to the SBC, are long and complex, the national agenda can be driven forward without significant limitations. As a result of this development there has been a shift towards intergovernmental cooperation that focuses on on-site collaboration and prioritizing national security rather than on adhering to any higher legal or political system. Nevertheless, this influences the current functioning of the Schengen system, resulting in a significant erosion of Schengen cooperation, as well as the current architecture of the AFSJ. This could open the space for cooperation in a broader geographical area without the need to consider the international system of human rights protection.

The migrant crisis also impacted relations with Western Balkan countries as candidate accession countries to the EU. Impacts are twofold. First, the externalization of border protection (and its consequences) to third countries, mainly to Serbia and Bosnia and Herzegovina (as a buffer zone, externalized migration zone, and migrant crisis zone). This involves the increased need for facilities to be provided to people in need on the borders of the EU and creates a precedent for EU integration, which has used money instead of the law as a permanent solution. Similarly to that mentioned above, this significantly decreases the narrative of the EU as a community based on the rule of law and certain values. In addition to this, it creates an unclear legal and political framework when it comes to first-hand experience of protecting the external border, that is now very often connected to the smuggling and trafficking of human beings. As a result, the externalization of the migrant issue has very little to do with the enlargement process and rule of law as such, and more to do with bargaining about security issues in exchange for financial transfers. Given the fact that there is very limited access to information and reliable data regarding the protection of the external border, the nature of the SBC seems to be dysfunctional, regardless of national regulations. Again, this creates a political environment in which the willingness to tackle smuggling and human trafficking is limited. Also, this contrasts with the meaning of the integration process for the Western Balkans, as these countries can see how easily the system can be made to malfunction.<sup>36</sup>

This leads to another significant impact of the migrant crisis which is connected to the politicization of the issue. Since the constant increase in measures focused on physical border protection as well as creating conditions that counter the provision of standardized protection to vulnerable persons, there has also been constant demand for smuggling and human trafficking into the EU.<sup>37</sup> These conditions contribute to the significant spread of organized crime due to the state 'pushing problems through the border policy.' This sharply contrasts with Art. 3 of the European Convention on Human Rights, ECHR (1950), which has served as the legal basis for European Court of Human Rights regarding the definition of human trafficking as an act that is against the spirit of the ECHR.<sup>38</sup> This might result in the activation of European Court of

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<sup>36</sup> For an example of a large-scale case connected to smuggling at the Horgoš/Röske border crossing: 444.hu (2017).

<sup>37</sup> An example of how migrants and smugglers seek new ways of getting into the EU/Schengen area is provided by Adrian Mogoš (2018).

<sup>38</sup> More details regarding the activities against smuggling and human trafficking can also be found within the Council of Europe Convention on Action against Trafficking in Human Beings, signed in 2005.

Human Rights processes against countries such as Hungary in an inter-state dispute because of the latter's refusal to admit migrants, refugees and applicants, and a lack of assessment of their applications. Since Hungary hinders the entry of vulnerable persons, it increases secondary migration in the EU and people-smuggling. The politicization of the migration crisis across the EU, with an emphasis on countries like Hungary, thus raises questions about the application of basic norms such as the prohibition of torture, inhuman treatment, and the right to a fair trial.

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