



Definition and Management of European Borders and Migration Flows: EU Policies and Instruments

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1. Introduction

- **Some terminological and regulatory clarifications**
- **External and internal Borders**
- The **geographical demarcation of the respective borders is an exclusive competence of the Member States**, in accordance with international law (art.77, par. 4, TFEU)
- **Application of different measures and exceptions**
- **Migration flows** are always existed as temporary or permanent movement of individuals or groups from one place to another from one country to another.

- Towards the end of the millennium, the migratory phenomenon took on a **global character**, both from the point of view of the migrant flows and the territories concerned
- The so-called globalization did not exclude **polarization around certain geographical areas**, linked to the emergence of new economic aggregations
- The European Union has always considered **migration flows in more economic terms as the entry of workers and labor**, i.e. the labor market
- **The right to leave a country, including one's own.** It is a right of individual freedom and concerns, in particular, the freedom of movement .
- It is an **autonomous right**, as well as it is **instrumental or functional** for the exercise of other fundamental rights and freedoms.

The right to leave a countries

Universal Level

- The **Universal Declaration of Human Rights** (Article 13.2)
- the **International Covenant on Civil and Political Rights** (ICCPR, Article 12.2). This right can be restricted, but restrictions must be provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and be consistent with the other rights recognized by the ICCPR (Article 12.3)
- The **1966 UN Convention on the Elimination of All Forms of Racial Discrimination** (Article 5, lett. ii)
- The **1990 UN Convention on the Rights of the Child** (Article 10.2)
- The **1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** (Article 8.1)
- The **2000 UN Convention against Transnational Organized Crime** contains **two protocols** relevant to the issue of the right to leave a country

European Level

- **Article 2.2 of Protocol No. 4 to the European Convention of Human Rights of 1968**

The European Court of Human Rights' case law concerning the right to leave one's country emphasized that any restrictions: must be adopted in accordance with the principle of legality, must pursue a valid legitimate aim and must be strictly necessary to achieve that aim. Any interference or limitation must be proportionate to the circumstances

- **The EU Charter of Fundamental Rights does not include this right**

The EU Court of Justice's case law uses a different parameter to frame the right to leave a country, that is to say the common market system and the rules of its functioning

- International sources are silent about a possible individual's right to be admitted to the territory of a State other than his own.
- On the contrary, **the right to seek and enjoy asylum** is deeply embedded in the international human rights system

Universal level

- The **1948 Universal Declaration of Human Rights** (Article 14.1)
- The **1951 UN Convention relating to the Status of Refugees and its 1967 Protocol** (refoulement – prohibited by Article 33)
- The **1984 UN Convention against Torture** extends the non-refoulement duty to anyone who is at risk of torture (Article 3.1)

European Level

- The **European Convention on Human Rights** does not contain any specific provision in respect of refugees:
 - Article 3 - **prohibition of torture**
 - Article 2 - **right to life**
 - Article 6 - **right to fair trial**
- **Article 4 of Protocol No. 4 – Prohibition of collective expulsion of aliens**
- The **EU Charter of Fundamental Rights**
 - Article 18 - **Right to asylum**
 - Article 19 - **Protection in the event of removal, expulsion or extradition**

Some Critical Issues

- The person must **cross an international border** and get to another country in order to be able to seek and enjoy asylum and protection from refoulement
- The impact of the **externalisation of border control policies** on the right to leave a country: introduction of visa requirements, readmission agreements, etc.

2. The creation of the Schengen Area

- The EU deals with immigration issues in the framework of the **Area of "Freedom, Security, Justice" (AFSJ)**: the widest possible freedom of individuals, safeguarding security and respect for the rules of coexistence
- The matter is now regulated in the Title V, **Chapter 2 concerning Policies on border checks, asylum and immigration of the TFEU**
- The Treaty of Rome did not contain provisions in this field, but **provisions on the free movement of workers from the same Member States**, at least until the 1970s
- When the geographical origin of the workforce changes, Community action aims to **prevent and repress illegal immigration and improve the conditions of workers from third countries in order to guarantee them the equal treatment of EC workers**

- The **abolition of internal checks borders needs a precondition: the strengthening of controls at external borders**
- Hence the **introduction of immigration, visa and asylum rules aimed to ensure that the accession criteria to the common internal market are shared** in order to avoid economic imbalances
- With **1985 Schengen Agreement**, Belgium, France, Germany, Luxembourg and the Netherlands decided to progressively eliminate internal border controls and introduced freedom of movement for all citizens of the signatory countries, other EU countries that wish to join and some third countries, such as Iceland, Norway, Switzerland and then Liechtenstein (19 December 2011) which became part of the Schengen area
- The **1990 Schengen Convention** completed the agreement and specified the conditions and guarantees for the establishment of an area of free movement, adopting a number of **compensatory measures necessary to strengthen controls at external borders** according to some mechanisms, such as the **Schengen Information System (SIS) and the Visa Information System (VIS)**.

3. From Schengen to the Current Immigration Policy

- The transition from Schengen to the current immigration policy begins with **the 1992 Maastricht Treaty** whose Title VI created the so-called "**third pillar**" concerning the **Cooperation on "Justice and home affairs"**
- However, **the Schengen "system" remained outside** the third pillar
- The effective abolition of borders check began on March 26, 1995
- Then, **the Schengen Area expanded, albeit with different rules for some Member States**
- The Agreement and the Convention, as well as the related agreements and rules, formed the "**Schengen acquis**", and were integrated into the framework of the European Union thanks to **the 1999 Amsterdam Treaty** which "**communitarised**" immigration policy

- The term "communitarization" indicated that the Schengen system and all the acts that have been enacted within the framework of this system **were "trasposed" within the competence of the Community institutions** (Title IV of the EC Treaty on "Asylum, visas, immigration")
- In parallel with the revisions of the Treaties, **the European Council played an important programmatic role in relation to developments and progress in the different areas of the AFSJ**, thanks to the 1999 Tampere Program, the 2004 Hague Program, the 2009 Stockholm Program
- **The Lisbon Treaty officially recognizes the role of the European Council** which defines **the strategic guidelines for legislative and operational planning** within the Area of Freedom, Security and Justice (Article 68 TFEU)
- In the **Conclusions of 26-27 June 2014**, the European Council adopted the Strategic guidelines intended to guide the action of the European Union in this area during **the five-year period 2015-2020**.

4. The Provisions of Lisbon Treaty

According to **Article 77 TFEU**, the Union shall develop a policy with a view to:

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

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt **measures** concerning:

- (a) **the common policy on visas and other short-stay residence permits**;
- (b) the checks to which persons **crossing external borders** are subject;
- (c) **the conditions under which nationals of third countries shall have the freedom to travel** within the Union for a short period;
- (d) any measure necessary for the gradual establishment of an **integrated management system for external borders**;
- (e) the **absence of any controls on persons**, whatever their nationality, when crossing **internal borders**.

According to **Article 79 TFEU**, the Union shall develop a **common immigration policy aimed at ensuring**, at all stages,:

- the **efficient management of migration flows**,
- **fair treatment of third-country nationals** residing legally in Member States,
- the prevention of, and enhanced measures to combat, **illegal immigration and trafficking in human beings**

In many cases, workers from third countries are an indispensable economic resource for the Member States, so that Article 79, par. 4 states: “the European Parliament and the Council may establish measures to provide **incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories**”

- any harmonisation of the laws and regulations of the Member States is excluded
- Member States have the right to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed (par. 5).

4. The Schengen Area today

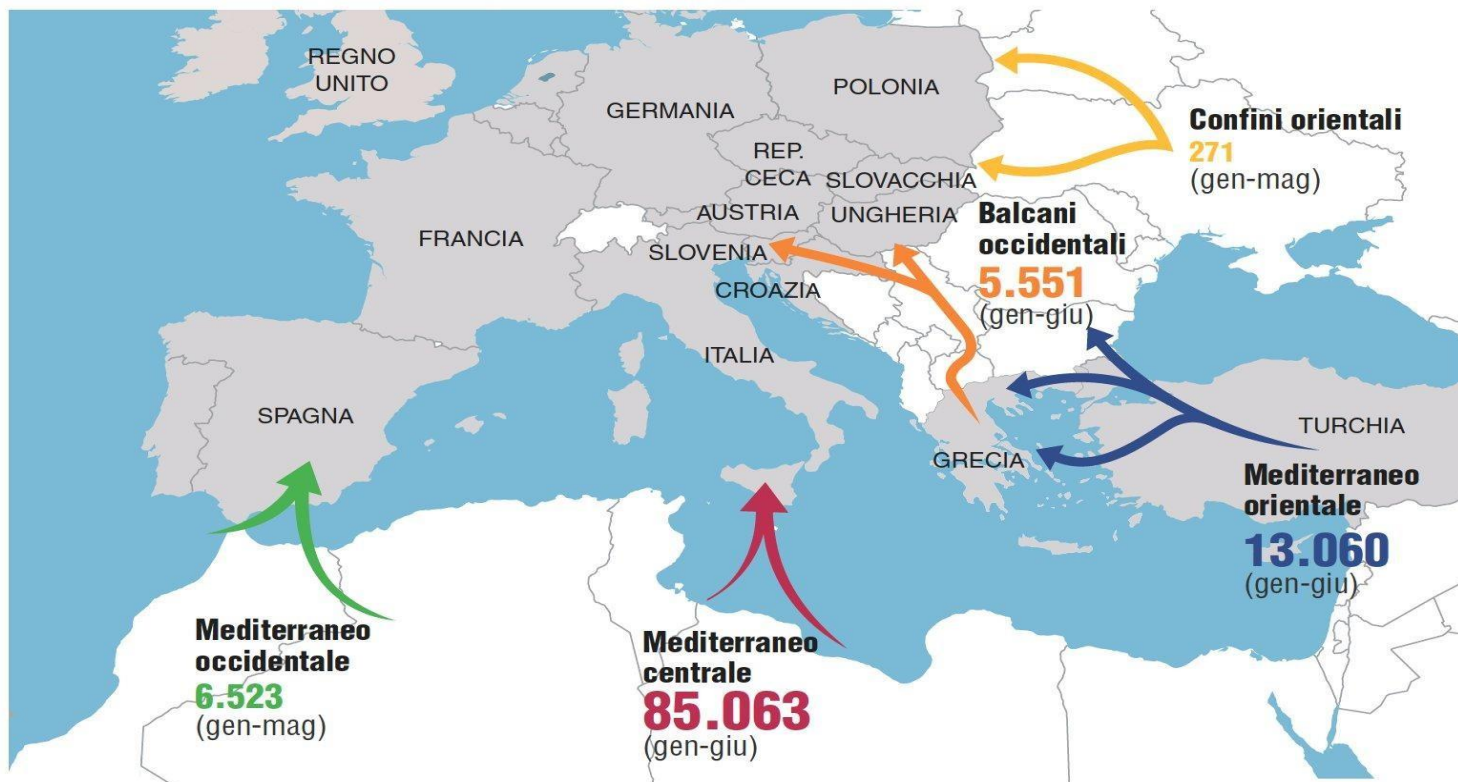
- Currently, the Schengen Area is made up of **26 European countries** (including 22 EU states)
- **There aren't checks at the internal borders** (i.e. at the borders between two Schengen States)
- There are, according to clearly defined criteria, **harmonized checks at external borders** (i.e. at the borders between a Schengen State and a non-Schengen State)
- As a result, both **EU citizens and third-country nationals can move freely within the Schengen Area** and are only subject to checks at external borders

- **Bulgaria, Croatia, Cyprus, Romania** are EU member states, but are not yet part of the Schengen Area
- **EU citizens can move freely within the EU**, regardless of whether or not individual countries join the Schengen area. Upon entry into an EU Member State that is not a member of the Schengen area, EU citizens are, in principle, subject to minimum checks, aimed at verifying their identity based on travel documents (passport or identity card)
- **EU accession candidate countries must fully accept the Schengen acquis** at the time of their accession and gradually integrate it into their legal systems
- **Checks of internal borders are lifted** only (by unanimous decision of the Council), after an evaluation by the Commission and EU country experts that verify the correct application of the all the measures required.

- The **Schengen Area has been repeatedly suspended** for reasons of public order, public safety, health protection, public health, etc., **according to the Regulation (EU) 2016/399** - Chapter II on the Temporary reintroduction of border control at internal borders (art. 25 ff.). See the *Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services* (Official Journal of the European Union, C 0961, 24 March 2020)
- There are others provisions of the TFEU that limit for the same reasons free movement of:
 - ✓ Goods, Art. 36 TFEU;
 - ✓ Workers, Art. 45 TFEU;
 - ✓ Establishment, Art. 52 TFEU;
 - ✓ Capital and Payments Art. 65 TFEU
- art. 72 TFEU: “This Title shall not affect **the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security**”
- Pursuant to art. 4, par. 2 TFEU "**The Union has a shared competence with that of the Member States** in the following main areas:
 - j) **area of freedom, security and justice;**
 - (k) common safety concerns in public health matters, as regards the aspects defined in this Treaty ”.

Le porte d'Europa

Clandestini arrivati nel 2017 attraverso le principali rotte migratorie



Fonte: Frontex

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6. EU External Borders Checks' Mechanisms and Agencies

- **Schengen Borders Code - Regulation (EU) 2016/399** of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders
- **Schengen Information System (SIS) - Regulation (EU) 2018/1861** of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 which introduced measures concerning **Biometrics, counter-terrorism, vulnerable persons, irregular migration, improved access for other EU agencies (SIS II)**

On 28 November 2018, the European Parliament and the Council of the EU adopted a package of reforms consisting of three regulations whose purpose is to develop the **Schengen Information System (SIS II)**

SIS II is based on the following three regulations governing the operation and use of the system in different sectors:

- **Regulation (EU) no. 2018/18624** concerns the area of police cooperation and police judicial cooperation in criminal matters (**Police SIS Regulation**);
- **Regulation (EU) no. 2018/18615** regulates the use of the system in the verification of Frontier (**SIS Frontiers Regulation**);
- **Regulation (EU) no. 2018/18606** forms the basis for the use of SIS II in view of the return of third-country nationals whose stay is irregular (**SIS Return Regulation**).

- **Entry/Exit System (EES) - Regulation (EU) 2017/2226** of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011
- **European Border Surveillance System (Eurosur) - Regulation (EU) No 1052/2013** of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) “in order to improve situational awareness and to increase reaction capability at the external borders of the Member States of the Union ... for the purpose of detecting, preventing and combating **illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants**”

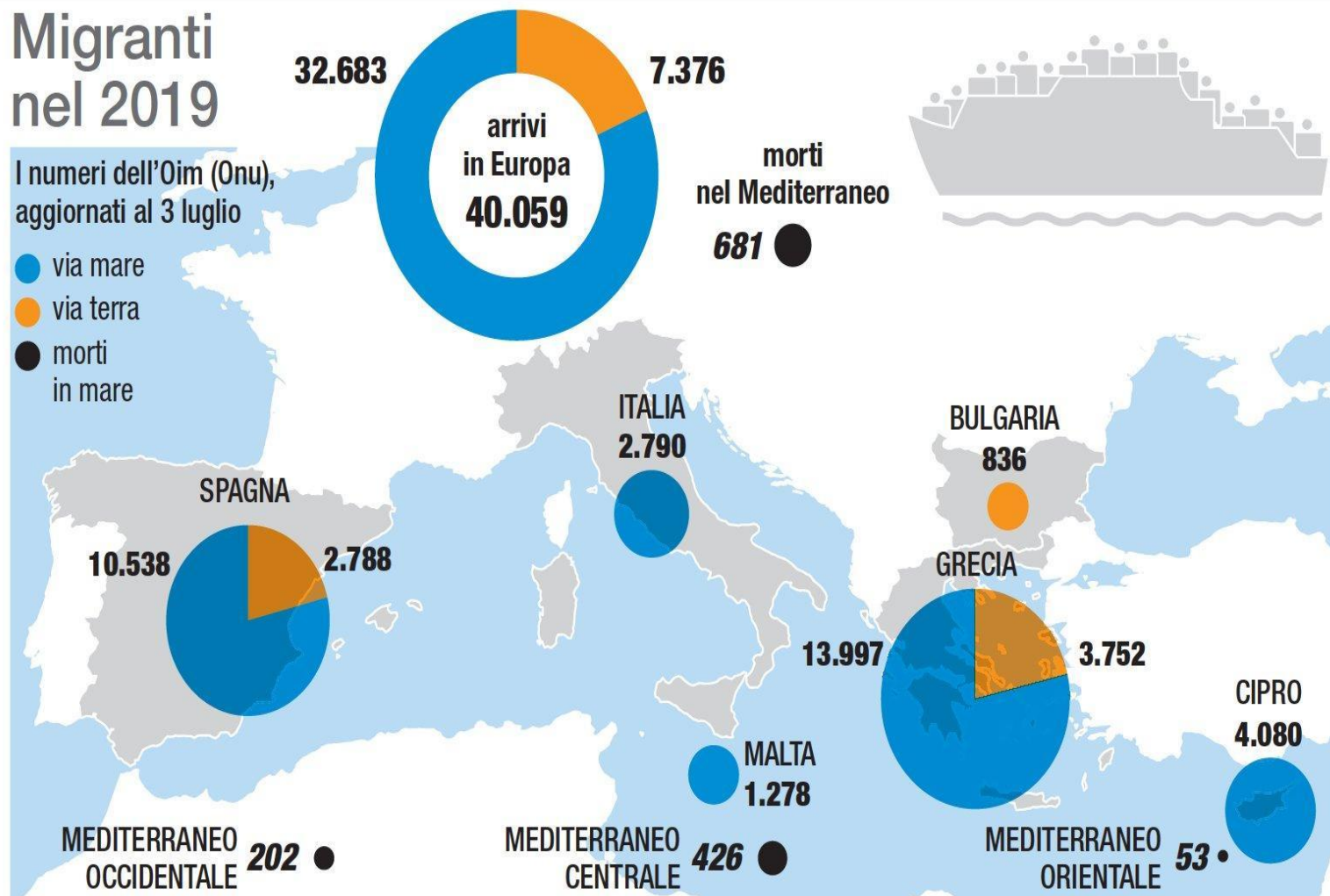
FRONTEX

- It was born as European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, **commonly referred to as Frontex**, thanks to the Council Regulation (EC) No 2007/2004
- **European Border and Coast Guard Agency - Regulation (EU) 2019/1896** of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624
- **European integrated border management at the external borders** (article 3)
- **shared responsibility of the Agency and of the national authorities** for border management (article 7)
- **Cooperation with third countries** is an important element of European integrated border management
- On 5 October 2018, the European Union signed an agreement with **Albania** on cooperation on border management between Albania and the European Border and Coast Guard Agency (Frontex). Albania participated in the first join mission on May 2019

Migranti nel 2019

I numeri dell'Oim (Onu), aggiornati al 3 luglio

- via mare
- via terra
- morti in mare



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6. An overview of the operations at sea

- Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for **the surveillance of the external sea borders in the context of operational cooperation** coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
- **EU operations in the Mediterranean**

528 653 lives saved since 2015

Data as of 8 March 2020 | Dead or missing: 12 677 (as of 10/03/2020)



Starting date of each operation



Operation Sophia:
01/06/2015



Operation Poseidon:
01/01/2016



Operation Indalo:
03/05/2017



Operation Themis:
01/02/2018

**Including figures from former Operation Triton since 1 February 2016. **The deployment of the naval assets of Operation Sophia has temporarily been suspended. During its operation 44 916 persons were rescued (source: ISAA 202).*

Source: Frontex and IOM



7. Conclusions

An overlapping legal framework of Search and Rescue

Obligations of the Master (art. 98.1 UNCLOS and SOLAS regulation V/33.1)

Obligations of Governments and Rescue Coordination Centres (RCCs) - according to art. 98.2 UNCLOS, SOLAS regulation V/7 and SAR CONVENTION

Guidelines on the treatment of persons rescued at sea – IMO Resolution MSC.167(78) – 2004

The discussed concept of «place of safety» in compliance with the right of non-refoulement, art. 33.1 of the 1951 Refugee Convention

A judicial solution: Italian Court of Cassation, Section III, 20 February 2020, nr. 6626