



## ARTICLES

### SCHENGEN AND EUROPEAN BORDERS

edited by Iris Goldner Lang

#### SCHENGEN AND EUROPEAN BORDERS: AN INTRODUCTION TO THE *SPECIAL SECTION*

The lifting of internal border controls in the Schengen area has been one of the most valued achievements of European integration. However, the functioning of the Schengen area and, more broadly, of European external borders, have been under considerable strain due to increased migration flows, the COVID-19 pandemic and security threats. These developments have tested Member States' and EU agencies' compliance with EU rules and principles, and the viability of the EU migration, asylum and border control policies. Member States' reintroduction of internal border controls within, what is supposed to be, a border control-free area was a direct reaction to these developments and a challenge to the future of Schengen. The increasing use of modern technologies at the EU borders pose additional operational and fundamental rights challenges. Additionally, the Croatian admission to Schengen, paralleled with the exclusion of Romania and Bulgaria, was another politically charged event, which re-opens the question of the criteria for the admission to Schengen. The future is equally challenging and will be marked by the reform EU migration, asylum and border control policies, with the recent adoption of the New Pact on Migration and Asylum and the amendment of the Schengen Borders Code.

The nine *Articles* contained within this *Special Section* explore these burning issues by critically analysing the ongoing developments and by trying to suggest avenues for the improvement of the system. The contributions discuss European borders from theoretical, normative and empirical perspectives, combining legal insights with political, social and policy perspectives. The *Special Section* thus offers a contemporary and rich study of Schengen and European borders against the backdrop of recent challenges and future perspectives.

The first drafts of the *Articles* comprising this *Special Section* were presented at the 4th UNESCO Chair Conference "Schengen and European Borders", organised by Prof. Dr. Iris Goldner Lang at the Faculty of Law – University of Zagreb on 9 December 2022. The conference marked eight years since the establishment of the UNESCO Chair on Free Movement of Persons, Migration and Inter-Cultural Dialogue, and the decision of the Justice and Home Affairs Council of 8 December 2022, enabling Croatian accession to Schengen on 1 January 2023. The conference brought together some of the leading EU legal scholars who dealt with the challenges in the functioning of Schengen and European borders, concentrating on the future of Schengen, the protection of the rule of law and



fundamental rights of migrants and asylum seekers at the EU's external borders and the application of modern technologies at the Schengen borders. Following the discussion of the original drafts at the conference, the *Articles* were reviewed and revised for the *Special Section*. Special thanks to the reviewers for their time and valuable comments on all the contributions. The usual disclaimer applies.

The *Special Section* consists of two sets of *Articles*. The first set of three *Articles* is published in this issue of *European Papers*, while the second set of six *Articles* will be published in the next issue. The first set of *Articles* contains contributions by Thomas Gammeltoft-Hansen and William Hamilton Byrne, by Violeta Moreno-Lax and by Jorrit J. Rijpma and Henriët Baas. The second set of *Articles* contains the remaining six contributions by Niovi Vavoula, Věra Honusková and Enes Zaimović, Luisa Marin, Matija Kontak, Ana Kršinić and the editor, Iris Goldner Lang.

The *Article* by Thomas Gammeltoft-Hansen and William Hamilton Byrne on "Untangling the Legal Infrastructure of Schengen" sets the stage and takes an original perspective on Schengen as a composite legal regime. The paper builds on the authors' work at the Centre of Global Mobility Law (MOBILE) at the University of Copenhagen (led by Professor Gammeltoft-Hansen), where they research complex legal structures that govern how we move or are prevented from moving across national borders. This *Article* pioneers legal infrastructures as an analytical tool to bring into focus law's fundamental role in shaping human (im)mobility. It sets the theoretical frame and conceptualises Schengen as a legal infrastructure, while at the same time showing how Schengen has transformed to actively mediate human mobility and normative frameworks also outside the European space. The *Article* concludes on the implications of the analysis for our understanding of Schengen as a cornerstone of European mobility law.

In her *Article* on "'Crisification' as a Means of Governance in the Externalisation of EU Borders", Violeta Moreno-Lax discusses European borders from the perspective of the protection of fundamental rights and the rule of law. She argues that the "crisis mode" has permeated the EU migration and external borders acquis, consequently curtailing rights and freedoms. Professor Moreno-Lax's *Article* builds on her work as the Director of the Centre for the Study of Borders, Migration and Law: (B)OrderS at Queen Mary University of London. The *Article* argues that the "crisis" framing allows for the characterisation of (unwanted) migration as an anomaly calling for the adoption of "exceptional" (typically restrictive) measures – which eventually consolidate into standard policy, such as the routine fingerprinting of asylum applicants, pre-removal detention of overstayers and enhanced on-arrival interrogation of irregular migrants.

Jorrit J. Rijpma's and Henriët Baas's *Article* on "Schengen Purgatory or the Winding Road to Free Travel" is the third *Article* contained in the first part of the *Special Section*. The *Article* casts a new perspective on both the legal and political context of Schengen by discussing the duplication of external borders and external border controls – caused by the exclusion of Romania and Bulgaria from Schengen. The *Article* suggests that in order

to prevent new Member States from remaining stuck in the Schengen purgatory forever, future accession agreements should stipulate clear and binding commitments on both sides, which go beyond compliance with mere technical requirements, and provide for a proper transitional regime that lays down a clear legal framework governing the situation at the borders of Schengen candidates with both third countries and those with existing Schengen members.

The second part of the *Special Section* contains six *Articles*, three of which discuss the use of modern technologies at the EU's external borders. Niovi Vavoula's *Article* on "The Role of the Schengen Evaluation and Monitoring Mechanism (SEMM) in the Operationalisation of Interoperable Large-Scale IT Systems for Third-Country Nationals" unpacks the extent to which the SEMM has been an effective way to address operational challenges of large-scale IT systems for third-country nationals and whether it will be able to monitor how these systems operate in the future. The *Article* analyses whether the SEMM will face challenges in monitoring how information systems operate in the increasingly complex environment, whereby IT systems will double in number, and all systems will be connected through the interoperability components. Prof. Vavoula is one of the leading EU scholars on the digitalisation of EU immigration control and its challenges for fundamental rights.

Matija Kontak's *Article* on "Biometric Borders Envisaged by Frontex: Fundamental Rights in the Backseat" provides an assessment of biometric policy of the European Border and Coast Guard Agency (Frontex) and its consequences for the fundamental rights of migrants. By examining how and why Frontex uses biometrics and by analysing the Frontex report on "Technology Foresight on Biometrics for the Future of Travel", the author concludes that Frontex fails to account for the consequences of its biometric policy on fundamental rights when considering the effects of biometric technologies for the future.

The third *Article* addressing the use of modern technologies at the EU's external borders is the one by Ana Kršinić, titled "The Rise of Machines: Legal Aspects of Artificial Intelligence at Schengen Borders". It investigates the extent to which AI-based tools are being developed under direct EU financing, the transparency concerns, and the potential backsliding in legal protection when it comes to such technologies. She contends that the reasoning behind why certain AI border technologies are forbidden from being used or are put into the "high risk" category need to be clearly communicated and explained, cautioning that the current classification, which is based on an unspoken proportionality test, does not take into account all the relevant characteristics of AI. Both Matija Kontak and Ana Kršinić are junior researchers who have been researching the application of modern technologies in migration and asylum over the past year, as part of their work in the interdisciplinary project "Algorithmic Fairness for Asylum Seekers and Refugees (AFAR)", granted by Volkswagen Foundation to five partner institutions: Hertie School of Governance, University of Oxford, European University Institute, University of Zagreb and the University of Copenhagen.

Luisa Marin's *Article*, titled "Which Rule of Law for the External Borders of the European Union? Agencies, Institutions and the Complex Upholding of the Rule of Law at the EU's External Borders", suggest new responses to the rule of law crisis at the EU's external borders, thus expanding Dr. Marin's work on securitisation of border practices, done as a Marie Curie Fellow at the European University Institute. The *Article* expands the rule of law crisis narrative to the emerging EU administrative layer and claims that an effort of constitutional coherence is needed to support the embedding of the agencies into a more robust rule of law framework.

Věra Honusková and Enes Zaimović critically evaluate the legitimacy of the reintroduction of internal border controls in the Schengen area, based on the example the 2022 developments at the Czech-Slovak borders, in their *Article* titled "Framing Secondary Movements as a Threat to National Security: The Czech Republic and the Reintroduction of Border Controls". Although on paper the Czech Republic complied with the relevant deadlines and other conditions set by the Schengen Borders Code, the authors claim that this was, in fact, yet another example of politics prevailing over the law, fitting into a more general and existing pattern created by other Member States after the 2015 refugee "crisis". The authors' research is conducted within the framework of the Centre for Migration and Refugee Law at Charles University, headed by Prof. Honusková.

Finally, in her *Article* on "National Independent Monitoring Mechanisms for Fundamental Rights Compliance at the EU's External Borders", the editor of the *Special Section*, Iris Goldner Lang relies on her first-hand experience as a member of the Coordinating Board of the Croatian Independent Monitoring Mechanism – as the first such mechanism established in the EU. The *Article* argues that the mandate of national independent monitoring mechanisms, as stipulated by the recently adopted Screening Regulation and Asylum Procedures Regulation, should be broadened to encompass monitoring of all border activities and all locations and not only the EU's external borders. It also suggests that monitoring activities of such mechanisms should be based on EU-harmonized rules on evidence collection, processing and follow-up procedures, to prevent dissonance among different Member States.

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