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Watching the guards: Ensuring compliance with fundamental rights at the external borders

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Abstract

The essay deals with the enhancement of the legal framework for informal readmissions at internal borders enshrined in the proposal on an amended Schengen Border Code, which in turn requires enhancement of bilateral police cooperation. It focuses on the impact of the new rules on the prohibition on police controls equivalent to border checks to highlight that the case-law of the Court of Justice on the matter creates a huge grey area which is critical for the ideal of a border-check-free Union. Increased use of video surveillance and other technologies also faces the legal bottleneck of prohibition on police controls having equivalent effects to border checks, as well as raising serious concerns on fundamental rights. It is argued that the situation resulting from these amendments to the Schengen Border Code should be considered in terms of an impending rule of law crisis at internal borders. [Correction added on 19 July 2024 after first online publication: The Abstract section was previously omitted and has been included in this version.]

1 | INTRODUCTION

In April 2022, a damning report from the EU's anti-fraud office (OLAF) detailing how the European Border and Coast Guard Agency (Frontex) had turned a blind eye to pushbacks led to the resignation of its Executive Director, Fabrice Leggeri.¹ In his letter of resignation, Leggeri stated that he stepped back because the mandate of Frontex had

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¹Giorgios Christides and Steffen Lüttke, 'Classified Report Reveals Full Extent of Frontex Scandal', *Der Spiegel* (29 July 2022), <https://www.spiegel.de/international/europe/frontex-scandal-classified-report-reveals-full-extent-of-cover-up-a-cd749d04-689d-4407-8939-9e1bf55175fd>. "Pushbacks", although widely used, is not a legal term. It will be used in this article to mean the refusal of entry or direct return at the external borders or at sea, in violation of the prohibition of non-refoulement and collective expulsions, as laid down in Art 3 ECHR and Art 4 of the fourth protocol to the ECHR, as well as Arts 4 and 19 of the EU Charter of Fundamental Rights.

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'silently, but effectively' been changed.² Critics interpreted these words as saying that human rights have taken priority over the protection of Europe's borders. Just a month later, in an interview with a Dutch newspaper, Commissioner Schinas was asked why the Commission had not taken action against pushbacks by Member States. His answer: 'The external borders have to be protected!'³ Both statements show a widely present misconception that the respect for fundamental rights is an obstacle to the management of the EU's external borders, rather than part and parcel thereof.⁴

In the same interview, the Commissioner stated that despite many allegations, there was very little hard evidence of pushbacks. This statement is contradicted by widely reported and well-documented violations of fundamental rights at the external borders of the European Union, which includes pushbacks.⁵ National courts, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have on numerous occasions confirmed the existence of such violations.⁶ The inaction of the Commission has given rise to widespread criticism. In 2021, the European Parliament in its Annual Report on the Functioning of the Schengen area reproached the Commission for being 'slow or outright reluctant to initiate infringement proceedings.'⁷ The reluctance to bring enforcement actions is visible not only in relation to the external borders but also in relation to the prolonged reintroduction of internal border checks contrary to EU law. More generally, there has been a decrease in the number of infringement proceedings brought and a shift towards other means of addressing non-compliance with EU law.

This article examines the means the Commission has at its disposal to address non-compliance with the Schengen borders *acquis* in general, and with fundamental rights at the external borders specifically. First, it will look at the Commission's enforcement powers under primary law, most importantly the infringement procedure. Second, it will examine two alternative instruments aimed at ensuring compliance with the Schengen (border) rules, namely the Schengen Evaluation and Monitoring Mechanism (SEMM) and the Vulnerability Assessment Mechanism (VAM). Third, it will examine to what extent conditionality can be applied to the EU's funding instruments for the management of immigration, asylum and external borders as a means of enforcing compliance with the Schengen *acquis*, and in particular the role of national border monitoring mechanisms. It will be shown that although alternative forms of compliance management may improve the oversight over Member States' implementation of EU law, when it comes to ensuring the respect for fundamental rights, they can at best complement the Commission's enforcement powers.

²Publication of Leggeri's Resignation Letter (29 April 2022), https://twitter.com/g_christides/status/1519967913066782720.

³Marc Peepker, 'Europees Commissaris Margaritis Schinas: "We zijn getuige van het einde van Poetins macht"', *De Volkskrant* (27 May 2023), <https://www.volkskrant.nl/nieuws-achtergrond/europees-commissaris-margaritis-schinas-we-zijn-getuige-van-het-einde-van-poetins-macht~b89f1765/>. Note that this interview was given before the OLAF Report was leaked.

⁴Regulation (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 Borders Code), OJ 2016 L77/1.

⁵See, for a recent example, the footage published by the *New York Times* in May 2023: <https://www.nytimes.com/2023/05/19/world/europe/greece-migrants-abandoned.html>. Further examples are readily available: Final Report of the Frontex Scrutiny Working Group of the LIBE Committee on the fact-finding investigation on Frontex concerning alleged fundamental rights violations (14 July 2021), 3–4; Refugee Rights Europe, 'Pushbacks and Rights Violations at Europe's Borders: The State of Play in 2020', <https://refugee-rights.eu/wp-content/uploads/2020/11/pushbacks-and-rights-violations-at-europes-borders.pdf>; Special Rapporteur on the human rights of migrants (F. González Morales), 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea', A/HRC/47/30 (UN Human Rights Council 2021); Human Rights Watch, 'Croatia: Ongoing, Violent Border Pushbacks' (3 May 2023), <https://www.hrw.org/news/2023/05/03/croatia-ongoing-violent-border-pushbacks>; May Bullman, Bashar Deeb et al., 'Europe's Black Sites', *Lighthouse Reports* (8 December 2022), <https://www.lighthousereports.com/investigation/europes-black-sites/>; H. Barker and M. Zajić (eds.), 'Black Book of Pushbacks 2022' (GUE/NGL), 7 December 2022, <https://left.eu/issues/publications/black-book-of-pushbacks-2022/>.

⁶By means of example, see *D. v. Bulgaria*, App. No. 29447/17 (ECtHR, 20 July 2021); *M.H. e.a. v. Croatia*, App. Nos. 15,670/18 and 43,115/18 (ECtHR, 18 November 2018); Case C-808/18, *Commission v. Hungary* (Access to International Protection) (2020), EU:C:2020:1029; Supreme Court of Slovenia, I U 1686/2020, 9 April 2021 (ECLI:SI:UPRS:2020:I.U.1686.2020.126); Administrative Jurisdiction Division of the Council of State of the Netherlands, 202,106,105/1/V3, 8 September 2022 (ECLI:NL:RVS:2022:2644) and ECLI:NL:RVS:2022:2644, 12 April 2022, ECLI:NL:RVS:2022:1043. See also the eight pending cases concerning pushbacks communicated by the ECtHR to Greece on 20 December 2020: <https://racistcrimeswatch.wordpress.com/2021/12/23/2-318/>, as well as the numerous interim measures issued by the Court preventing Greece from removing refugees, e.g., on islets in the Evros river bordering Greece: Greek Council for Refugees, 30 April 2022: <https://www.gcr.gr/en/news/press-releases-announcements/item/1962-the-european-court-for-human-rights-ecthr-grants-interim-measures-for-5th-group-of-syrian-refugees-stranded-on-an-islet-in-the-evros-river>.

⁷European Parliament Resolution of 8 July 2021, P9_TA(2021)0350, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0350_EN.html, para. 4.

2 | WHERE IS THE GUARDIAN OF THE TREATIES?

Under Articles 258–260 TFEU, the Commission can bring legal action before the CJEU against a Member State that has acted in breach of its obligations under EU law.⁸ Infringement proceedings may address straightforward cases of non-compliance, such as the non-transposition of directives or non-conformity of national legislation with EU law, but also the incorrect application of EU law by national authorities.⁹ In *Commission v. Ireland* (Irish Waste), the Court held that a Member State can infringe Union law through ‘a consistent and general administrative practice’.¹⁰ In *Commission v. Hungary* (Access to International Protection), the Court held that Hungary had infringed EU law through a combination of both national legislation and administrative practice, both of which limited access to international protection as provided under the Asylum Procedures Directive, read in light of the Charter.¹¹ Even administrative inaction may give rise to infringement proceedings as a breach of the principle of sincere cooperation, for instance when a Member States fails to take adequate steps against the violation of EU law by non-state actors.¹²

When guarding their external borders, Member States are implementing EU law and are therefore bound by EU fundamental rights.¹³ This is also the case when they derogate from EU law, e.g., when invoking the public policy or national security exceptions under EU secondary legislation or Article 72 TFEU, as they would continue to operate within the scope of EU law.¹⁴ Member States also have an obligation to prevent or stop violations of EU law, which could be relevant in case of private parties violating migrants' rights.¹⁵ The case of *Commission v. Hungary* (Access to International Protection) shows how national measures may violate both non-Charter and Charter provisions, especially where secondary legislation gives expression to fundamental rights or expressly provides that it shall be applied in compliance with fundamental rights. As argued by Prete and Smulders, both would be able to constitute self-standing infringement, but the violation of the Charter could be an ‘aggravating factor’ adding to the seriousness of the breach of the non-Charter provision.¹⁶

2.1 | The Commission's discretion

It is important to recall that the Commission is not under a legal obligation to initiate infringement proceedings.¹⁷ This has been justified by ‘factors like political sensitivity, limited human resources and compliance management’.¹⁸ In the words of former Advocate General Mengozzi: ‘the Commission must be allowed to set an order of priority for its action which takes account of the nature and gravity of the infringements and the extent of the effects thereof’.¹⁹ The CJEU has also repeatedly confirmed that the Commission cannot be forced to initiate infringement proceedings in an action for failure to act.²⁰

⁸Its legal nature distinguishes the political procedure of Art 7 TEU against a Member State that infringes EU foundational values. See also Case C-619/18, *Commission v. Poland* (2011), EU:C:2019:325, Opinion of AG Tachev, paras. 48–51.

⁹European Commission, ‘Commission Staff Working Document, Part I: General Statistical Overview’ SWD (2018) 377 final, 5, accompanying the document: Commission, ‘Report from the Commission Monitoring the Application of European Union Law 2017 Annual Report, COM(2018) 540 final.

¹⁰Case 494/01, *Commission v. Ireland* (2005), ECLI:EU:C:2005:250, para. 28.

¹¹Case C-808/18, *Commission v. Hungary* (Access to International Protection) (2020), EU:C:2020:1029.

¹²Art 4(3) TEU. See Case C-265/95, *Commission v. France* (1997), ECLI:EU:C:1997:595.

¹³This means that they are bound by the Charter of Fundamental Rights, see Art 51(1) CFR, and general principles of EU law, which include fundamental rights.

¹⁴See the recent declaration of a state of emergency by Poland and Lithuania in response to the “instrumentalisation” of migrants by Belarusian dictator Lukashenko: M. Grzeskowiak, ‘The “Guardian of the Treaties” Is No More? The European Commission and the 2021 Humanitarian Crisis on Poland-Belarus Border’, (2023) 42(1) *Refugee Survey Quarterly*, 81.

¹⁵See, for instance, Matthew Brunwasser, ‘Bulgaria's Vigilante Migrant “Hunter”’ (30 March 2016), <https://www.bbc.com/news/magazine-35919068>.

¹⁶L. Prete and B. Smulders, ‘The Age of Maturity of Infringement Proceedings’, (2021) 58 *CMLRev*, 285, 290–291.

¹⁷C. Harlow and R. Rawlings, ‘Accountability and Law Enforcement: The Centralised EU Infringement Procedure’, (2006) 30(4) *ELRev*, 447, 449 and 454.

¹⁸E. Várnay, ‘Discretion in the Arts 258 and 260(2) TFEU Procedures’, (2015) 22 *Maastricht Journal of European and Comparative Law*, 836, 841.

¹⁹Case C-523/04, *Commission v. Netherlands* (2006), EU:C:2006:717, Opinion of AG Mengozzi, para. 86.

²⁰Starting with Case 247/87, *Star Fruit* (1989), EU:C:1989:58, paras. 11–12.

The Commission has consistently emphasised that its enforcement priorities are with 'systematic and persistent' infringements.²¹ In the absence of a designated monitoring or investigation service, information on infringements reaches the Commission in different ways, ranging from the media to national ombudspersons, and from European parliamentary questions to complaints from individual businesses and individuals. The Commission increasingly relies on technological resources, in terms of both monitoring the implementation of EU law, e.g., through a database that automatically flags late implementation and in handling complaints (EU Pilot).²² However, enforcement by database has been criticised for fostering a technocratic enforcement at the expense of infringement that cannot be readily put into a database, such as violations of fundamental rights.²³

The Juncker Commission, as part of its Better Regulation Agenda, advocated a more strategic approach to enforcement but failed to provide a clear focus and lacked attention to fundamental rights.²⁴ In its 2020 Strategy to strengthen the application of the Charter, the Commission reaffirmed that it would use infringement proceedings 'where appropriate' and would 'closely monitor' cases of systemic failure.²⁵ It would focus on issues of principle or those having a particularly far-reaching negative impact for citizens, showing a striking disregard for the protection of third country nationals under the Charter.²⁶ Despite numerous reports monitoring the situation of fundamental rights and the rule of law in the EU, their use is limited due to their general nature and the absence of a coherent and principled enforcement strategy which effectively links fundamental rights reporting with enforcement action.²⁷

2.2 | The retreat from public enforcement

Even more important than the lack of a strategy for when to bring infringements is the overall decline in the number of infringement cases. Rather than being evidence of a more focused approach, Hofmann concludes that this demonstrates the Commission's withdrawal from centralised enforcement.²⁸ This conclusion is shared by Kelemen and Pavone. They attribute this development to the politicisation of the infringement procedure, which has gone hand in hand with a more central role for the Commission President and the Secretariat General.²⁹ Although it would be naive to think that wider political considerations have never played a role in the decision to launch infringement proceedings, the politicisation of this decision may easily become self-reinforcing if enforcement action is increasingly seen as unfriendly or hostile, rather than an exercise of the Commission's responsibilities under the Treaties.

Given the sensitivity of the Schengen *acquis*, touching upon politicised questions of control over borders and internal security, it does not come as a surprise that the Commission has been reluctant to initiate infringement proceedings, even in the face of blatant violations of the Schengen *acquis* and the rules of the Common European Asylum System (CEAS). It has been argued that during the 2015 refugee policy crisis, the Commission lost much political

²¹Commission, 'Better Monitoring of the Application of EU law' (communication) COM(2002) 725 final; Commission, 'A Europe of Results—Applying Community Law' (communication) COM(2007) 502 final; Commission, 'EU law: Better Results through Better Application' (communication) C(2016) 8600 final; A. Hofmann, 'Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union', (2018) 40 *J Eur Integr*, 737, 741.

²²EU Pilot is an online platform used for the exchange of information and a 'structured problem-solving dialogue': https://single-market-scoreboard.ec.europa.eu/enforcement-tools/eu-pilot_en (last visited 17 July 2023).

²³M. Smith, 'Infringement and Sanctions Procedures', in A. Arnall and D. Chalmers (eds.), *The Oxford Handbook of European Law* (Oxford University Press, 2017), 350, 364.

²⁴It would give priority to non-transposition of directives, failure to comply with CJEU rulings and cases of damage to the EU's financial interests or a violation of the EU's exclusive competences, as well as non-compliant national legislation and the incorrect application of EU law: Commission, 'EU Law: Better Results through Better Application' (Communication), C(2016) 8600 final, 14.

²⁵Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (Communication), COM(2010) 573 final, 10; Commission, 'Strategy to Strengthen the Application of the Charter of Fundamental Rights in the EU', COM(2020) 711, 7.

²⁶*Ibid.*, COM(2010) 573 final, 10.

²⁷See, e.g., the Commission's yearly rule of law reports, the annual reports on the application of the Charter that have been published since 2010, as well as the information compiled by the European Union Agency for Fundamental Rights (FRA). See, on the need for such strategy, K.L. Scheppele et al., 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', (2020) 39 *Yearbook of European Law*, 3–121.

²⁸A. Hofmann, see above, n. 21, 741.

²⁹R.D. Kelemen and T. Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union', (2022) <https://doi.org/10.2139/ssrn.3994918>.

capital on the failed relocation scheme, making it particularly reluctant to use its enforcement powers.³⁰ Moreover, the Commission and Member States are keen to prevent a repetition of the events of 2015. Given the lack of progress on the Commission's New Pact on Migration and Asylum, their focus shifts once again to the politically less contentious reinforcement of the external borders. It is worrying that, starting with the EU-Turkey deal and the "closing" of the Balkan route in 2016, pushbacks and non-entry policies, even when enacted by EU Member States, have increasingly been met with acquiescence, if not tacit support.³¹

2.3 | Proving fundamental rights violations at the external borders

A recurring reason put forward by the Commission for refraining from enforcement action against violations of fundamental rights at the external borders has been that it lacks the power and staff to gather the necessary evidence to bring infringement proceedings.³² In a case of non-implementation, incorrect implementation or national legal provisions violating EU law, the argument put before the Court can be rather straightforward, consisting of a comparison between the applicable EU norms and the offending national legal provisions. In the same way, it should not be too difficult to prove a failure to comply with a ruling of the CJEU.

What may be more difficult to demonstrate is a national administrative practice in violation of EU law. The Court has held that cases of systemic and persistent administrative practices in violation of EU law require different evidence from cases regarding national provisions.³³ Once such a case has entered the judicial phase, the Commission must provide the Court with all necessary information and may not rely on any presumption.³⁴ It is only once the Commission has put forward sufficient evidence to show an incorrect application of EU law that the Member State concerned must challenge in substance and in detail the information produced.³⁵ The Commission must provide 'sufficiently documented and detailed proof of the alleged practice'.³⁶ Although the Court did not give much detail on when such a systemic and persistent breach must be deemed to exist, Advocate General Geelhoed, in his Opinion in *Commission v. Ireland* (Irish Waste), referred to the scale, duration and seriousness of the infringement to be taken into account, which has subsequently been endorsed in literature.³⁷

Since the Commission does not have a dedicated investigating service, it must rely on information provided by complainants, as well as the Member States.³⁸ It may also use information from other EU institutions and agencies, Member State Expert Groups, United Nations and Council of Europe bodies, judicial networks and civil society organisations in much the same way as it does for the compilation of its annual report on the application of the Charter.³⁹ In *Commission v. Hungary* (Access to International Protection), the Commission attached three United Nations High

³⁰M. Grześkowiak, see above, n. 14, 97, with reference to A. Betts and P. Collier, *Refugee: Transforming a Broken Refugee System* (Penguin Books, 2018), 89–90. This is the case not only in relation to the external borders but also with regard to the prolonged reintroduction of internal border controls. See in this regard J. Rijpm and S. Salomon, 'The Promise of Free Movement in the Schengen Area: The Decision of the Court of Justice in *Landespolizeidirektion Steiermark* (NW)', (2023) *European Law Review*, 123. The Commission launched successful infringement proceedings against the Member States refusing to comply with the relocation decisions: Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and the Czech Republic*, ECLI:EU:C:2020:257.

³¹European Council (18 March 2016). EU-Turkey statement. Press release, 144/16, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>. See, for example, Alistair Jamieson and Kirsten Ripper, 'Greece Is "Europe's Shield" in Migrant Crisis Says EU Chief von der Leyen on Visit to Turkey Border', *euronews.com* (4 March 2023), <https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>; Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the October European Council and the situation in Belarus and at its border with the EU, 23 November 2021, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_6249.

³²See, e.g., European Ombudsman, 'Decision Concerning How the European Commission Monitors and Ensures Respect for Fundamental Rights by the Croatian Authorities in the Context of Border Management Operations Supported by EU Funds (Case 1598/2020/V5)', 22 February 2022, point 14, <https://www.ombudsman.europa.eu/en/decision/en/152811>.

³³Case C-441/02, *Commission v. Germany*, EU:C:2006:253, para. 49.

³⁴See inter alia Case 494/01, *Commission v. Ireland* (2005), ECLI:EU:C:2005:250, para. 41; Case C-441/02, *Commission v. Germany*, EU:C:2006:253, para. 48; ECLI:EU:C:2018:251; Case C-541/16, *Commission v. Denmark*, ECLI:EU:C:2018:251, para. 25.

³⁵Case 494/01, *Commission v. Ireland* (2005), ECLI:EU:C:2005:250, para. 44.

³⁶Case C-441/02, *Commission v. Germany* (2006), EU:C:2006:253, para. 49.

³⁷L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings', (2010) 47 *CMLRev*, 9, 24.

³⁸Case 494/01, *Commission v. Ireland* (2005), ECLI:EU:C:2005:250, para. 44.

³⁹Commission, 'Strategy to Strengthen the Application of the Charter of Fundamental Rights in the EU' (Communication), COM(2020) 711 final, 7.

Commissioner for Refugees (UNHCR) reports to its application, which the Court referred to in its judgment.⁴⁰ The CJEU pointed to the significant role given to the UNHCR in the 1951 Refugee Convention, with which EU asylum law has to comply.⁴¹ It also referred to reports by the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, also annexed to the Commission's application.⁴²

Information provided by governmental and non-governmental actors was also instrumental in the seminal case of *M.S.S. v. Belgium and Greece*, in which the ECtHR found that transfer of an asylum applicant under the Dublin Regulation violated the prohibition of non-refoulement under Article 3 of the ECHR.⁴³ Paragraph 160 of that judgment contains a long list of reports published by national, international and non-governmental organisations which formed the basis of its finding. In the *N.S. and M.E.* case, the Court specifically referred to the ECtHR's judgment in the *M.S.S. v. Belgium and Greece* case and the 'regular and unanimous reports of international non-governmental organisations' referenced therein.⁴⁴ Where the CJEU requires a Member State to assess fundamental rights risks in another Member State on the basis of such information,⁴⁵ it should also be admissible as evidence before the Court.

In *Aranyosi and Căldăraru*, a case in which the question was raised whether Member States could surrender individuals under the European Arrest Warrant when prison conditions in the requesting country do not meet fundamental rights standards, the Court held that the executing judicial authorities should initially rely on 'objective, reliable, specific and properly updated information' on detention conditions.⁴⁶ Such information could be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN, which again shows the importance the CJEU attributes to this information.⁴⁷ There is no reason why this should be different for the CJEU when ruling on an alleged infringement of EU law. In a similar vein, information from EU bodies and agencies, such as the European Ombudsman and OLAF, as well as national ombudsmen and human rights bodies, should be admissible as evidence in infringement proceedings. It is submitted that the Commission should also be able to rely on the work of independent investigative journalists.⁴⁸

Especially, Frontex's human rights organs could form an important source of information for the Commission. Frontex's Consultative Forum, Fundamental Rights Officer and Fundamental Rights monitors all have the power to conduct on-site visits in relation to the Agency's activities in the Member States.⁴⁹ The Fundamental Rights Officer is responsible for the handling of complaints under the Agency's individual complaints mechanism.⁵⁰ They are therefore well-versed in assessing the on-the-ground situation at the external border and should make this knowledge available when so requested by the Commission.⁵¹ The same goes for Frontex liaison officers, who are posted to the Member States and whose tasks include contributing 'to promoting the application of the Union acquis relating to the management of the external borders and return, including with regard to respect for fundamental rights and to cooperate with the fundamental rights officer to this effect'.⁵² Finally, all participating border guards are required to report violations of fundamental rights in the context of joint operational activity, under the Serious Incident

⁴⁰Case C-808/18, *Commission v. Hungary* (Access to International Protection) (2020), EU:C:2020:1029, para. 115.

⁴¹*Ibid.*

⁴²*Ibid.*, para. 116.

⁴³*MSS v. Belgium and Greece*, App. No. 30696/09 (ECtHR, 21 January 2011).

⁴⁴Joined Cases C-411/10 and C-493/10, *NS & ME* (2011), EU:C:2011:865, para. 90.

⁴⁵*Ibid.*, para. 91.

⁴⁶Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru* (2016), EU:C:2016:198, para. 89.

⁴⁷*Ibid.*

⁴⁸The same would apply, e.g., to research carried out by Forensic Architecture: <https://forensic-architecture.org/about/agency> (last visited 17 July 2023).

⁴⁹Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard on the European Border and Coast (...), OJ 2019, L295/1.

⁵⁰*Ibid.*, Art 32(4) and (5).

⁵¹In theory, under Art 66(1) of the Court's Rules of Procedure, he could also be summoned as an expert witness.

⁵²Regulation (EU) 2019/1896, see above, n. 49, Art 31(2)(e) and (f).

Reporting Standard Operational Procedure.⁵³ In fact, it is this latter procedure that may help to shed light on the events that led to the Pylos shipwreck, in particular the role played by the Greek coast guard.⁵⁴

2.4 | Private enforcement

The Commission has been an advocate of private enforcement.⁵⁵ Two recent preliminary rulings illustrate how individuals may assert, based on the principles of primacy and direct effect, their rights under EU law before national courts against a Member State. In both cases the Commission intervened on the side of the applicant. In *N.W.*, the court ruled that the prolonged reinstatement of internal border controls by Austria violated the provisions of the Schengen Borders Code.⁵⁶ In *M.A.*, the Court held that the disapplication of EU asylum laws under Lithuania's state of emergency, imposed in response to the "instrumentalisation" of migrants by Belarus, violated the Asylum Procedures Directive, read in light of the Charter.⁵⁷ It is important to emphasise that these situations had been well-documented and known to the Commission. Other Member States had also reinstated internal border controls for prolonged periods of time, and like Lithuania, Poland and Latvia had closed their borders for refugees trying to enter from Belarus.

Although private enforcement of the Schengen Rules may prove a powerful tool to address breaches of EU law in the face of the Commission's silence, it cannot serve as a substitute. The former's purpose remains individual redress, as opposed to Member State compliance.⁵⁸ From that point of view, it is particularly worrying that not even the Member States from which the preliminary references originated have remedied their non-compliance. To date, internal border controls remain in place throughout the Schengen area, and refugees and migrants remain trapped at the Belarus-EU border. Such behaviour in defiance of a CJEU ruling would call for an even more proactive enforcement role on the part of the Commission.

Relying solely on private parties to bring violations of EU law before a national judge is also problematic from the point of view of processual economy. Since only courts of last instance are obliged to refer questions to the CJEU, it may take a long time for infringements to ultimately reach the CJEU.⁵⁹ Finally, private enforcement tends to privilege resourceful parties, such as commercial actors, over individuals with limited means.⁶⁰ Migrants and refugees are by their very nature a vulnerable group with limited access to justice, especially when they have been prevented access to or have been removed from EU territory. It would be both unfair and inefficient to place the burden of ensuring Member State compliance with EU law on their shoulders.

2.5 | Accommodating non-compliant behaviour in policy and legislation

In addition to intervening on the side of private applicants in preliminary proceedings before the CJEU, the Commission has sought to reply to infringements of the Schengen *acquis* and fundamental rights by proposing emergency measures under Article 78(3) TFEU, by proposing legislative amendments and by issuing guidelines. In relation to the reinstatement of internal border controls, it issued guidelines on police controls and the use of technological means

⁵³Code of Conduct applicable to all persons participating in Frontex Operational Activities (2019), Arts 20 and 21; Decision of the Executive Director No. R-ED-2021-51, Standard Operating Procedure (SOP)—Serious Incident Reporting, 19 April 2021.

⁵⁴Jacopo Barigazza, 'EU Border Agency to Scrutinize Events Leading to Greek Migrant Shipwreck', *Politico.com*, (22 June 2021), <https://www.politico.eu/article/frontex-greece-capsize-ship-probe-incident-hundreds-of-migrant-deaths/>.

⁵⁵This may also explain why the one area in which the Commission has resorted most frequently to the use of infringement proceedings has been to address attacks on the independence of the judiciary in Hungary and Poland, as independent national courts are a prerequisite for private enforcement.

⁵⁶Case C-368/20, *N.W.* (2022), ECLI:EU:C:2022:298.

⁵⁷Case C-72/22 PPU, *M.A.* (2022), ECLI:EU:C:2022:505. The *FMS* case (Joined Cases C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367) was decided before the Court's judgment in *Commission v. Hungary* (Access to International Protection), but infringement proceedings had already been launched at the time the preliminary reference was made.

⁵⁸Case 28/67, *Molkerei-Zentrale* (1968), EU:C:1968:17, 153.

⁵⁹Art 267 TFEU.

⁶⁰A. Hofmann, see above, n. 21, 742.

as an alternative to the reinstatement of border controls and amendments to the Schengen Borders Code to allow Member States to reinstate controls at their internal borders more readily and for longer periods of time.⁶¹ This has been widely criticised for essentially legalising non-compliant behaviour *ex post*.⁶² In response to the refugee situation on the border with Belarus, the Commission has sought to introduce new border emergency procedures under both the SBC and the asylum directives, responding to the “instrumentalisation” of immigrants by a third country.⁶³ The content of these proposals has been fiercely criticised, as they would unduly limit asylum seekers’ access to asylum procedures, short of closing the external borders.⁶⁴ The proposals have yet to be adopted.

3 | ALTERNATIVE COMPLIANCE MECHANISMS

Next to its enforcement powers under primary law, the Commission has been endowed with alternative means of compliance management under secondary law.⁶⁵ In the context of the management of the external borders, two of these deserve special attention: the Schengen Evaluation and Monitoring Mechanism (SEMM), which measures Member States’ compliance with the Schengen *acquis* more generally, and the Frontex Vulnerability Assessment Mechanism (VAM), specifically focusing on Member States’ capacity and preparedness at the external borders.⁶⁶

The SEMM has its origins in the work of the Schengen Evaluation Committee under the Schengen Implementing Convention, which was substituted by the Council’s Schengen Evaluation Working Party (Sch-eval) after the integration of the Schengen *acquis* into EU law in the Amsterdam Treaty.⁶⁷ In 2013, following the call for stricter supervision and compliance with the Schengen rules, the SEMM was adopted, giving the Commission a central role in the process.⁶⁸ It was amended in 2022, as part of the Commission’s Schengen Strategy, following evaluations by the Commission and Parliament.⁶⁹

⁶¹Commission Recommendation 2017/820 of 12 May 2017 on Proportionate Police Checks and Police Coordination in the Schengen Area, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32017H0820>; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders of 27 September 2017, COM(2017) 571 final; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders of 14 December 2021, COM(2021) 891 final.

⁶²This has been characterised as “policy laundry” by Sergio Carrera: S. Carrera, D. Colombi and R. Cortinovis, ‘An Assessment of the State of the EU Schengen Area and Its External Borders’ (European Parliament, 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/737109/IPOL_STU\(2023\)737109_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/737109/IPOL_STU(2023)737109_EN.pdf), 102.

⁶³Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland of 1 December 2021, COM(2021) 752 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A752%3AFIN&qid=1638547296962>.

Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum of 14 December 2021, COM(2021) 890 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2021:890:FIN>; COM(2021) 891 final, see above, n. 61.

⁶⁴See, for instance, ECRE, ‘Comments on the Proposal for a Regulation of the European Parliament and the Council Addressing Situations of Instrumentalisation in the Field of Migration and Asylum COM(2021) 890 final’ (2022), <https://ecre.org/wp-content/uploads/2022/01/ECRE-Comments-Instrumentalisation-January-2022.pdf>; Meijers Committee, ‘Commentary on the Commission Proposal Amending the Schengen Borders Code (COM(2021) 891)’ (2022), <https://www.commissie-meijers.nl/wp-content/uploads/2022/05/CM2205-Commentary-on-the-Commission-Proposal-Amending-the-Schengen-Borders-Code-COM2021-891.pdf>.

⁶⁵M. Scholten, ‘Mind the Trend! Enforcement of EU Law Has Been Moving to “Brussels”’, (2017) 24 *JEPP*, 1348; Commission, ‘Commission Staff Working Document, Part I: General Statistical Overview Accompanying the Document Report from the Commission Monitoring the Application of European Union Law 2018 Annual Report’, SWD(2019) 285 final, 8.

⁶⁶Council Regulation (EU) 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* (...) and implementation of Schengen, OJ 2013, L295/27; Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard on the European Border and Coast Guard (...), OJ 2019, L295/1, Art 32.

⁶⁷Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, SCH/Com-ex (98) 138; Art 2 of the Protocol No. 19 on the Schengen *acquis* integrated into the Framework of the European Union (2012).

⁶⁸This call followed the “Italian-French row” over the arrival of Tunisian migrants at the start of the Arab Spring and ultimately resulted in the adoption of Regulation (EU) 1053/2013, see above, n. 66.

⁶⁹Regulation (EU) 2022/922 of the Council of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* (...), OJ 2022, L160/1; Commission, ‘A Strategy towards a Fully Functioning and Resilient Schengen Area’ (Communication), COM(2021) 277 final; Commission, ‘Report on the Functioning of the Schengen Evaluation and Monitoring Mechanism Pursuant to Art 22 of Council Regulation (EU) No. 1053/2013’, COM(2020) 779 final; Policy Department for Citizens’ Rights and Constitutional Affairs (Study requested by LIBE committee), ‘The State of Play of Schengen Governance: An Assessment of the Schengen Evaluation and Monitoring Mechanism in Its First Multiannual Programme’, (2020), PE 658.699.

One of the shortcomings of the 2013 instruments was the lack of attention paid to fundamental rights violations. As the Commission noted, the SEMM was not established with the primary objective of monitoring the respect for fundamental rights.⁷⁰ Much of its focus has been on compliance with the more technical aspects of the Schengen borders *acquis*. However, respect for fundamental rights is both an obligation and a prerequisite for cooperation. The new Regulation therefore approaches fundamental rights as a horizontal issue to be taken into consideration across the board, rather than establishing a separate evaluation dedicated to fundamental rights.⁷¹ Periodic evaluations through visits are the norm, but unannounced visits are possible, including when serious violations of fundamental rights are suspected.⁷² Evidence from independent monitoring mechanisms or by relevant third parties may be taken into account in the programming and design of the evaluations.⁷³ Yet, unlike in the Commission's proposal, there is no mention of this information being taken into account in the implementation of the evaluations, and only information verified during the evaluation activity can be taken into account.⁷⁴

Fundamental rights violations themselves qualify as serious deficiencies, triggering Article 22 of the Regulation, requiring immediate remedial action from the Member State concerned. An evaluation report, containing recommendations for remedial action, is adopted by the Commission in the form of an implementing act and transmitted to the Parliament and Council. The Council is then required to urgently discuss the matter and adopt recommendations to address the fundamental rights violations. The Member State concerned is required to submit an action plan for approval to the Commission, which will be subject to periodic revisits followed by a revisit report adopted by the Commission. The Council may, on the basis of this report and a proposal by the Commission, adopt new recommendations or approve the closing of the action plan, again by means of an implementing decision.

The SEMM Regulation calls for synergies with other monitoring mechanisms, mentioning expressly the VAM, set up under the European Border and Coast Guard Regulation. Under this mechanism, Frontex assesses the preparedness of Member States in the narrower field of external border management. However, it remains unclear how exactly the interaction of the two mechanisms should take shape in practice.⁷⁵ The SEMM Regulation merely states that the recommendations under the VAM will be complementary to those under the SEMM.⁷⁶

The VAM assesses Member States' border management systems on a yearly basis, relying on the information provided by the Member States themselves, as well as the Frontex liaison officers posted to the respective Member States.⁷⁷ Frontex's Fundamental Rights Strategy states that 'the qualitative and quantitative aspects of a Vulnerability Assessment allow fundamental rights-related information to be factored in, and an assessment of the availability and effectiveness of mechanisms and procedures for the identification and referral of vulnerable persons and those who are in need of or wish to apply for international protection'.⁷⁸ It is, however, unclear to what extent this is systematically done.

The SEMM and VAM have been embedded in a new governing structure for Schengen that was set up in the wake of the refugee policy crisis, in response to the call for a more fundamental reform of the Schengen area.⁷⁹ Rather than a fundamental overhaul, one may observe a degree of "forum mushrooming": the emergence of a range of new deliberative venues and policy cycles, which in their composition are reminiscent of Schengen's intergovernmental origins.⁸⁰ First of all, a Schengen Forum was established in late 2020, set up to bring together a range of stakeholders, including

⁷⁰European Commission, 'Commission Staff Working Document: Impact Assessment', SWD(2021) 119 Final, accompanying the document, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0119>, 61–62.

⁷¹Ibid., 77.

⁷²Regulation (EU) 2022/922, see above, n. 69, Recital 13.

⁷³Ibid., Arts 10 and 11.

⁷⁴Ibid., Recital 11.

⁷⁵Regulation (EU) 2019/1896, see above, n. 49, Art 32(7).

⁷⁶Regulation 2022/922, see above, n. 69, Art 10(2).

⁷⁷Regulation (EU) 2019/189, see above, n. 49, Art 32.

⁷⁸The European Border and Coast Guard Agency ('The Agency'), 'Fundamental Rights Strategy' (Frontex, 2021), https://frontex.europa.eu/assets/Key_Documents/Fundamental_Rights_Strategy/Fundamental_Rights_Strategy.pdf, 7.

⁷⁹Elisa Braun, 'Macron Calls for a 'Refoundation of the Schengen Area'', *POLITICO*, (5 November 2020), <https://www.politico.eu/article/emmanuel-macron-refoundation-schengen-area/>.

⁸⁰Carrera, Colombi and Cortinovis, see above, n. 62, 69.

members of Parliament and Member State representatives to ‘foster political dialogue on addressing common challenges’. In March 2022, a Schengen Council was introduced, as offspring of the JHA Council. Finally, there will be a yearly ‘high level’ management board meeting of Frontex, politicising also this supervisory body.⁸¹

A designated Schengen coordinator within the Commission oversees the implementation of an annual Schengen cycle, with the Schengen Council setting priorities, based on an annual State of Schengen Report, including a Schengen Scoreboard and a Schengen Barometer. While the report, scoreboard and barometer do take into account Member States’ compliance with the Schengen rules, they also bring together factual data on migration movements and the situation at the external borders.⁸² Only scarce attention is paid to the respect for fundamental rights, echoing the critique on “enforcement by database” that fundamental rights violations are hard to present in the form of benchmarks.

A Member State’s refusal to follow up on the recommendations flowing from either the SEMM or the VAM could be considered a serious deficiency in the management of the external borders.⁸³ Where these serious deficiencies are of a persistent nature, causing a serious threat to public policy or national security which results in putting the overall functioning of the Schengen area at risk, the ultimate consequence could be a Council recommendation to reintroduce internal border controls under Article 29 of the Schengen Borders Code.⁸⁴ It is, however, unlikely that fundamental rights violations at the external borders will constitute a serious threat to the functioning of the Schengen area. Rather cynically, some Member States will, if not openly, consider that border closures and pushbacks actually serve the purpose of curbing irregular migration and secondary movements.

Both mechanisms could nonetheless provide important added value. Neither prejudices the enforcement powers of the Commission under the Treaties.⁸⁵ The revised SEMM, as well as a VAM that pays due attention to fundamental rights, may serve as important sources of information in the context of infringement proceedings, compensating for the Commission’s lack of investigating powers. Both instruments expressly prescribe the exchange of information between the Commission and the Agency on the outcome and implementation of the respective mechanism in a ‘secure and timely manner’.⁸⁶

4 | CONDITIONALITY IN FUNDING AND BORDER MONITORING MECHANISMS

Frequent calls have been made to render the disbursement of funds under the Border Management and Visa Instrument (BMVI) and the Asylum, Migration and Integration Fund (AMIF) conditional on fundamental rights compliance.⁸⁷ In relation to rule of law conditionality, the CJEU has already held that it is permissible for the EU legislator to establish in secondary legislation procedures protecting the rule of law, in addition to the one in Article 7 TFEU, provided that such procedures differ in aim and subject.⁸⁸ The same reasoning could be applied in relation to the imposition of conditionality in relation to fundamental rights compliance in the field of external border management, coming in addition to the infringement procedure. Both the BMVI and the AMIF explicitly state that they shall be implemented in full respect of the Charter.⁸⁹ The question is, however, to what extent conditionality can be read in

⁸¹European Commission, ‘State of Schengen Report 2022’ (Communication) COM (2022) 301 final/2, 2–3.

⁸²European Commission, ‘State of Schengen Report 2023’ (Communication) COM (2023) 274 final. Cf. the biannual reports on the functioning of Schengen that were published up until 2015.

⁸³Regulation (EU) 2016/399, see above, n. 4, Art 21; Regulation (EU) 2019/1896, see above, n. 49, Art 42.

⁸⁴Regulation (EU) 2016/399, *ibid*.

⁸⁵See explicitly Regulation (EU) 2022/922, above, n. 69, recital 30.

⁸⁶Regulation (EU) 2019/1896, see above, n. 49, Art 33 (adding ‘regular’) and Regulation (EU) 2022/922, see n. 69, Art 10.

⁸⁷Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund (AMIF) (2021) OJ L251/1; Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (BMVI) (2021) OJ L251/48.

⁸⁸Case C-156/21, *Hungary v. Parliament and Council* (2022), EU:C:2022:97, para. 168 on the validity of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020, L433/1. Note that the European Court of Auditors is currently carrying out an audit of the effective application of the conditionality mechanism, https://www.eca.europa.eu/Lists/ECADocuments/AP23_01/AP_Rule-of-law_EN.pdf, last visited 17 July 2023, but already the mere threat of withholding funds appears to yield results. See, e.g., Euronews, ‘Poland Passes New Law to Appease EU and Release Funding’ (13 January 2023), <https://www.euronews.com/2023/01/13/poland-passes-new-law-to-appease-eu-and-release-funding>, last visited 17 July 2023.

⁸⁹Regulation BMVI, see above, n. 87, Recital 4, Arts 3, 4, 13, 16 and 25(6); Regulation AMIF, see above, n. 87, Recital 25 and Art 6.

their founding instruments, as well as in the Common Provisions Regulation (CPR) which provides a horizontal financial framework for eight funds, including the IBMF and the AMIF.⁹⁰

The CPR provides for so-called enabling conditions. These are the prerequisite conditions for the effective and efficient implementation of the specific objectives of the respective funds.⁹¹ Under Article 15(1) CPR and Annex III, the effective application and implementation of the Charter is a so-called 'horizontal enabling condition' applicable to all funds. Based on Articles 15(5) and 15(6) CPR, the Commission can withhold reimbursement of expenditure where enabling conditions are not fulfilled. However, this enabling condition is already considered fulfilled as soon as a Member State has put in place effective monitoring and reporting mechanisms, providing a safeguard in form rather than in substance. Member States must in any case establish Monitoring Committees to exercise oversight and monitor implementation of national programmes, which includes the fulfilment of enabling conditions and their application throughout the programming period.⁹²

Annual performance reviews for programmes supported by the AMIF and the BMVI are organised at least twice during the programming period.⁹³ Annual Performance Reports for programmes supported by the BMVI and AMIF have to be approved by the Monitoring Committees.⁹⁴ The reports should include information on the fulfilment of the applicable enabling conditions and their application throughout the programming period, in particular compliance with fundamental rights.⁹⁵

The founding instruments of the BMVI and AMIF state that a Member State is deemed non-compliant if it has failed to fulfil its obligations under the Treaties in the areas covered by the respective funds, including as regards fundamental rights obligations, if there is a clear risk of a serious breach by that Member State of Union values when implementing the relevant *acquis* or if a SEMM evaluation identifies deficiencies in a relevant area.⁹⁶ However, no further guidelines are publicly available, and the Commission's decision-making on national programmes is carried out by means of implementing decisions, which are not systematically published.⁹⁷ By the end of 2024, the Commission should carry out a mid-term review examining effectiveness, efficiency, relevance, coherence and Union added value of each Fund.⁹⁸ Here, there is no specific reference to fundamental rights compliance, presumably also because this does not form part of the core performance indicators listed in Annex V of the CPR. However, as a horizontal enabling condition, this respect is fundamental to the effective and efficient implementation of the funds and should therefore be factored into the mid-term review.

The call for conditionality under the migration and border funds has gone hand in hand with the discussion on the setting up of independent national border monitoring mechanisms. Currently, the only explicit reference in secondary legislation to national border monitoring mechanisms can be found in the SEMM Regulation, where the term is not further defined.⁹⁹ The proposed Screening Regulation would introduce the obligation to set up independent national border monitoring mechanisms, but their scope would be limited to monitoring fundamental rights compliance under the screening procedure at the external borders.¹⁰⁰ Various organisations have pointed out that 'the proposed monitoring mechanism has the potential to address violations but only if it is expanded in scope; independence is ensured; accountability for violations is strengthened; and suitable consequences follow

⁹⁰Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (CPR) (2021) OJ L231/159, Art 41.

⁹¹*Ibid.*, Art 2(2).

⁹²*Ibid.*, Art 38.

⁹³*Ibid.*, Art 41.

⁹⁴*Ibid.*, Art 41(7).

⁹⁵Regulation BMVI, see above, n. 87, Recital Art 29(1)(f); Regulation AMIF, see above, n. 87, Art 35(1)(f).

⁹⁶Regulation AMIF, see above, n. 87, Recital 39; Regulation BMVI, see above, n. 87, Recital 41.

⁹⁷ECRE and PICUM, 'Fundamental Rights Compliance of Funding Supporting Migrants, Asylum Applicants and Refugees Inside the European Union' (2023), <https://ecre.org/wp-content/uploads/2023/03/PIC-ECR-Rights-and-EU-funds-March-2023.pdf>, 5.

⁹⁸Regulation CPR, see above, n. 90, Art 45.

⁹⁹Regulation 2022/922, see above, n. 69, Art 10(1).

¹⁰⁰Commission, 'Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders (...)', COM (2020) 612 final, Art 7(2).

governments' non-compliance'.¹⁰¹ Commissioner Johansson for Home Affairs encouraged Member States to make progress in establishing such mechanisms and 'not to wait for the Pact'.¹⁰²

In recent years, the Commission has made the disbursement of emergency funding (EMAS) to Croatia and Greece conditional upon the establishment of border monitoring mechanisms.¹⁰³ One could argue that the legal basis for such form of "procedural conditionality" can be read into Article 15 and Annex II CPR in the obligation to establish effective monitoring mechanisms. Although national border monitoring mechanisms may improve scrutiny at the national level and draw attention to the fundamental rights situation internally, the absence of a clear framework governing their establishment and functioning means they risk being instrumentalised by the very Member State they need to control. Already in relation to the Croatian and Greek national border monitoring mechanisms, serious concerns have been voiced as regards their independence and impartiality.¹⁰⁴

5 | CONCLUSION

Frequent reporting by investigative journalists and NGOs paints a grim picture of the fundamental rights situation on the edges of Europe. This contribution has looked at the different instruments the Commission has at its disposal to improve compliance with the Schengen borders *acquis* in general and with fundamental rights at the external borders in particular. It has shown that the Commission has often chosen not to make use of its enforcement powers, instead resorting to alternative strategies and an elaborate system of 'compliance management'.

It should not come as a surprise that the politicisation of the European Commission, and with it the infringement procedure, is particularly felt in the sensitive area of migration and border management. Given the operational nature of Schengen cooperation, as opposed to the classic notion of 'integration through law', infringements are also more likely to consist of non-compliant executive action, which is generally harder to prove. Yet, as the case-law of the Court shows, violations consisting of a persistent non-compliant administrative practice can be addressed within the framework of infringement proceedings. Especially when there is ample third-party evidence, the admissibility thereof before the CJEU means the Commission should not invoke its lack of investigative powers as an excuse.

It would be wrong to discard all too readily the alternative means of compliance management that are taking shape under the banner of Schengen governance. On the one hand, they may contribute to a culture of compliance and mutual learning in relation to Schengen's more technocratic elements (SEMM/VAM). On the other hand, they may provide a venue for political problem-solving (Schengen Council, Schengen Forum). They do, however, reinforce remnants of Schengen's intergovernmental past, rather than phasing these out. Moreover, even with increased attention paid to fundamental rights, they lack teeth as enforcement tools. At best, they supplement the Commission's powers under the Treaties, allowing for a solution either prior to the launch of infringement proceedings or still during the administrative phase, or in providing the Commission with the necessary information to state its case before the Court.

There may be some potential for the application of conditionality in the use of EU funding for migration and border management, following the example of rule of law conditionality to protect the EU's financial interests. This

¹⁰¹ECRE, 'Joint Statement: Turning Rhetoric into Reality: New Monitoring Mechanism at European Borders Should Ensure Fundamental Rights and Accountability' (2020), <https://ecre.org/turning-rhetoric-into-reality-new-monitoring-mechanism-at-european-borders-should-ensure-fundamental-rights-and-accountability/m>; Markus Jaeger and others, 'Feasibility Study on the Setting Up of a Robust and Independent Human Rights Monitoring Mechanism at the External Borders of the European Union' (2022), <https://www.proasyl.de/wp-content/uploads/Feasibility-Study-FINAL.pdf>.

¹⁰²'Commissioner Johansson's Speech at the Plenary Debate on Pushbacks at the EU External Border', 20 October 2021, https://ec.europa.eu/commission/presscorner/detail/en/speech_21_7870.

¹⁰³European Ombudsman, 'Report on the Inspection of Documents and Meeting on How the European Commission Ensures That the Croatian Authorities Respect Fundamental Rights in the Context of Border Management Operations Financed by EU Funds' (23 September 2021), <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/148061>, 15; Jaeger and others, see above, n. 101, 40ff.

¹⁰⁴Human Rights Watch, 'Croatia/EU: Strengthen Border Monitoring System' (2 August 2021), <https://www.hrw.org/news/2021/08/02/croatia/eu-strengthen-border-monitoring-system>, 3; A. Fotiadis, 'Mapping Potential Elements of an Independent Border Monitoring Mechanism in Greece' (International Rescue Committee, October 2021), <https://www.rescue.org/sites/default/files/2022-04/Greece%20IBMM%20Report%20final.pdf>.

would, however, require the EU legislator to create a clear legal basis in the Common Provisions Regulation and the respective Funds' founding legislation in order to go beyond the current form of 'procedural conditionality'. While national border monitoring mechanisms may provide for closer scrutiny at the national level, EU legislation will also need to provide the rules and conditions that allow such mechanisms to function in the spirit of full independence and impartiality.

Of course, infringement proceedings are not a magic bullet, especially if there is a risk that Member States will continue to act in defiance of Court rulings. Alternative compliance mechanisms may attempt to bring Member States back in line more gently. Ultimately, a legal system exists not by the grace of sanctions but by a shared understanding of its underlying values. However, respect for fundamental rights is the very basis for the mutual trust underpinning the operation of the Schengen area and the Area of Freedom, Security and Justice as a whole. The blatant disregard for EU law and the EU's founding values in the implementation of the Schengen *acquis* cannot be seen in isolation from the broader rule of law crisis and calls for an equally firm response from the Commission.

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