

Local and Regional Authorities and the EU's External Borders

**A Multi-Level Governance Assessment of Schengen
Governance and 'Smart Borders'**

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It does not represent the official views of the Committee of the Regions.**

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List of Abbreviations

AFSJ	Area of Freedom Security and Justice
BCP	Border Crossing Point
CoR	Committee of the Regions
CJEU	Court of Justice of the European Union
DG	Directorate-General
EASO	European Asylum Support Office
EBF	European Borders Fund
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EES	Entry Exit System
ENP	European Neighbourhood Policy
ESTA	Electronic System of Travel Authorisation
EU	European Union
EUROSUR	European Border Surveillance System
FRA	Fundamental Rights Agency
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
IBM	Integrated Border Management
ISF	Internal Security Fund
JHA	Justice and Home Affairs
LBTA	Local Border Traffic Agreement
LRAs	Local and Regional Authority
MEP	Member of the European Parliament
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
PCCC	Police and Customs Cooperation Centre
RTP	Registered Traveller Programme
SBC	Schengen Borders Code
SIS II	Second Generation Schengen Information System
TCN	Third Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VIS	Visa Information System

1. Introduction

Debates over Schengen governance and the management of the EU's external borders took centre stage in 2011 and 2012. Mobility flows linked to what has come to be known as 'the Arab Spring' sparked a chain of national actions affecting free movement in 2011 and, coupled with wider perceived policy challenges posed by immigration and asylum across the EU,² led the June European Council of 2011 to call on the European Commission to propose legislative reform of the Schengen system.³ Simultaneously, the European Council also called for work on "smart borders" – an upgrading of EU's external borders using state-of-art surveillance technology - to be rapidly pushed forward.⁴

The developments in the EU policy agenda concerning Schengen governance and Smart Borders will have critical implications for the Schengen Borders Code (SBC) - the set of common rules and procedures applying to external border crossings and the reintroduction of internal border controls which forms the backbone of Schengen.⁵ The manner in which the SBC is implemented at national, regional and local levels is central for safeguarding the EU principles of free movement and protecting the fundamental rights of both European citizens and third country nationals. The harmonious and consistent implementation of the SBC are also key to ensuring the overall smooth functioning of the internal market, with important implications for local border traffic and cross-border trade, impacting on cooperation both between Schengen members as well as third country neighbours.

The ground level effects of EU border policy developments means that it will be those local and regional level practitioners and authorities who will ultimately bear the task of adjusting to (or be the first to reap the advantages) stemming from fundamental modifications to the SBC and the future shape of EU border controls and surveillance. The smooth operation of Schengen will also be dependent on the resources, practices and approaches of border practitioners applying the SBC 'on the ground.' This 'local and regional dimension' has so far been largely overlooked in the often heated and controversial debates at EU level surrounding the Schengen system and EU external borders more generally.

² Including for instance, the high political visibility and debates surrounding mobility at the Greek – Turkish border.

³ European Council Conclusion, 23-24 June 2011, Council doc. EUCO 23/11, points 20 and 21.

⁴ European Council Conclusion, 23-24 June 2011, Council doc. EUCO 23/11, point 24.

⁵ Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, 15 March 2006, OJ L 105/1, 13.04.2006.

This information note therefore aims to situate the work of the Committee of the Regions (CoR) and the interests and concerns of local and regional authorities (LRAs), in current EU inter-institutional debates on Schengen and EU external borders. It focuses in particular on the Schengen Governance Package and the Smart Borders Package adopted by the Commission in September 2011 and February 2013 respectively. These legislative proposals are indicative of the parallel but interconnected trends currently running through EU policy debates and developments on ‘borders’: both raise questions of competence, practical effects, and repercussions for mutual trust and solidarity and both constitute major developments within the so-called EU Integrated Border Management (IBM) Strategy.⁶ As such, this note is structured around the following research questions:

1. What is the current state of play as regards the inter-institutional debates on the Schengen Governance Package and the Smart Borders Package?
2. What potentially controversial issues have emerged during the inter-institutional debates on these proposals and what do they tell us about the wider challenges underpinning policy developments on EU external borders and the Schengen system?
3. What issues of concern do these initiatives raise for LRAs and the CoR? What administrative, financial or practical consequences might these new proposals place on LRAs who are at the front line as regards the application of new European standards and rules?

The above issues will be assessed from a ‘multi-governance perspective’,⁷ with particular attention paid to questions of competence and implications for the principle of subsidiarity as laid down in Article 5.3 of the Treaty on the European Union (TEU) and Protocol No. 2 on the application of the principles of subsidiarity and proportionality attached to the Treaty on the Functioning of the European Union (TFEU). Schengen and external border management are policy domains which have seen a significant transfer of powers from the national to the EU levels during the last decade, with the EU progressively developing an EU IBM Strategy,⁸ supported by the SBC, dedicated financial instruments (the European Borders Fund - soon to be encompassed within the

⁶ European Commission, Communication, Towards Integrated Management of the External Borders of the Member States of the European Union, COM(2002) 233 final, Brussels, 7 May 2002.

⁷ The literature on multi-governance is extensive; here our understanding is one which takes into account the interests and views of LRAs and the CoR (as their representative at EU level), drawing on a bottom-up approach and based on the application of the subsidiarity and proportionality principles.

⁸ P. Hobbing (2005) *Integrated Border Management at the EU Level*, CEPS Working Document No. 227, August 2005.

new Internal Security Fund⁹), and an EU agency dedicated to the support and coordination of the management of the EU's external borders (Frontex).¹⁰

However, especially since 2011 we have witnessed a re-surfacing of nationalistic debates and populist tendencies, with several member states looking to maintain, and in certain cases even regain - discretion over largely 'Europeanised' areas such as the reintroduction of internal borders and management of external borders. Consequently it will be asked, how could consideration of the multi-level governance dimensions of the Schengen debate and Smart Borders packages help guarantee that policies and programmes better take into account the issues of concern for LRAs and that any new legislative and financial initiatives are of a truly added-value in light of their needs and experiences?

Taking these considerations into account, this information note will be structured as follows:

Following this introduction, Sections two and three will set out the current state-of-play as regards the Schengen Governance and Smart Borders Packages highlighting the positions of the various EU institutional actors and identifying those issues which are proving particularly controversial in inter-institutional debates (especially between the Council and the European Parliament), including questions of competence, necessity, practical effects (including over fundamental rights) and implications for mutual trust in an enlarged EU.

Section four then examines the issues of particular concern for LRAs and the CoR resulting from the potential changes brought by the two legislative packages, and paying special attention to four key domains: First, implications for **multi-level governance**, particularly relating to divisions of legal competence in border management; second, the potential consequences for **cross border cooperation** and the **European Neighbourhood Policy** taking into account the implications for inter-regional mobility and impacts on local economies as well as mechanisms for upholding the rule of law and accountability; third, issues of concern arising from the management of **asylum and migration** under the two packages, including both the impact of migration and asylum flows on local services and infrastructure as well as the implications for LRAs of approaches to migration management, such as border surveillance. Finally, a fourth sub-section is devoted specifically to the **Smart Borders**

⁹ Proposal for a Regulation establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa, Brussels, COM(2011) 750 final, 15.11.2011.

¹⁰ Council and Parliament Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1, 22.11.2011.

Package and broader challenges of technological frontiers, examining the specific implications brought by the shift to technological borders and potential consequences for LRAs. In each sub-section the impact on **fundamental rights** and **free movement** are considered horizontally.

The note concludes by drawing key findings and points for reflection for the CoR and for LRAs.

2. The Schengen Governance Package

2.1. State of play on the inter-institutional debates

The European Commission officially re-opened the debate over the functioning of Schengen in September 2011 when it adopted new legislative proposals in the shape of the so-called Schengen Governance Package. The Package comprises two inter-linked proposals: the first establishing a new evaluation and monitoring mechanism to verify member states' application of the Schengen acquis;¹¹ the second, an instrument proposing new rules for the temporary reintroduction of internal border controls.¹²

2.1.1. Setting the Background

Discussion on ways to better improve the functioning and implementation of the Schengen system is not a new topic on the EU agenda. An earlier Commission proposal of 2010 had already identified a number of weaknesses in the system for monitoring the application of the SBC and proposed a series of amendments aimed at making the existing Schengen evaluation mechanism more “efficient, transparent and consistent.”¹³ The Commission's 2010 proposal aimed to address the deficiencies in the existing evaluation system: an inter-governmental, peer review mechanism carried out principally by the Schengen Evaluation Working Group in the Council which allows for only a weak EU monitoring over member states obligations to secure free movement within the Schengen area. Driven by the member state national experts, with only an observer role for the Commission (and no role for the EP) it opens the door for a politicisation of the evaluation process,¹⁴ allowing political interests to influence the process of a neutral and objective assessment and resulting in a scenario where, to all intents and purposes, ‘the pupils discipline the pupils.’ This leads to weaknesses in the implementation of the SBC, as evidenced by the results of the Commission's bi-annual reports on the functioning of Schengen.¹⁵

¹¹ Commission proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011)559, 16.09.2011, Brussels.

¹² Commission proposal for a Regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011)560, 16.09.2011, Brussels.

¹³ Commission Proposal for a Regulation on the establishment of an evaluation mechanism to verify application of the Schengen acquis, COM(2010)624, 16.11.2010.

¹⁴ Interestingly, the current Schengen evaluation mechanism also ‘depoliticises’ the evaluation process, in the sense that it excludes the process from the sphere of democratic scrutiny and public accountability.

¹⁵ For instance, according to the latest report, between the period November 2011 - April 2012 alone the Commission investigated 11 different cases of possible infringement of the SBC by 10 different member states. See Commission Communication on the Biannual report on the functioning of the Schengen area 1 November 2011 – 30 April 2012, COM(2012) 230 final, Brussels, 16.5.2012.

Although the Commission's early proposal was abandoned, the functioning of Schengen was once again brought under scrutiny in 2011, when a temporary spike in human mobility in the Mediterranean following the revolutions of the Arab Spring provoked a diplomatic dispute between the governments of France and Italy. French authorities decided to unilaterally reintroduce border checks at its land borders with Italy in response to the move by Italian authorities to issue residence permits to Tunisian migrants from North Africa.¹⁶ The Franco-Italian affair proved the first in a chain of incidences in 2011 where compliance of national actions with EU legal obligations under the SBC were put into question by certain national governments. These included a Danish plan announced in May 2011 to intensify custom controls (shelved in October 2011) and a Dutch scheme to place video road surveillance equipment on its borders with Belgium and Germany with a view to curtailing irregular immigration and residence.¹⁷

In the midst of these events, political pressure was levied by certain national leaders to amend Schengen by allowing the possibility to reintroduce internal border controls in case of exceptional difficulties in the management of the external borders. The call was taken up by the European Council of June 2011,¹⁸ prompting the Commission to revisit the Schengen legal regime in the spring and summer of 2011, coming forward with two new legislative proposals adopted in mid-September of that year.¹⁹ The proposals reflect the Commission's attempt to develop a stronger 'Union-led' approach to Schengen governance. However, they also reflect a partial success on the part of the member states to re-open debates on the scope of exceptions to EU rules on the reintroduction of internal border checks and freedom of movement inside the Schengen territory. Indeed, the EU's Stockholm Programme – the third Multi-annual programme on the AFSJ – did not envisage new legislative proposals on Schengen Governance.²⁰

¹⁶ S. Carrera, M. Merlino and J. Parkin (2011), "A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair" CEPS Paper in Liberty and Security Series, Centre for European Policy Studies, June.

¹⁷ P. Hobbing (2011), "A Farewell to Open Borders? The Danish Approach", CEPS Paper in Liberty and Security Series, Centre for European Policy Studies, Brussels, November; European Parliament, 'Plenary Focus - MEPs call on Commission to do more to defend free movement', available at: <http://www.europarl.europa.eu/news>.

¹⁸ A joint letter by former French and Italian Heads of State Nicolas Sarkozy and Silvio Berlusconi addressed to the Commission and Council Presidents demanded "new measures to reinforce security in Schengen ... (such as) ... the possibility to re-establish internal border controls in case of exceptional difficulties in the management of common external borders."

¹⁹ For an in-depth examination of the Commission's proposals within the Schengen Governance Package see S. Carrera (2011), "An Assessment of the Commission's 2011 Schengen Governance Package: preventing abuse by EU member states of freedom of movement?" CEPS Liberty and Security Series, Centre for European Policy Studies, Brussels.

²⁰ Council of the European Union, "The Stockholm Programme: An open and secure Europe serving and protecting citizens," 5731/10, Brussels, 3 March 2010.

2.1.2. The Schengen Governance Package proposals and state-of-play

What are the key features of the Schengen Governance proposals?

The proposed **new evaluation mechanism** foresees a leading role for the Commission in the planning and implementing of Schengen evaluations. Here an important innovation of the proposals is the possibility for evaluation teams composed of Commission and member state experts to conduct both announced and unannounced on site visits to a national border control point as part of an evaluation procedure. According to the proposals the Commission is also responsible for the decision for specific measures to be adopted in cases of “serious deficiencies” by a member state when carrying out external border control or return procedures.²¹ For instance, in the case of “serious deficiencies” following an evaluation, the Commission could request a member state to implement measures as far-reaching as closing a specific border-crossing point for a limited period or request the deployment of ‘European Border Guard Teams’ under the coordination of Frontex. The proposals also allocate an important ‘fact-finding role’ to EU Home Affairs agencies such as Frontex and Europol.²²

Concerning **the reintroduction of internal border controls**, the proposed Regulation envisages a new EU coordinated mechanism ensuring a ‘Union-level response’ and stipulating that reintroduction of controls “should be based on a decision proposed and adopted by the Commission” via comitology (implementing acts). This would replace the current system by which the reintroduction of checks relies on a unilateral decision by national governments required only to inform the Commission and Parliament.²³ The proposal foresees two scenarios which could justify reintroducing internal checks (and thus grounds for derogation of a member state's duty to safeguard free movement): the first, a ‘serious threat to public policy or internal security’; the second, as a response to a member state's ‘serious and persistent failure to adequately protect a part of the EU’s external border’.²⁴ The latter addition should be seen as a direct response to the demands of member states such as Italy and France to widen member states’ room for manoeuvre where another Schengen member is

²¹ According to Article 15 of the Commission proposal for a Regulation on the establishment of a Schengen evaluation mechanism, “Serious deficiencies” are identified if the evaluation report concludes that “the evaluated Member State is seriously neglecting its obligation to carry out external border control or return procedures.”

²² Articles 8, 10 and 15 of the Commission proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011)559, 16.09.2011, Brussels.

²³ S. Carrera (2011), An Assessment of the Commission’s 2011 Schengen Governance Package: preventing abuse by EU member states of freedom of movement? CEPS Liberty and Security Series, Centre for European Policy Studies, Brussels.

²⁴ Article 26 of the proposed Regulation for the reintroduction of internal border controls.

seen to be failing in its duty to protect the EU external border. However, the Commission included a number of criteria to qualify for this measure, stipulating that this action should be resorted to only in case of serious and persistent deficiencies identified by the evaluation mechanism and insofar as these deficiencies constitute a serious threat to public policy or internal security at the Union or national level.

The Commission's proposals received a cool reception inside the Council and political agreement was only reached after several months of heated negotiation which saw the texts undergo several important mutations.²⁵ As expected, the changes agreed at the Justice and Home Affairs Council meeting of 7-8 June 2012 reveal **the tensions surrounding the 'EU-Centred' nature of the Schengen package and the fundamental shift in responsibility that the proposals accorded to the European Commission.**

The most important of these changes by the Council concerned **the legal basis allocated to the evaluation mechanism proposal.** The Danish Presidency took the decision, following an opinion by the Council Legal Service, to change the legal basis from Article 77 TFEU on policies on border checks,²⁶ as designated by the Commission, to Article 70 TFEU on the evaluation of Union policies under the area of freedom security and justice²⁷ – a move unanimously agreed by the Justice and Home Affairs Council of June 2012.²⁸ The stated reasons for the change in legal basis are, on the face of it, largely technical.²⁹ However, they mask deep political struggles.

Indeed one of the most important practical implications of the Council's move was to effectively exclude the European Parliament as co-legislator (Article 70 does not rely on the ordinary legislative procedure, unlike Article 77 TFEU). Although the Council later agreed to consult the European Parliament in order to take into account its position, this would nevertheless still mean no binding input for the Parliament when it comes to negotiating changes to the evaluation mechanism. We have argued elsewhere that **the Commission's designation of Article 77 is in fact the correct one**, due to the advanced degree of legislative harmonisation in this policy domain and the fact that Article 70 was rather

²⁵ Press release of the 3172nd Justice and Home Affairs Council meeting - Luxembourg, 7 and 8 June 2012.

²⁶ Article 77 TFEU provides for the adoption of measures, via co-decision, for "the absence of any controls on persons, whatever their nationality, when crossing internal borders".

²⁷ Article 70 TFEU provides for the "laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies (...) by Member States' authorities".

²⁸ Council of the EU, Opinion of the Legal Service, 10148/11, Brussels 13 May 2011.

²⁹ For further examination of this issue see Y. Pascouau (2011), 'Schengen and Solidarity: The Fragile Balance between Mutual Trust and Mistrust', Policy Paper 55, European Policy Centre.

intended to apply to policy areas when legislative harmonisation is not the main objective or has not yet been achieved.³⁰

Further changes by the Council also targeted the ‘Union focused’ nature of the proposals. Thus, in the amended Council text the Commission no longer has primary responsibility for implementing the evaluation mechanism but rather the mechanism is to be implemented jointly by Commission and Member State experts with on-site visits and the drafting of reports the responsibility of a team comprised of 2 Commission experts and 6 member state experts. It also foresees greater member state involvement in overseeing and monitoring national action plans to address deficiencies revealed in the evaluation reports; removal of the possibility to make parts of the reports public. In addition, ‘unannounced’ on-site visits would require a pre-warning of at least 24 hours. Finally, the last major change concerned **the procedure for the reintroduction of internal borders in cases of persistent, serious deficiencies related to external borders**. According to the Council’s position, based on a Council legal service opinion, reintroduction of controls could not be made through a binding Commission or Council Decision but rather through a Council recommendation to the neighbouring states.³¹

The Council’s decision – especially regarding the legal basis change - **proved extremely controversial with the European Parliament**, an institution which, since the entry into force of the Lisbon Treaty, has been promoted to the status of co-legislator on an equal footing with the Council. By way of retaliation, the decision was taken on 14 June 2012 at the highest political level of the European Parliament –the Conference of Presidents (leaders of political groups and the President of the European Parliament) – to suspend cooperation with the Danish Presidency of the Council on five JHA dossiers until the Schengen question is resolved.³²

Currently, voting on those dossiers remains blocked by the European Parliament (although informal discussions with the Council continue) due to the fact that trilogue negotiations on the Schengen Governance Package underway

³⁰ S. Carrera (2011), An Assessment of the Commission’s 2011 Schengen Governance Package: preventing abuse by EU member states of freedom of movement?” CEPS Liberty and Security Series, Centre for European Policy Studies, Brussels.

³¹ Thus the Council amended text includes the addition in Recital 6 of the proposal: “In view of the politically sensitive nature of such measures which touch on national executive and enforcement powers regarding the control at internal borders, implementing powers to adopt recommendations under this specific Union-level procedure should be conferred on the Council, acting on a proposal from the Commission”. See Recital 6 of the revised draft compromise text of a proposal for a Regulation on the temporary reintroduction of border control at internal borders, Council doc, No. 6161/5/12, 5 December 2012.

³² The five dossiers are: Amendment of Schengen border code and Convention implementing the Schengen Agreement; Judicial cooperation in criminal matters: combating attacks against information systems; European Investigation Order; Budget 2013 aspects relating to Internal Security; and EU Passenger Name Records.

throughout autumn and winter 2012 and continuing into 2013 have as yet failed to reach agreement. Despite the stated intention of the Cyprus Presidency of the Council to reach a political compromise by the end of its term, there remained a number of lines of division between the Council and MEPs Carlos Coelho and Renate Weber (Rapporteurs for the evaluation mechanism and the reintroduction of internal borders regulations respectively).

First, as regards the legal basis dilemma, **the Parliament is keen to ensure that it retains a degree of control over the overall nature of the evaluation mechanism.** Negotiations have focused on the possibility of reaching a compromise solution, proposed by Carlos Coelho, to introduce a so-called ‘bridging clause’ in the SBC - a cross reference laying down certain key features and principles in the SBC and linking to the Regulation for an evaluation mechanism. Such a bridging clause would ensure that no changes to the Schengen evaluation mechanism could be made without first amending the SBC (which would require co-decision and thus the involvement of the European Parliament in the decision-making process). The Parliament also considers problematic that the procedure for the reintroduction of internal borders be based on a Council recommendation rather than a Commission or Council Decision, the extent of information provided to the Parliament following Schengen evaluations and the precise procedure for unannounced visits.

At the time of writing, inability to find compromise on these issues are no closer to being resolved. The Parliament is relying on various tools at its disposal to gain leverage in negotiations (e.g. the threat to withhold EU funding for the evaluation and monitoring mechanism should it fail to meet the Parliament’s basic criteria for an EU-centred mechanism). There also remains a distinct possibility, expressed by certain key actors in the Parliament, to block the proposal altogether or to take the matter before the Court of Justice.³³

2.2. Controversies

The lines of division running through the current stalemate in negotiations between the Council and the European Parliament, as well as the key drivers that spurred the Commission’s proposals back in 2011, reveal several key issues of concern.

³³ European Parliament Press Release, ‘Schengen: MEPs strongly object to Council decision and consider legal action’ 12.06.2012.

2.2.1 Competences – ‘who’ controls mobility?

Both the Schengen events of 2011 and 2012 and the EU inter-institutional struggles over the Governance Package reveal just **how contested the question remains over who has the power to decide on the scope of application of EU border law and who has the authority to adjudicate when derogations occur**, in other words - to determine when border law may justify a derogation to freedom of movement and evaluate its correct implementation across the national arenas.

This comes as rather a surprise given the fact that the entry into force of the SBC in 2006 means that Schengen members are no longer solely competent in this domain but are subject to clear obligations to apply a harmonised set of EU rules on border controls and surveillance which should be under the guardianship of the Commission as well as the Court of Justice. Indeed, **the Europeanisation of policymaking on border law and policy is born out by the progressive development of an EU IBM strategy, supported by its own legal, financial and institutional framework** (i.e. the SBC, financial instruments like the European Borders Fund and dedicated European regulatory agency – Frontex) and relying on a multi-actor framework that involves local and regional – as well as national level agents (see section 4.2).

Yet, the move by the Danish Presidency (endorsed by the JHA Council) to unilaterally change the legal basis of the Commission’s evaluation mechanism proposal, effectively excluding the European Parliament mid-way through a legislative procedure, reveals a pre-Lisbon (and pre-SBC) mind-set among member states in the Council, reluctant to acknowledge the Parliament as a powerful co-legislating body in the post-Lisbon EU institutional landscape and the Commission as guardian of EU law.

Indeed, the resistance shown by member states to accept the Union-centred approach underpinning the Schengen Governance Package (by pushing to maintain the features of an inter-governmental evaluation mechanism and retain decisional power over the reintroduction of internal borders) also indicates **a strong preference to retain national sovereignty or even ‘renationalise’ elements of a policy domain – free movement – which falls squarely in the EU’s sphere of competence and underpins not only European Citizenship but the functioning of the Internal Market**. Such a turn towards an inter-governmental Schengen governance could lead to increased incidences of controls at EU internal frontiers of the kind witnessed since 2011, implying an increased future ‘security’ presence at or around Schengen internal borders, most likely carried out by member of national (as well as regional and local) border authorities.

2.2.2. Effects – free movement at risk?

A second key controversy over the Schengen Governance Package has stemmed from debates over **the degree to which the Commission’s proposals will either ultimately improve the Schengen system, reinforce the status quo or rather undermine free movement**. Inter-institutional negotiations over the texts of the two proposals and the substantial changes demanded by the Council have led certain key policy actors in the European Parliament to question **the very added-value of the legislative package**.

The degree to which the final adopted text will lead to **a strengthened evaluation and monitoring mechanism still depends on the outcome of negotiations** between the Council and the European Parliament. Should the Parliament succeed in gaining a leading role for the European Commission in the implementation of evaluations and the possibility to conduct genuine unannounced visits, one could expect a more objective evaluation process with less political horse-trading between member states (such an outcome would require a more robust system for independent evaluation as even the Commission is not immune from such pressures). Unannounced on-site visits meanwhile would make a critical difference when gathering the data needed to sanction potential breaches of the SBC.

More contested has been **the proposal on rules governing the reintroduction of internal border controls**. The provisions in the Commission proposal aimed at limiting the unilateralism and lack of transparency and accountability in the implementation of SBC rules for reintroducing checks. Based on the compromise text of 4 December, Council amendments retaining decisional power of member states at times of reintroducing internal checks will do little to increase accountability here.³⁴

Provisions narrowing the possibilities for governments to suspend ‘unilaterally’ free movement along with the clarification of the specific requirements that must be respected by member states (including consideration of the necessity and proportionality of the measure against ‘the threat’ to public policy or internal security, together with a consideration of the alternative measures that could be taken and the impact on free movement and other fundamental rights) remain in place and should be welcomed as a much needed support for legal clarity. However, **the main criteria to be followed by member states to justify restricting free movement are largely similar to those in the current SBC, while the procedure applying to the immediate reintroduction of temporary**

³⁴ Article 24.3 of the revised draft compromise text of a proposal for a Regulation on the temporary reintroduction of border control at internal borders, Council doc, No. 6161/5/12, 5 December 2012.

borders in the case of emergency situations still leaves a wide discretion to national authorities. Furthermore, as long as the Council resists attempts by the Parliament to insert obligations over transparency (keeping the Parliament informed of the outcomes of on-site visits and Commission recommendations and their implementation) there will remain an important deficit in democratic accountability and oversight.

Indeed, the 2011 Franco-Italian affair served to demonstrate the (too) wide margin of manoeuvre that can often be afforded to national governments when interpreting the term ‘threat to public policy’.³⁵ With the addition of the new grounds for justifying a reintroduction of controls based on ‘exceptional circumstances’ resulting from ‘persistent, serious deficiencies’ related to external border control there is concern that member states may view this mechanism inserted into the SBC as a new tool by which to evade free movement obligations under EU law. Again, the materialisation of this risk will depend in large part on how criteria such as ‘exceptional circumstances’, ‘persistent serious deficiencies’ and ‘serious threat to public policy and internal security’ are interpreted by the Commission, Council and ultimately - should such a move be contested - by the CJEU. Here, **the accuracy of information depicting the situation on the ground and identifying security threats is key.**

This raises questions over the appropriateness (including independence and accountability) of actors such as Frontex, Europol and other Home Affairs agencies who have now been attributed a prominent role in assessing ‘risk’ and ‘threat’ as part of the proposed Schengen evaluation mechanism. Further, it calls for further consideration of ‘who’ is best placed to provide accurate, timely and balanced information?

2.2.3. Mutual (mis)trust – solidarity at stake?

The third and final key controversy raised by the debates over the Schengen Governance Package has been the issue of (lack of) solidarity³⁶ and mutual trust. The issue of trust is multi-layered – ‘whose’ trust are we talking about in the Schengen discussions? The debates surrounding the Schengen Governance Package have taken their toll on trust between the EU institutions (particularly Parliament and Council) but also imply an erosion of mutual trust between the member states themselves, particularly stemming from the decision by the

³⁵ In this case, the French government determined that approx. 200 irregular migrants and protesters on board a train crossing the French-Italian border at Ventimiglia constituted a threat to public policy. See S. Carrera, M. Merlino and J. Parkin (2011), “A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair” CEPS Paper in Liberty and Security Series, Centre for European Policy Studies, June.

³⁶ As laid down in Article 80 TFEU which stipulates that “The policies of the Union... and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.”

Commission to introduce – at the behest of certain member states – a mechanism that would oblige the closing of internal frontiers due to one member experiencing “persistent serious deficiencies related to external border control.”³⁷

The Commission’s inclusion of this mechanism is problematic in that it has legitimised and fuelled the idea that one member state could potentially jeopardise the internal security of the wider EU through deficient control of its external border (and to an extent that would justify the reintroduction of internal controls). In the words of the Director-General of the Commission's DG Home Affairs, in this situation “such a ‘ring-fencing’ mechanism would be ordered by the Commission to prevent contagion.”³⁸ The decision to sanction a member state in this way, even after several solidarity mechanisms have been activated (funding, deployment of European Border Guard teams etc.) appears not only counter-productive but may also potentially stand in tension with EU legal principles laid down in the Lisbon Treaty which enshrine loyal cooperation (Art. 4.3 TEU) and solidarity and fair sharing of responsibility (Art. 80 TFEU).³⁹

In fact solidarity and mutual trust – the cornerstones of a smooth functioning Schengen system - are dependent on the existence of a commonly agreed set of standardised rules and practices (the SBC) and the understanding that those rules will be applied correctly. This is particularly central for ensuring legal certainty and for reinforcing the trust held by individuals for the application of the rule of law by competent authorities. Further, it is especially important when we consider that the sanctioning of a member state in the manner laid down in Article 26 of the proposed Regulation for the reintroduction of internal border controls would penalise first and foremost individuals (EU citizens and third country nationals) ‘on the move’ rather than the state or national government in question.

Ultimately, the “persistent serious deficiencies related to external border control” allude most directly to an incorrect application by the Member State government involved of the SBC, and potential breaches of other EU legal principles including the fundamental rights to asylum and to judicial redress envisaged in EU secondary legislation. In such cases, the correct EU response to

³⁷ Article 26 of the revised draft compromise text of a proposal for a Regulation on the temporary reintroduction of border control at internal borders, Council doc, No. 6161/5/12, 5 December 2012.

³⁸ EPC ‘Freedom of movement of persons in the Schengen area - A critical juncture?’ Event Report, 20.11.2012, available at: http://www.epc.eu/events_rep_details.php?cat_id=6&pub_id=2946

³⁹ D. Vanheule, J. van Selm and C. Boswell (2011), *The Implications of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of responsibility on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration*, Study for the the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs.

identified breaches of EU standards could instead be the launch of accelerated infringement proceedings. It is somewhat disappointing therefore that the insertion of the new mechanism for reintroduction of internal border controls in cases of serious persistent deficiencies in **the Commission's proposal has served somewhat to divert attention from the long-awaited and much needed strengthening of an EU-coordinated evaluation and monitoring mechanism for the Schengen system.**

3. Smart Borders Package

3.1. Background and State of play of inter-institutional debates

The Smart Borders Package was adopted by the European Commission on 27 February 2013, and proposes an Entry-Exit System (EES) designed to register TCNs entering and leaving the EU territory,⁴⁰ and a Registered Traveller Programme (RTP) aimed at speeding up border-crossing for pre-vetted or “bona fide” travellers based on automated identity checks and border-crossing gates.⁴¹ The package also contains a proposal amending the Schengen Borders Code so as to allow implementation of the two systems.⁴²

The origins of the Smart Borders Package date back more than a decade and finds its roots in the US VISIT programme which was established in the wake of the 9/11 terror attacks amid a political climate that saw increasing requests from law enforcement agencies for information on all foreigners entering and exiting the US territory. The US VISIT Programme obliges every traveller entering the US to have prior authorisation by the Homeland Department and to have their fingerprints collected, and can be considered as a precursor of the Smart Borders package presented by the European Commission. The concept of an Entry-Exit System at the European level first made its appearance in 2004, presented as one of the possible policy options during discussions on the introduction of a future Visa Information System (VIS). However the option was discounted due to its high costs and the fact that it would have covered only third-country nationals subject to EU visa requirements.

In February 2008 the European Commission published a communication on “the next steps in border management”,⁴³ exploring the possibility to introduce an Entry-Exit System, a Registered Traveller Programme, Automated Border Control gates and an Electronic System of Travel Authorisation (ESTA). In addition, a parallel communication, released on the same day, presented an EU external borders surveillance system (EUROSUR).⁴⁴ The European

⁴⁰ Proposal for a Regulation establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM(2013) 95 final, Brussels, 28.2.2013.

⁴¹ Proposal for a Regulation establishing a Registered Traveller Programme, COM(2013) 97 final Brussels, 28.2.2013.

⁴² Proposal for a Regulation amending Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System (EES) and the Registered Traveller Programme (RTP), COM(2013) 96 final, Brussels, 28.2.2013.

⁴³ European Commission (2008), Preparing the next steps in border management in the European Union, COM(2008) 69 final, 13 February 2008.

⁴⁴ European Commission (2008), Examining the creation of a European Border Surveillance System (EUROSUR), COM(2008) 68 final, 13 February 2008.

Commission's Smart Borders communication of February 2008 was welcomed by the Council (French and Czech Presidencies), which considered the creation of such systems as a priority.⁴⁵ In 2009 the European Council, via the Stockholm Programme, invited the Commission to present legislative proposals for both an EES alongside an RTP with a view to their "becoming operational as soon as possible."⁴⁶ However, certain Member States failed to be convinced of the added-value of such systems, especially in view of the cost implications and against the background of an economic recession that was beginning to take its toll on national budgets.⁴⁷ During the Polish Presidency's informal JHA ministerial meeting in Sopot in July 2011, clear doubts about the necessity or effectiveness of the proposals were expressed.⁴⁸

Consequently, instead of coming forward with the legislative proposals as planned, the European Commission responded in October 2011 with a new communication on smart borders.⁴⁹ The 2011 Communication bore two key differences when compared with the 2008 text: first, the estimated costs of the systems had increased tenfold from 135 million EUR to 1.1 billion EUR; second, the Commission shelved plans to introduce the Electronic System of Travel Authorisation.⁵⁰ **The communication generated controversy from various quarters, including certain MEPs who dismissed the need for a Smart Borders proposal, questioning its necessity, proportionality and effectiveness.**⁵¹

Yet, despite these critiques and the ballooning costs of the future EES and RTP, the systems had powerful support from a core group of member states, among them Germany, the Netherlands and the UK. Political pressure behind the Package was reinforced by the European Council in the wake of the Arab Spring which called for a speedy preparation of the legislative proposals as a means to

⁴⁵ See Council of the EU (2008), Presidency project for a system of electronic recording of entry and exit dates of third-country nationals in the Schengen area, 13403/08, Brussels, 24 September 2008; Council of the EU (2009), Questionnaire on the possible creation of a system of electronic recording of entries and exits of third country nationals in the Schengen area, 8552/09, Brussels, 21 April 2009; Council of the EU (2009), Results of the data collection exercise, 13267/09, Brussels, 22 September 2009.

⁴⁶ Council of the EU (2010), The Stockholm Programme: An Open and Secure Europe serving and protecting Citizens, 5731/10, Brussels, 3 March 2010, p. 27.

⁴⁷ See Hayes, Ben, Vermeulen, Mathias (2012), *Borderline: The EU's New Border Surveillance Initiatives*, Berlin: Heinrich Böll Foundation, June 2012, p. 27.

⁴⁸ Polish Presidency of the European Union (2011), *Conclusions of the Informal Meeting of the Justice and Home Affairs Ministers in Sopot, 18–19 July 2011*.

⁴⁹ European Commission (2011), *Smart Borders – options and the way ahead*, COM(2011) 680 final, 25 October 2011.

⁵⁰ See Bigo, Didier, Carrera, Sergio et al (2012), *Evaluating current and forthcoming proposals on JHA databases and a smart borders system at EU external borders*, Study for the European Parliament, forthcoming.

⁵¹ Official website of MEP Ska Keller. "LIBE Flash October 2011 - Briefing on Smart Borders", at: <http://www.ska-keller.de/en/news-from-libe-committee>

strengthen the control and surveillance of the EU's external borders.⁵² However, the adoption of the Smart Borders proposals by the European Commission was nevertheless delayed by three months due to prolonged internal negotiations over the financial implications of the legislation and the sensitive nature of certain elements of the proposed systems, such as the collection of biometric data.⁵³

The legislative text of the Commission's Smart Borders proposals finally adopted on 28 February 2013 set out the nature and functions of the two systems as follows:

The Entry Exit System (EES) will comprise an electronic registry, recording the time and location of entry and exit of all third country nationals admitted to the Schengen Area for a short stay (up to three months). For the first two years of operation the system will gather alphanumeric data after which the EES will transition to the collection of biometric data (fingerprints). The primary objective of the system is to identify over-stayers – non-EU nationals legally entering the Schengen area and then failing to leave upon expiration of their allowed stay. The system will automatically send an alert to the relevant competent national authorities (border authorities) when it detects that a TCN registered in the system has not left the Schengen territory after the stipulated period. Access to data in the EES is open to border, visa and immigration authorities of each member state however, the EES Regulation stipulates that “the technical development of the systems should provide for the possibility of access to the system for law enforcement purposes should this Regulation be amended in the future to allow for such access.”⁵⁴

The stated objective of the **Registered Traveller Programme (RTP)** is to facilitate border crossings for frequent, pre-vetted and pre-screened TCN travellers at the Schengen external borders. A key rationale for presenting a RTP alongside the EES was that it would off-set the longer waiting times implied by the EES (although such claims have been contested by analysts and academics, see Section 4.2). The scheme would be voluntary and open to third country nationals who can prove during the application process and via the means of supporting documents that they need to travel regularly, have the financial means to support themselves during the duration of their stays and have “a genuine intention of leaving the territory in due time”.⁵⁵ In addition, applicants must agree to have their fingerprints taken and pay a fee up to EUR 20.

⁵² European Council Conclusion, 23-24 June 2011, Council doc. EUCO 23/11, point 24.

⁵³ Interviews with EU policymakers.

⁵⁴ Recital 11 of the EES Proposal, COM(2013) 95 final, *op. cit.*

⁵⁵ Article 12 of the RTP Proposal, COM(2013) 97 final, *op. cit.*

Following the adoption of the legislative proposals, the Commission has emphasised that technical work shall not be commenced on the development of the EES and RTP systems until the European Parliament and the Council have adopted the legal basis for the systems setting out clearly their specifications. Any draft legislation must be agreed jointly by the European Parliament and the Council under the ordinary legislative procedure.

3.2. Controversies

The Smart Borders communications of 2008 and 2011 have already raised some fundamental concerns by the European Parliament as well as various other stakeholders (member states, European Data Protection Supervisor, CoR – see Section 3.2.1). These provide us with an early indication of some of the **points of contention likely to emerge during the inter-institutional negotiations that will take place during the course of 2013 and beyond.**

3.2.1 Costs, necessity and proportionality

Are these proposals in accordance to the law and necessary in a democratic society? Is there a pressing social need? Is this the most effective way to respond to irregular immigration in the EU? One of the most controversial issues, particularly in the current climate of economic crisis and budget cuts, is likely to be **the projected costs of the proposals versus the perceived proportionality/necessity and financial suitability of these new systems.**

Financial concerns have already figured as a key point of contention in the lead up to the presentation of the proposals, both among certain member states and during the Commission's internal discussions on the Smart Borders Package. The Commission sets aside an estimated 1.1 billion EUR as 'an indicative amount' for the development of both the EES and the RTP. These costs would be covered by the Internal Security Fund (ISF) under which the Commission has earmarked a total 4.6 billion EUR for the period 2014-2020. However, there is no guarantee that even this substantial investment will be sufficient to cover the costs of developing the systems in practice.

Indeed, **this figure already represents a ten-fold increase on that projected in 2008.** Furthermore, the EDPS, in its comments on the 2008 communication, drew attention to the example of the US VISIT programme which, after four years of development and 1.3 billion US dollars invested, had still only half the system effectively up and running.⁵⁶ The Commission's Impact Assessment published alongside the proposals notes that several member states, particularly

⁵⁶ European Data Protection Supervisor (2008), Preliminary Comments, *op. cit.*, p. 3.

those with low numbers of travellers crossing their external borders, have expressed concerns regarding the high costs and additional administrative burden that the system infrastructure might impose and questioned the overall cost-benefit analysis.⁵⁷

The high costs associated with the EES and RTP appear all the more burdensome in view of the important question marks placed over the necessity and proportionality of the new systems. Indeed, this question appears particularly pertinent as regards the EES and its ability to meet the stated aim of identifying over-stayers. With no concrete link to arrest and expulsion procedures, the system could only be capable of systematically pinpointing over-stayers once they exit the Schengen area. A study for the European Parliament has therefore contended that the EES would amount to “little more than an extremely expensive mechanism for gathering migration statistics.”⁵⁸

More generally, in its preliminary comments on the 2008 communication,⁵⁹ the European Data Protection Supervisor (EDPS) critically challenged the necessity and proportionality of the Smart Borders communication, mainly on the basis of a lack of reliable evidence to support the need for new systems. The EDPS maintained that evidence cited in the impact assessment in support of the new system was not reliable and suggested that a thorough assessment of the effectiveness and weaknesses of existing databases be conducted.

Given the paucity of reliable evidence provided in the new Impact Assessments published alongside the legislative proposals in February 2013,⁶⁰ these critiques are likely to re-emerge during negotiations between the Parliament and Council. This is particularly true for the European Parliament which has stressed **the importance of waiting until the SIS II and VIS are fully operational and evaluated before any new proposals for large scale EU databases are made.**⁶¹ A similar concern was also raised by the Committee of the Regions in its Opinion on the Stockholm Programme.⁶²

⁵⁷ Commission Staff Working Document - Impact Assessment accompanying the Proposal for a Regulation establishing a Registered Traveller Programme, SWD(2013) 50 final, Brussels, 28.2.2013.

⁵⁸ Bigo, Didier, Carrera, Sergio et al (2012), *op. cit.*

⁵⁹ European Data Protection Supervisor (2008), Preliminary Comments on the proposed border package, 3 March 2008, p. 4.

⁶⁰ Commission Staff Working Document - Impact Assessment accompanying the Proposal for a Regulation establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union, SWD(2013) 47 final, Brussels, 28.2.2013; Commission Staff Working Document - Impact Assessment accompanying the Proposal for a Regulation establishing a Registered Traveller Programme, SWD(2013) 50 final, Brussels, 28.2.2013.

⁶¹ *Ibid.*

⁶² Committee of the Regions Opinion on ‘The Stockholm Programme: challenges and opportunities in view of a new multi-annual programme on the EU AFSJ’, OJ C 79/37, 27.03.2010.

3.2.2 Fundamental rights

The lack of a clear demonstration of the necessity and proportionality of the Smart Border Package means that the fundamental rights challenges posed by any such large scale system of data collection will be all the harder to justify. The Committee of the regions has already been vocal in its concerns over the fundamental rights implications of establishing the EES and RTP.⁶³ Both systems entail the collection of a substantial quantity of personal (including biometric) data. The EES for instance – after a transitional period of two years – will oblige the fingerprinting of all short stay TCNs entering (and exiting) the EU, dramatically increasing the amount of personal (biometric) data on foreigners accessible to border authorities and (potentially) also law enforcement agencies.

Article 8 of the European Convention on Human Rights and Article 8 of the EU Charter of Fundamental Rights protect an individual's right not to have personal data disclosed to third parties without their informed consent, i.e. an individual has the right to determine who has access to their data and what this data will be used for. For states to depart from this obligation, they must demonstrate that the collection of data pursues a pressing social need and is legitimate and proportionate to that aim.⁶⁴ **The difficulty of demonstrating this legitimate aim has already proved a point of controversy**, with the European Parliament stressing in a press release on the day of the adoption of the Smart Borders Package that: “The intrusive proposals, which would compromise the data protection rights of travellers, go far beyond what the Commission requires to ensure its ostensible aim of verifying who has overstayed their permit to stay in the EU”.⁶⁵ A key question to be examined during the inter-institutional negotiations is **whether the aims of the Smart Borders Package could be achieved through much cheaper and less-intrusive systems which do not require the collection and retention of biometric data.**

Forthcoming negotiations will also no doubt scrutinise **whether the legislative proposals contain sufficient safeguards to prevent the violation of the right to data protection, privacy and access to effective remedies by third country nationals**⁶⁶ the latter being especially crucial to prevent the erroneous return of

⁶³ Committee of the Regions Opinion on ‘The Stockholm Programme: challenges and opportunities in view of a new multi-annual programme on the EU AFSJ’, OJ C 79/37, 27.03.2010.

⁶⁴ The ECtHR has further developed the necessity test in its case-law, see European Court of Human Rights (2008), Case *S. and Marper v the United Kingdom*, ECHR 1581, Applications nos. 30562/04 and 30566/04, Judgment, 4 December 2008. In *Marper v. United Kingdom*, the Court found that retention of DNA samples from persons suspected but not convicted of a criminal offence was disproportionate and not necessary in a democratic society.

⁶⁵ Press Release of the European Parliament, “Big Brother Technologies not a Smart Plan for Europe’s Borders” The Greens/European Free Alliance, 28 February 2013.

⁶⁶ The right to an effective remedy is enshrined in the EU Charter of Fundamental Rights, Article 47.

a third country national caused by an alert on the system. Further, the fact that the legislative proposals stipulate that the development of the technical system should provide for future access to law enforcement authorities opens the door for potential breaches of the purpose limitation principle which requires that data be “processed fairly for specified purposes”,⁶⁷ as well as allowing the possibility for the new systems to be used as tools for profiling and data-mining and potential violations of EU principles of non-discrimination (see Section 4.4.).⁶⁸ Consultations with member states during the preparation of the proposals indicate that there was a divergence of views between national governments over the collection of biometric data and access by law enforcement authorities,⁶⁹ and this is likely to be an on-going debate both within member states inside the Council and between the Council and Parliament.

⁶⁷ Article 8 of the EU Charter of Fundamental Rights.

⁶⁸ The first obligation stemming from Article 21 of the EU Charter of Fundamental Rights.

⁶⁹ Commission Staff Working Document - Impact Assessment accompanying the Proposal for a Regulation establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union, SWD(2013) 47 final, Brussels, 28.2.2013.

4. Issues of concern for Local and Regional Authorities and the Committee of the Regions

Both the Schengen Governance and the Smart Borders Packages imply important reframing and adjustments to border control processes, procedures and infrastructures as well as the daily work of border control authorities. The following section explores how LRAs, especially those in close proximity to external EU borders, might be exposed to changes in EU border management and the various practical dilemmas which they may raise. It will also examine whether there is scope for LRAs to be engaged in the development and evaluation of a European framework governing Schengen and the implementation of the management of the common Schengen external borders.

4.1. Multi-level Governance Challenges

What are the issues of concern for local and regional authorities and the CoR resulting from the potential changes brought by the two legislative packages, in relation to their implications for multi-level governance, particularly relating to divisions of legal competences and tasks in border management-related activities? The first issue that needs to be examined at times of identifying the issues of concerns for LRAs in the Schengen and smart borders debates at EU levels is **‘who’ are those local and regional authorities that we need to be concerned about from a ‘multi-governance perspective’**. Who is responsible for border management (controls and surveillance) in the European Union?

The answer to this question is however not a straightforward one.⁷⁰ One could be first inclined to think that these authorities are mainly national border guards services and that these are under the direct command of national governments and the Ministries of Interior. The current picture across the Schengen member countries is somehow more complex and diversified one. As Annex 1 of this Note demonstrates, **a reduced number of these countries count with a specialized borders controls unit.**

This is, as a way of illustration, the case in relation to Finland, Latvia, Lithuania, the Netherlands, Portugal and Poland. A substantial majority of EU Member States the national services responsible for border-controls are the police or

⁷⁰ S. Carrera (2010), Towards a Common European Border System, CEPS Working Document No. 331, June 2010, Brussels. Refer also to the European Migration Network (2009), Ad Hoc Query on Border Control, November 2009.

hybrid services between border guards and policemen (i.e. border police). In countries such as Austria, Belgium, Denmark, Germany, Greece, Hungary, Italy, Luxembourg, Slovenia, Spain, Sweden, Iceland and Norway), the police are the main/sole competent authority in charge of border management. Hybrid models can be found for instance the context in Czech Republic, Estonia, France, Malta, Romania and Slovakia. Few Member States count with specialized border units in charge of blue (sea) borders and ports (e.g. France, Greece, the Netherlands, Sweden and Norway).

The competent Ministries to which this multi-actor setting belongs are equally heterogeneous across the Schengen territory. The predominant tendency among Schengen member states is still one where the Ministries of Interior have the main responsibility. That notwithstanding, in several countries like France, Italy, the Netherlands, Portugal, Spain, Sweden and Norway the Ministry of Defence shares some direct or shared competences too. Malta constitutes a case in point, as it is the sole member state still having armed forces (under the authority of the Ministry of Justice and Home Affairs) involved in border controls and surveillance.

The ‘who’ question also leads us to explore **the extent to which LRAs have any competences in relation to border management activities falling within the scope of Schengen.** As we have emphasized above, the police are playing an important role in the ways in which external border controls and surveillance are being performed in Schengen. **As a general rule it can be said that regional/local law enforcement authorities are not directly involved in border controls/surveillance and that this largely remains under the responsibility of the competent authorities at ‘national’ levels.** However, in a number of countries LRAs have been bestowed with some indirect police (law and public order) powers, which **could include border checking and surveillance functions.** This is for example the situation in countries presenting constitutional systems recognising or allowing for law and order powers to regional actors such as in Germany (*Länder* like Bavaria, Bremen and Hambourg) or Spain (*Comunidades Autónomas* like Pais Vasco and Calatunya, which count with their own police forces).⁷¹

During our research we have come across few past cases where authorities below the national level were vested with tasks in border management-related

⁷¹ J. Tóth and Z. Fejes (2009), *Multilevel Governance and the Competences of Local and Regional Authorities in the Area of Freedom, Security and Justice*, Committee of the Regions, Study, Brussels. Refer also to CEMR (2012) *Local and Regional Government in Europe - Structures and Competences*, September 2012.

matters. This was mainly the case before their accession to the Schengen regime.⁷²

The diverse multi-level and (disintegrated) multi-actor landscape of border management has been said to pose a number of conundrums. The multiplicity of border actors across the Schengen Area raises a number of fundamental challenges from the perspective of ensuring a consistent and harmonious application of the European approach on external border controls as codified in the SBC. **These same national services are in fact those in the first line of application of the common set of rules and standards comprising the normative body of Schengen *acquis*. They have also been entrusted with the correct and effective daily implementation and delivery of the SBC.**

A relatively low level of attention has been paid however to **the practical issues and concerns that national authorities competent for external border controls and surveillance have faced following the first steps of the SBC application since 2006**. One difficulty in the Schengen landscape of authorities in charge of border controls has emerged as a consequence of the restructuring stemming from the abolition of internal border checks. The gradual shifting and hybridisation of powers from ‘border guards’ to ‘police’ authorities has in fact meant putting in charge of border management an actor which in liberal democracies has been traditionally entitled to search for criminality and bringing criminals to justice. These actors, especially those belonging to Schengen Member States holding the common (green) external borders, have too often been subject to a large degree of public attention and political criticism regarding the (in)efficient fulfilment of their responsibilities.

This has been particularly contested where it concerns **the correct application of the safeguards provided by EU law, the EU Charter of Fundamental Rights and the SBC as regards the fundamental rights and administrative guarantees afforded to third country nationals and asylum seekers when attempting to enter and reside in the Schengen territory, and receiving a refusal of entry.**

A key issue of concern has been the ‘criminalisation’ of undocumented, asylum seekers and refugees and the shifting of responsibilities in situations of alleged fundamental rights violations of these vulnerable groups. Cases in point have included **the challenges facing a proper implementation of the SBC and the EU Charter of Fundamental Rights in the Mediterranean Sea or in particularly contested border regions** like the one between Greece and Turkey

⁷² For instance, the Bayerische Grenzpolizei (GREPO, Bavarian Border Police) was a regional police force in Germany which exercised border control functions from 1946 to 1998, ending with the Schengen accession of Austria, when GREPO was dissolved. See the website of the Bavarian Police at: <http://www.polizei.bayern.de/wir/geschichte/index.html/23287>.

or Spain and Morocco. Ultimately, if a violation of the principles, rights and guarantees is being reported and confirmed in the conduction of external border checks / surveillance, **the liability and responsibility for these infringements will mainly lie with the border authorities concerned.**⁷³

True, national services responsible for border management across Europe have been recognized to have achieved an impressive degree and expertise of border management techniques and working logics, including the fundamental rights implications of their work, in light of the EU standards and rights envisaged in the SBC. Yet, **the weaknesses attributed for instance to the methodology currently used in the EU Schengen evaluation mechanism**, which remains under the steer of Member States' national governments and experts inside the Council of the EU, **and the legal uncertainties still applying to particularly sensitive external border management** such as search and rescue at sea, the extra-territorial application of border surveillance and controls, and the practical delivery of fundamental rights and SBC administrative guarantees to persons on the move, **do not help in making the fulfilment of their task a straightforward matter, nor the scope of their responsibilities crystal clear on the ground.** These unresolved legal questions nuance and bring obscurity to the question as to how the SBC is supposed to be correctly applied in practice.

The main question that LRAs and the CoR could therefore raise is **the extent to which the current revision of the Schengen evaluation mechanism is going to help at times of ensuring an independent (depoliticised) evaluation of the SBC implementation.** In particular, would the new evaluation system focus on ways to consolidate, improve and clarify external border management practices/responsibilities and overcome practical obstacles on the basis of a **bottom-up approach** drawing on experiences and 'lessons learned' of the professionals in the Member States national services? Would (or should) border authorities and their practical knowledge and experiences gained be engaged in any way in the newly envisaged Schengen evaluation system?

Moreover, **the possibility currently envisaged by the revisited Schengen governance package proposals to potentially reintroduce internal border checks with a Member State proving to have serious deficiencies in the practical implementation of the SBC constitutes another issue of concern.** What is the message that such an initiative is sending to the border management practitioners across the common EU external borders? How to ensure that a high

⁷³ Carrera, S., E. Guild, L. den Hertog and J. Parkin (2011), Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies – Frontex, Europol and the European Asylum Support Office, Study prepared for the European Parliament (Policy Department C – Citizens' Rights and Constitutional Affairs), CEPS, Brussels, August.

degree of trust and mutual confidence in the performance of their duties would be still guaranteed and secured should these situations arise?

Beyond the questions related to Schengen evaluation, **the proposal** covering the revision of the reintroduction of internal border checks **should be also assessed from a multi-governance viewpoint and taking into account the interests and concerns of the national services/practitioners working on external border activities at regional and local levels of the Schengen governance**. As has been illustrated elsewhere,⁷⁴ the border management professionals at national levels have gained experience in carrying out non-systematic spot checks inside the Schengen territory as well as at times of re-introducing internal border controls.

No less than 70 times internal border checks have been reinstated since 1995 until today. **The political and inter-institutional controversies** which have been witnessed between EU institutions and national governments of certain EU Member States during 2011 and 2012 **have brought a great deal of confusion not least to those working on border management authorities**. What are the precise rules and procedures applying to this derogative decision, and what is the precise margin of appreciation/leverage enjoyed by national authorities in such as sensitive context? Here also, those involved in the reintroduction of internal border checks will be implementing the decision on the ground and potentially face liability for unlawful practices and controls.

Similar to the question raised in relation to the revision of the Schengen evaluation mechanism, are the new rules going to bring more clarity as regards the rules and procedures to be applied in these kind of situations and what are the standards and procedures that national authorities below which they will not be allowed to cross in order to avoid disciplinary measures from EU institutions institutional instances? Could local and regional authorities play a stronger role when it comes to ensuring the correct application and evaluation of EU standards ‘on the ground’, for instance by supporting evaluation and monitoring strategies and ensuring that EU policies and national actions falling within their framework meet principles of proportionality and added-value, as suggested by the Committee of the Regions in its Opinion on the Stockholm Programme?⁷⁵

⁷⁴ S. Carrera, E. Guild, M. Merlino and J. Parkin (2011), *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, CEPS Liberty and Security Series, CEPS, Brussels.

⁷⁵ The possibility for LRAs to play a greater role in the AFSJ evaluation instruments and mechanisms was raised in the Committee of the Regions Opinion on ‘The Stockholm Programme: challenges and opportunities in view of a new multi-annual programme on the EU AFSJ’, OJ C 79/37, 27.03.2010.

These questions are further explored in Section 4.2 and 4.3 below with respect to two key policy areas in particular: cross border cooperation; and migration and asylum.

4.2. Challenges for Cross-border cooperation and the European Neighbourhood Policy

Cross-border cooperation – the forging of connections and relations in border regions to find common responses to challenges affecting ‘border communities’ – is often closely bound up with border management policies and their repercussions. Cross border cooperation between LRAs both along the ‘internal borders’ of the EU (internal cross border cooperation) as well as along the ‘external borders’ of the Schengen Area, and between third states themselves (external cross border cooperation), has been pursued via a range of EU-led mechanisms⁷⁶ which encompass **the dual objectives of developing efficient border structures and effective border controls, while at the same time ensuring that border controls do not impede cross-border exchanges and economic and social cohesion across state frontiers.**

How then might the adoption of the Schengen Governance and Smart Borders Packages impact on the pursuit of these dual objectives?

4.2.1 Cross-border cooperation: impacts for regional economic and social cohesion

Under the rubric of ‘cross border cooperation’, a whole series of EU projects and programmes have been funded over the past decades which aim to complement the Schengen Agreement and optimise the benefits of the EU internal market by working to further reduce the negative effects of borders as administrative, legal and physical barriers.⁷⁷ Such initiatives have aimed at bringing together the national, regional and local authorities of neighbouring member states to work together on a wide range of issues including entrepreneurship, the development of SMEs, tourism, culture and cross-border trade and the joint use of infrastructure, including transport and communication

⁷⁶ Council of Europe, European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, Madrid, 21.V.1980; Regulation (Ec) No 1082/2006 of the European Parliament and Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) OJ L 210/19, 31.07.2006. See also regional organizations and bodies such as the Baltic Sea Council, the Black Sea Economic cooperation (BSEC), the Central European Initiative (CEI) as well as “Euro-regions” established to foster cross-border cooperation between regional and local authorities.

⁷⁷ Including under the INTERREG funding programmes (<http://www.interreg4c.eu/>), as well as a range of other funding instruments for regional development. See the official website of EU Regional Policy: http://ec.europa.eu/regional_policy/thefunds/instruments/index_en.cfm.

networks.⁷⁸ They have generally focused on the facilitation of the daily lives of their residents, whose work and interactions operate in a cross-border context, and more broadly to stimulate dynamism, economic growth and cross-border cohesion.

The outcome of negotiations on the Schengen Governance Package could therefore have important implications for on-going cross border cooperative efforts. A stronger Schengen evaluation mechanism which would enforce the application of the SBC at internal frontiers and reduce the likelihood of systematic checks and barriers to free movement would clearly complement the on-going objectives pursued by cross border cooperation initiatives to dismantle boundaries between EU member states and between so called ‘euroregions’.⁷⁹ On the other hand, a procedure for the reintroduction of internal controls which may ultimately widen the discretion of member states to apply exemptions to EU free movement could have negative repercussions over key aims of cross border projects, such as the development of common infrastructures to facilitate the mobility of traffic, goods and people.⁸⁰

One might imagine the disruption that a coordinated reintroduction of internal controls by a number of member states as a result of alleged persistent serious deficiencies’ might cause to initiatives to improve transport and mobility connections within and between regions. Any disruptive effects are likely to negatively impact the daily lives of residents, but also the significant revenues brought by tourism and trade on which the specific economies of local border regions are often highly dependent. It is these very specificities of local economies and labour markets (which may depend on high rates of daily cross-border mobility for employment),⁸¹ which are not always taken into account in EU level decision-making debates and processes on border management.

Similar tensions may arise between local and regional interests for economic and social development and national priorities for border management when we examine the implications of the Smart Borders Package on cross border cooperation.

⁷⁸ For more information on specific projects for European Territorial Cooperation see the official website of EU Regional Policy:

http://ec.europa.eu/regional_policy/cooperate/cooperation/crossborder/index_en.cfm.

⁷⁹ M. Perkmann (2007), “Policy entrepreneurship and multi-level governance: a comparative study of European cross-border regions”, in *Environment and Planning*, C 25(6), pp.861-879.

⁸⁰ Take, for instance, the project pursued by Italy and Greece under the European Regional Development Fund to support the flow of passenger and commercial traffic between local sea ports in Italy and Greece. For more details see the EU’s Regional Policy (Inforegio) website at:

http://ec.europa.eu/regional_policy/projects/stories/details_new.cfm?pay=IT&the=97&sto=1782&lan=7®ion=ALL&obj=ALL&per=ALL&defL=EN. See also the SoNorA project (“Smooth Journey between Baltic and Adriatic Waters”) funded under the EDRF at: <http://www.sonoraproject.eu/>.

⁸¹ S. Carpentier (2012), “Cross Border Local Mobility between Luxembourg and the Walloon Region: an Overview” in the *European Journal of Transport and Infrastructure Research*, Vol. 12, No. 2, pp. 198 – 210.

The impact of the Smart Borders Package is likely to fall primarily on *external* cross border cooperation, i.e. cooperation between EU member states and third countries in the EU neighbourhood. Specific provisions for cross border cooperation along the EU's external borders and between third countries have been incorporated into the European Neighbourhood Policy framework, with the specific objective of preventing new dividing lines from developing along the borders of the enlarged EU. According to the Commission, "the EU and the partner countries have a common interest in ensuring that the new external border is not a barrier to trade, social and cultural interchange or regional cooperation."⁸² Cross border cooperation therefore aims to support sustainable development along both sides of the EU's external borders,⁸³ in the recognition that cooperation across external border regions must be made possible despite Schengen and EU visa requirements so as not to imperil the process of social, cultural and economic cohesion.

One example of such a mechanism is the conclusion of **Local Border Traffic agreements with ENP countries** sharing a border with the EU as a means to by-pass the slowing down of cross-border movements through imposed visa formalities. The 2006 Regulation on Local Border Traffic now allows for far-reaching derogations from the normal visa procedure.⁸⁴ The mechanism allows people living in the border communities to keep social, commercial and cultural contacts and has been found to have a notable economic impact on border regions where it is applied.⁸⁵ However, **there is little indication as to precisely how the new Smart Borders systems will integrate with, and accommodate, existing arrangements for local border communities, including Local Border Traffic regimes.** There is no reference in the legislation or accompanying impacts assessments on Smart Borders to this issue, although there are indications that data concerning entry-exit of those holding local border traffic permits may be entered into the future EES.⁸⁶

⁸² Communication from the Commission, *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104 final, Brussels.

⁸³ European Commission, *European Neighbourhood and Partnership Instrument – Cross Border Cooperation strategy paper and indicative programme 2007 - 2013*.

⁸⁴ Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, OJ L 405, 31.12.2006. Concrete arrangements on the basis of this legislation have been reached through agreements concluded by Ukraine with neighbours Poland, Hungary and Slovakia, and more recently between Russia and Poland concerning the Kaliningrad enclave. Regulation (EU) No 1342/2011 of the European Parliament and of the Council of 13 December 2011 amending Regulation (EC) No 1931/2006 as regards the inclusion of the Kaliningrad oblast and certain Polish administrative districts in the eligible border area. OJ L 347, 30.12.2011.

⁸⁵ See T. Dubowski (2012), "Local Border Traffic – European Union and Member States' perspectives (based on Polish Experience)", *European Journal of Migration and Law*, 14, pp. 367 – 391.

⁸⁶ UK Home Office, Explanatory Memorandum on the Proposal for a Regulation amending Regulation No. 562/2006 as regards the use of the Entry-Exit System and the Registered Travellers Programme (RTP), available at: <http://europeanmemoranda.cabinetoffice.gov.uk/files/2013/03/6931-13.pdf>.

Against this background, the implications of the Smart Borders legislation for local border communities and particularly the rolling out of an EES need to be carefully examined from a ‘multi-governance perspective’, particularly taking into account the concerns of LRAs situated at the EU’s external borders and which are dependent on smooth and dynamic cross border exchanges and interactions. Despite Commission claims of increased ‘efficiency’ brought by the new systems, studies have countered that the EES, by registering the time and place of entry and exit of all TCNs admitted for a short stay, including taking biometric data, is likely to significantly increase waiting times for third country nationals entering the Schengen Area.⁸⁷

And although the parallel implementation of a RTP is intended to offset the increased waiting times that travelers spend at immigration controls, it is estimated that the take-up rate for the RTP will be unlikely to alleviate to any significant degree the delays at border crossing points, given that the system will only cover a small minority of travellers.⁸⁸ **By contrast, the technical glitches associated with new technological infrastructure/additional assistance required by passengers getting to grips with automated gates (or dealing with lost tokens) may place additional burdens on border service resources and further impede flows at EU external border crossing points.**

The potential costs of backlogs at external crossing points, including their wider economic impacts on local border communities are difficult to predict. Neither of the Commission’s two Impact Assessments accompanying the proposed legislation on Smart Borders explores such eventualities. **This presents an important omission and signals a domain where the voices of LRAs and the CoR could have an important input.** Such issues are likely to be important not only for those communities which directly border the EU external frontier but also so called ‘metropolitan regions’ which are characterised by their gateway function in providing good accessibility for international business, trade and people-to-people contacts.⁸⁹ Given that the Smart Borders are expected to be phased-in first in the larger European airports, their impact on ease of travel and the reputation of certain cities as a hub for international exchanges will be a key concern.

⁸⁷ D. Bigo et al (2012), *Evaluating current and forthcoming proposals on JHA databases and a smart borders system at EU external borders*, Study for the LIBE Committee of the European Parliament. Studies have estimated that this could result in the annual fingerprinting of an additional 57 million third country nationals. See: B. Hayes and M. Vermeulen (2012), *Borderline: the EU’s New Border Surveillance Initiative*, Study by the Heinrich Boll Foundation, June 2012.

⁸⁸ Ibid.

⁸⁹ Eurocities (2011), *Cities Cooperating Beyond their Boundaries: Evidence through Experience in European Cities*, Eurocities Background Paper – Working Group Metropolitan Areas, September 2011.

In addition to these infrastructure challenges, scholars have argued that **the RTP risks creating a potentially discriminatory two-tier system**, establishing *de facto* categorisations of travellers as either ‘high risk’ and ‘low risk’ based on crude indicators such as wealth, nationality, employer and travel history.⁹⁰ Thus, in addition to added border-related bureaucracy and its economic effects on border communities, LRAs also need to consider **the implications of potentially discriminatory border procedures and their wider impact on cooperative relationships between LRAs on different sides of the external EU borders.**

4.2.2. Cross Border cooperation: impacts for border management

When considering the implications of the Schengen Governance and Smart Borders Packages for Cross Border Cooperation focused on developing efficient border structures and effective border controls, it is important to bear in mind **the multi-actor framework in which border management takes place** (as discussed in Section 4.1. above) which becomes particularly relevant in the context of cross border cooperation.

Cross-border cooperation on border management has been developed in recent years under the rubric of the EU’s Integrated Border Management Model which encompasses the understanding that cooperation on the common challenges which stem from managing shared borders should involve the engagement of different authorities and agencies, including at local and regional levels.⁹¹ The IBM model as it is implemented in practice in the EU cannot easily be located within just one legal framework – **practitioners have increasingly looked beyond ‘formal’ legal tools, sometimes resorting to informal arrangements and local level ‘practical’ solutions in order to address the challenges posed, in particular, by the abolition of internal EU borders.**⁹²

One prominent example is **the creation of joint police and customs cooperation centres (PCCCs)** which have been established since 1998 at several points along Schengen internal borders in order to smooth tensions between national police and security systems within the Schengen zone.⁹³ These centres are staffed by national border authorities (border guards, customs) as well as regional police forces from both sides of an internal frontier and focus their activities on exchanging information and providing support to operational

⁹⁰ D. Bigo et al (2012), *Evaluating current and forthcoming proposals on JHA databases and a smart borders system at EU external borders*, Study for the LIBE Committee of the European Parliament, p. 36.

⁹¹ European Commission, *Guidelines for Integrated Border Management in European Commission External Cooperation*, Europeaid, November 2010.

⁹² P. Hobbing (2005) *Integrated Border Management at the EU Level*, CEPS Working Document No. 227, August 2005, p.10.

⁹³ Article 39 of the Schengen Convention.

activities.⁹⁴ Another form of (internal) cross border cooperation occurs when Schengen states pool police forces in order to provide one another with assistance in the context of major events (e.g. political meetings and sporting events) seen to pose a public security risk. Although these arrangements are concluded at the national level (based on a network of bi-lateral agreements), their practical implementation may be ensured by regional police authorities.⁹⁵ This was the case for instance during the 2009 NATO-Summit at Strasbourg-Kehl where major regional police forces were involved in security measures, including preventing demonstrators from crossing the French-German border. In this case police authorities also were in charge of issuing so-called "Ausreiseverbote" (exit bans) to German demonstrators.⁹⁶ A similar involvement of regional police took place during the FIFA World Championships in France (1998) and Germany (2006).

The multiplicity of actors involved in border management in a context of cross border cooperation raises some important questions. First, does the implementation of the evaluation and monitoring mechanism as foreseen by the Schengen Governance Package take into account these decentralised, ad hoc forms of border control? Where spot checks and the introduction of unannounced visits will help monitor activities of competent border guards at border crossing points, what are the lines of accountability with respect to regional and local police forces engaged directly or indirectly in border management via structures of cross border cooperation? Are these actors, who by dint of being made responsible for border control activities are also placed at the front line of applying the SBC and ensuring the application of common EU standards, the recipients of adequate levels of training when entrusted with these tasks? **Such questions on the preparedness of local and regional police forces to temporarily monitor internal Schengen frontiers are vital as they relate directly to the ability of EU citizens and third country nationals to exercise their right of free movement in a borderless Schengen Area.**

Further reflection might be given to the role that LRAs could play in promoting EU level rules and standards among the wider set of actors at regional and local levels. All the more so given that the correct application of Schengen rules involves a whole series of actors beyond border authorities. That border guards may cooperate with different agencies and bodies such as local

⁹⁴ For instance, the Landespolizei - of the German Länder Baden-Württemberg, Rheinland-Pfalz and Saarland participate in the Franco-German PCCC at Kehl. See 'Accord entre le gouvernement de la République Française et le gouvernement de la République Fédérale d'Allemagne sur la coopération des polices et de la douane dans les zones frontalières'.

⁹⁵ P. Hobbing (2005) *Integrated Border Management at the EU Level*, CEPS Working Document No. 227, August 2005; K. Schelter (2006) *Challenges for Non - (and Not Yet) Schengen Countries* in M. Caparini and O. Marenin (ed.s) *Borders and Security Governance: Managing Borders in a Globalised World*, DCAF, Zurich.

⁹⁶ Interview with national level police contact.

police forces, but also traffic police, port employees and coastguards means that it may be worth reflecting on the wider training in EU border law and the Schengen Borders Code (and the EU Charter of Fundamental Rights) that could be extended to those agencies. This is particularly important to consider, in the face of evidence that shows that corruption among border guards rarely occurs as an isolated phenomenon, but often involves networks embedded in local border communities, implicating also local government, police, businesses, transportation authorities and port staff.⁹⁷

In a similar vein, the decentralisation and multi-actor framework inherent to cross-border cooperation on border management could also be put to good use when ensuring a correct application of the SBC and upholding EU standards on the ground.

For instance, as regards the temporary reintroduction of internal border controls, cross-border cooperation mechanisms such as PCCCs could play a role in fostering the ‘mutual cooperation’ required under Article 24.3 of the SBC which calls for consultations between member states in “examining the proportionality of the measures the events giving rise to the reintroduction of border control and the threats to public policy or internal security.” The doubts placed over the compliance with EU law of certain national decisions to reintroduce internal borders have been discussed in Section 2 above. There is scope to examine the extent to which structures like PCCCs - which are tasked with surveillance, exchanging information and assisting operations for maintaining public order - could feed into national security assessments on the necessity and proportionality of reinstating temporary checks at an internal border.

A similar input could be foreseen where there is perceived cause for the reintroduction of controls in the case of persistent and serious deficiencies in a member states’ management of its external border. Given that the mandate of PCCCs covers ‘illegal migration flows’,⁹⁸ these centres could also feed into evaluation processes by providing concrete, ground level information (in cooperation with civil society organisations), contributing an evidence-based assessment of the security risks allegedly caused by migration flows. Indeed, a deeper reliance on cross border consultation and cooperation via mechanisms such as PCCCs could help avoid the build-up of mistrust between member states and the mis-application of EU law that can occur when, as we saw with the

⁹⁷ P. Gounev et al (2012), *Study on Anti-Corruption Measures in EU Border Control*, Center for the Study of Democracy commissioned for FRONTEX, March 2012.

⁹⁸ Section II A. (1) of the European Best Practice Guidelines for Police and Customs Cooperation Centres state that “Information exchanged via PCCCs relates in particular to petty and moderately serious crime, illegal migration flows and public order problems.”

Franco-Italian affair of 2011, small, localised incidents become over-politicised and lead to disproportionate national responses.⁹⁹

Finally, when discussing external cross-border cooperation on border management, it is important not to neglect the role of **EU financial support channelled to third countries**, where the EU has been active in promoting and exporting its Integrated Border Management model to the wider EU Neighbourhood. EU funding instruments within the ENP framework are intended to complement internal EU border policies by promoting EU legal standards on border control externally. However, a 2012 evaluation of EU external funding for IBM in the ENP found that **EU support to border management has been subject to a significant imbalance, with more attention paid to border security to the detriment of trade and traffic facilitation.**¹⁰⁰ IBM has been used as an entry point to engage in security issues in the neighbourhood, overlooking the stated objective of IBM as laid down in the guidelines of ensuring "...open, but well controlled and secure borders...". **More worrying still, little attention has been paid to the subject of human rights in IBM in third countries and – where financial support to human rights has been provided – there has been very little follow up monitoring by the EU to determine the impact and effectiveness of such ‘support’.** Again, local and regional authorities, particularly those engaged in more intensive cross-border cooperation with third country partners in the Neighbourhood will be implicated by such gaps/failings in the EU’s fulfilment of its funding objectives.

4.3. Challenges for migration and asylum

The introduction of both the Smart Borders and the Schengen Governance Packages were fuelled by the concerns of national and EU policymakers over the management of migration and asylum flows. These concerns are also very much present for LRAs who often bear an important share of the overall impact weighing on EU Member States in migration and asylum matters. Certain LRAs, by dint of their location at the EU external frontier, will be particularly concerned by migration and asylum flows and their impacts for local infrastructure and services as well as the fundamental rights implications of border management methods.

How might the two legislative packages affect migration and asylum management and what are the key issues of concern for LRAs?

⁹⁹ S. Carrera, M. Merlino and J. Parkin (2011), "A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair" CEPS Paper in Liberty and Security Series, Centre for European Policy Studies, June.

¹⁰⁰ Partecip (2012), *Thematic global evaluation of the European union's Support to Integrated Border Management and Fight Against Organised Crime: Draft Final Report Volume 1*, Report prepared for DG DEVCO, European Commission, October 2012.

4.3.1 Asylum, migration and Schengen Governance

Turning first to the Schengen Governance Package. In the domain of migration, an important change brought by the package concerns the proposed regulation for the temporary reintroduction of border controls at internal borders and particularly the provision allowing for the unilateral re-instatement of border checks where a member state demonstrates persistent and serious deficiencies in the control of its external border.¹⁰¹ As highlighted in Section 2, this new provision proved controversial during the inter-institutional debates at EU level, with critics pointing to the potentially detrimental impact of this mechanism on European solidarity and mutual trust as well as its potentially counter-productive effects. Indeed, it could be inferred that **such a ring fencing approach would do little to alleviate the pressures falling - primarily - on local and regional authorities as a result of increased migration flows across a section of the EU external border, rather the opposite.**

Incidences where mobility flows reach the point where they may be categorised as a genuine ‘migration influx’ are rare and often overstated in an EU context. However, two recent experiences, the temporary peak in immigration from North Africa in Southern Italy during spring 2011 and the recent situation in the Greek-Turkish border region of Evros, demonstrate that a temporary increase of arrivals, even if still relatively insignificant on a national scale, can have very real impacts on a local and regional level. Flows can often comprise a significant component of individuals in need of international protection,¹⁰² leading to overstretched asylum reception facilities as well as pressures on local infrastructure including social and medical care services. In addition, and as field studies conducted by the Fundamental Rights Agency (FRA) in both Evros and Lampedusa have found, such circumstances can lead to the “flagrant violation of fundamental rights”,¹⁰³ including improper handling of asylum claims leading to refoulement risks and reception/detention conditions which fail to meet the standards set by EU and international law. Local and regional authorities may be implicated in such rights violations, for instance through their responsibility in running reception and detention centres.¹⁰⁴

¹⁰¹ Commission proposal for a Regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM(2011)560, 16.09.2011, Brussels.

¹⁰² Consider the significant increases in arrivals of Syrian migrants at the Greek-Turkish border since the third quarter of 2012. See Frontex (2013), *FRAN Quarterly: July – September 2012*, Warsaw, January 2013.

¹⁰³ FRA (2011), *Coping with a Fundamental Rights Emergency: the Situation of Persons Crossing the Greek Land Border in an Irregular Manner*, FRA Thematic Situation Report, Vienna; FRA (2013), *Fundamental Rights at Europe’s Southern Sea Borders*, FRA Report, Vienna, March 2013.

¹⁰⁴ FRA (2011), *Coping with a Fundamental Rights Emergency: the Situation of Persons Crossing the Greek Land Border in an Irregular Manner*, FRA Thematic Situation Report, Vienna.

EU funding mechanisms, and financial support channelled through **the External Borders Fund and Refugee Funds** (now being re-packaged within the new EU Asylum and Migration Fund and Internal Security Funds)¹⁰⁵ **are seen as a crucial safeguard** within the Schengen Governance Package to prevent that a single member state finds itself in breach of the ‘serious and persistent deficiencies clause in the new legislation on the reintroduction of internal borders. However, these funding instruments **have not functioned perfectly in the past, with Greek NGOs and civil society actors for instance complaining of substantial backlogs in the onward allocation of financing by the Greek state.**¹⁰⁶ Furthermore, the consultation of LRAs is currently not an obligatory part of the programming process for these funds, despite the fact that they are often the ones implementing programmes and projects.

Increased intervention of LRAs in the programming and allocation of funding could bring more effective, needs-based support to the local actors and may counter the tendency for national level authorities to direct funding towards expensive border security projects whose effectiveness and fundamental rights impacts are uncertain. Here one might take as an example the decision of the Greek state to fund the construction of a 12.5 km long fence on the Greek-Turkish border supported by surveillance technologies (thermal imaging cameras) financed by the EU.¹⁰⁷

The CoR has already questioned the efficacy of such funding projects in the context of countering irregular migration, stating that “it is questionable whether investing heavily on border control is the most effective and efficient way to bring about long term and meaningful change.”¹⁰⁸ The involvement of LRAs in allocating funding under the new Internal Security Fund and particularly the instrument on borders and visas could also bring a **much-needed fundamental rights dimension into the programming of EU financial support, particularly if they draw on the input of grassroots civil society and NGO actors.** As the EU’s Fundamental Rights Agency has noted, currently ‘fundamental rights are not addressed among the instrument’s objectives and...the allocation of funds appears to be security focused and based on threat levels determined through consultation with Frontex.’¹⁰⁹

¹⁰⁵ See the official webpage of DG Home Affairs for more information: http://ec.europa.eu/dgs/home-affairs/financing/fundings/funding-home-affairs-beyond-2013/index_en.htm.

¹⁰⁶ Ibid.

¹⁰⁷ Nicolaj Nielsen, “Fortress Europe: A Greek Wall Close Up”, *EU Observer*, 21.21.2012.

¹⁰⁸ See Committee of the Regions Opinion, EU Financial Instruments in Home Affairs, CIVEX-V-030, 96th plenary session, 18 and 19 July 2012.

¹⁰⁹ FRA (2013), *Fundamental Rights at Europe’s Southern Sea Borders*, FRA report, March 2013.

4.3.2 Asylum, migration and ‘Smart Borders’

Turning to the issues of concern raised by the Smart Borders package, Section 4.2 above has already underscored the risks that the Entry Exit System poses to cross border mobility. Increased bureaucracy and waiting times at the border together with the prospect of having one’s personal, biometric data stored in a central database may be off-putting for highly mobile categories of individuals that bring dynamism and growth to border areas.

The Commission’s central justification for introducing an Entry Exit System is that it will counter irregular immigration (although ability of the system to meet this objective is highly contested – see Section 3.2.1).¹¹⁰ This is a key issue of concern for LRAs who have a direct stake in managing the challenges of irregular migration policies in their communities. Indeed, local level authorities and actors are often at the frontline when it comes to managing the everyday affairs, basic needs and inclusion/exclusion processes stemming from the presence of undocumented migrants and their families.¹¹¹ However, critics of the EES have contended that the proposed system will do little to systematically reduce irregular overstaying in EU territory.¹¹² As there is no clear procedure between an EES alert and arrest and expulsion measures, **the EES is only likely to identify over-stayers as they attempt to cross an external BCP** – i.e. when they are already exiting the Schengen area. At the same time, the potential access by police authorities to EES data in the future, and its use in stop and search spot checks could have the **knock-on effect of driving irregularly residing migrants deeper into informal, shadow activities, making them more reluctant to deal with local authorities and service providers and thus exacerbating the vulnerability and social marginalization of this group.**

Not only does the EES threaten to increase the already precarious position of undocumented migrants, the system poses inherent risks to the fundamental rights of TCNs who fall within its scope of operation. As Hayes and Vermeulen have noted, the EES may wrongly identify ‘over-stayers’ or fail to take into account important contextual information (e.g. that the individual in question may have begun an asylum procedure). It is therefore vital that **adequate safeguards be built into the legislative text governing the use of the EES**

¹¹⁰ Article 4 of the Proposal for a Regulation establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM(2013) 95 final, Brussels, 28.2.2013.

¹¹¹ S. Carrera and J. Parkin (2011), *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Study for the Committee of the Regions of the Regions, November 2011.

¹¹² D. Bigo et al (2012), *Evaluating current and forthcoming proposals on JHA databases and a smart borders system at EU external borders*, Study for the LIBE Committee of the European Parliament; B. Hayes and M. Vermeulen (2012), *Borderline: the EU’s New Border Surveillance Initiative*, Study by the Heinrich Boll Foundation, June 2012.

ensuring that procedures attached to an EES alert and any alert of a presumed over-stayer do not lead to an automatic sanction or expulsion.¹¹³

It would be imperative that those competent authorities with access and enforcement powers apply those safeguards in order to determine whether the person has the right to remain on EU territory. This will be vital to avoid that the EES inadvertently leads to the violation of fundamental rights, including the right to judicial redress and the right to asylum. Here again, **adequate training and awareness by all relevant authorities on the proper uses of the EES as well as monitoring of the correct application of the SBC as amended by the Smart Borders Package, while not answering all the above-mentioned dilemmas, may contribute to better safeguarding the rights of those individuals affected.**

4.4. ‘Smart Borders’ and broader challenges of technological frontiers

Concerning the Smart Borders package, the scope and intended nature of the smart borders initiatives, the underlying EU inter-institutional controversies and immediate issues of concern for LRAs have been examined above. However, the Smart Border Package is part of a wider shift in EU border management which is seeing a steady transition in favour of technological or electronic frontiers and which raises a wider set of dilemmas from a multi-governance perspective, deserving particular scrutiny. Three issues in particular warrant consideration:

First, the shift towards technological borders presents serious concerns in respect of the challenges these technologies pose from a non-discrimination and data protection point of view. One of the most important legal challenges which will affect the implementation and use of smart borders technologies will be their profound repercussions over the principle of privacy, the fundamental right of data protection and the general principle of non-discrimination on the basis of race and ethnic origin.¹¹⁴ Smart borders have a very broad personal scope as they cover a wide range of individuals with a variety of legal statuses which creates a blurring of the individuals targeted as data subjects. This becomes even more worrying in light of the difficulties which have been signalled in relation to **the (lack of) purpose limitation which is likely to affect the smart borders tools due to challenges in preventing data from being used and/or processed for purposes different from those that were collected and by law**

¹¹³ B. Hayes and M. Vermeulen (2012), *Borderline: the EU’s New Border Surveillance Initiative*, Study by the Heinrich Boll Foundation, June 2012.

¹¹⁴ D. Bigo, S. Carrera, B. Hayes, N. Hernanz and J. Jeandesboz (2012), *Evaluating Current and Forthcoming Proposals on JHA Databases, including the impact of the introduction of a smart borders system at the EU external borders*, CEPS Liberty and Security Series in Europe, Brussels.

enforcement authorities with no direct competence over border management aspects.

One of the most problematic aspects which will characterise these technological systems will be that they will work on the basis of ‘**automated decision making,**’ parameters often called ‘**profiling**’ or ‘**predictive data-mining**’. The data collected is processed by calculation and statistical correlation with the aim of producing risk profiles. Ultimately, these techniques are used to identify a group of people as a risk or threat category and may raise questions related to non-discrimination on grounds of national or ethnic origin (now formal obligations contained in the EU Charter of Fundamental Rights and the Treaties for Member States when implementing EU law). Will smart borders be compatible with the EU Charter and Member States’ fundamental human rights obligations and the SBC guarantees? These changes may have far-reaching effects over both the practical organisation of resources at the border (with suggestions that electronic borders may one day even come to replace traditional border guards) and on the way in which fundamental rights and the rule of law are maintained.

Second, **the proliferation and use of security technologies and large-scale data bases which constitute the backbone of the smart borders corpus prevent a debate about the impact that these technologies will have over the classical European approach to border controls and most importantly their effects over the principle of subsidiarity.** The deployment of ‘de-territorialised’ mobility surveillance and control technologies (databases) will provoke an even greater restructuring than the abolition of internal border checks as regards the classical ways in which border controls are carried out in Europe. The *habitus* of control will no longer be related to territory, but rather to the individual on the move or would-be migrant or asylum seeker. The Commission itself has hailed the change in the border management approach from one that is “country-centric” to one that is “person-centric”.¹¹⁵ The issue of concern is therefore that **the full implications of technological borders for the principle of subsidiarity have yet to be properly examined and discussed.**

The planned EES and RTP will mainly involve the surveillance of foreigners travelling to, within and out of the Union. The electronic border controls inherent to these systems will imply **a progressive transfer of power and discretion as regards the control and uses (processing) of the data collected to various EU levels and actors beyond the classical national authorities and individual border guards.** This may include for instance EU home affairs

¹¹⁵ Presentation by Frank Paul at the European Day for Border Guards on ‘Border Guards and Technology’, May 2011.

agencies such as Frontex or Europol. Therefore, while generally perceived as purely ‘technical’ policy instruments in border management, the **operability of these technologies will fundamentally affect the locus of sovereignty as regards where and who carries out border controls and will have huge political implications concerning the future of mobility checks across and beyond Schengen understood as a common territory.** The most far reaching consequence would be the actual substitution of the national professionals of border management (human beings) by machines or electronic frontiers in Europe liberated from direct human intervention. Will ‘smart borders’ and security technologies render the activities of national border guards (and related actors and services) surplus to requirements in the long-run?

A third issue of serious consideration relates to **the contested relationship between principles of proportionality**, necessity and efficacy of the smart borders proposals. Are smart borders necessary?¹¹⁶ In light of the wide intrusive nature accompanying the introduction of these security technologies and the large financial repercussions involved in their development and implementation, the question arises as to whether these initiatives are proportionate to the aims pursued. Are there no less burdensome or onerous ways to achieve the same intended public goal?

As illustrated in Section 3 above, the financial burden underlying the high costs foreseen by the Commission to put these systems into practice has raised wide concerns, not least from Member States’ governments themselves, as regards the actual necessity of these technologies. This is particularly the case in light of the ongoing financial difficulties and budget cuts across the EU due to the economic climate. In view of these budget cuts which are squeezing funds for national infrastructure and services (including the budgets of local and regional authorities), is this the most appropriate investment that the EU could make in the field of border management infrastructure? This question becomes even more urgent when taking into account the doubts expressed on the overall effectiveness of the Smart Borders proposals and the ability of the EES in particular to meet its policy objectives countering irregular migration and overstaying.¹¹⁷ Further, it should be examined to what extent the smart borders initiatives will complement or distract from the aims of the Schengen Governance Package: are ‘smart borders’ actually going to facilitate the daily work of border guards in ensuring the application of the SBC, or will they rather

¹¹⁶ S. Carrera, F. Geyer and E. Guild (2008), *The Commission's New Border Package: Does it take us one step closer to a 'cyber-fortress Europe'?*, CEPS Policy Brief, Brussels.

¹¹⁷ D. Bigo, S. Carrera, B. Hayes, N. Hernanz and J. Jeandesboz (2012), *Evaluating Current and Forthcoming Proposals on JHA Databases, including the impact of the introduction of a smart borders system at the EU external borders*, CEPS Liberty and Security Series in Europe, Brussels.

drain vital border related resources, further complicating the work of delivering European standards of border management?

Once again, LRAs would be very well positioned to contribute to a bottom-up approach in the assessment of the proportionality, added-value (principle of subsidiarity) and cost-effectiveness of these new, technical security tools and information systems, as well as to identify the main practical dilemmas and concerns they raise with regard to the fundamental rights of data protection, non-discrimination and good administration of the SBC.

5. Conclusions and Points for Reflection

The note has examined the future outlook of Schengen and EU border controls with respect to the Commission's tabling of new legislative proposals on the governance of the Schengen system and the establishment of so-called 'Smart Borders.' It has also examined the potential repercussions for Local and Regional Authorities, acknowledging that LRAs have a clear practical stake in any developments in EU border control, being subject to any fluctuations brought by changes in border management techniques.

We present four findings of this report and suggest corresponding recommendations laying the ground for further policy reflection by the CoR.

1. The diverse multi-level and multi-actor landscape of border management across the Schengen Area raises a number of fundamental challenges from the perspective of ensuring a consistent and harmonious application of the European approach on external border controls as codified in the SBC. National competent border and police authorities acting at local levels, and in cooperation with a range of regional and local level actors, are at the frontline of applying the common set of rules and standards embodied by the Schengen *acquis* and are entrusted with the correct and effective daily implementation and delivery of the SBC. However, this multi-governance dimension has received little consideration in EU policy debates on the future of Schengen and EU border management and adequate implementation of the principle of subsidiarity in EU border policy requires more systematic integration of the local and regional dimensions. In this regard we offer the following points for reflection:
 - LRAs and the CoR should be engaged to ensure a bottom-up approach in the assessment and evaluation of the added value of new rules and technologies applying to external and internal border controls in the Schengen territory (subsidiarity and proportionality tests). Such a bottom-up approach would contribute to ensure the bridging of their experiences, concerns and expertise in various phases of EU decision-making processes, in particular the procedure and results driving the Schengen evaluation mechanism and the re-introduction of internal border checks, the effectiveness and added value of EU funding, as well as the multi-governance component of controversial EU proposals such as the 'smart' borders initiative.
 - In order to avoid a lowering of standards in the Schengen system by national governments looking to incorrectly exercise discretion when

derogating free movement, the new evaluation mechanism and re-introduction of internal border checks should be ‘Union driven’: coordinated by the European Commission while allowing for transparency and access to information vis-a-vis the European Parliament. Simultaneously, in order to take into account the multi-actor framework of border management, the new evaluation system should focus on ways to consolidate, improve and clarify external border management practices/responsibilities and overcome practical obstacles on the basis of the experiences and ‘lessons learned’ of the frontline professionals in the Member States national services. It should be examined whether border authorities and local and regional actors could more effectively feed their practical knowledge and experiences into the newly envisaged Schengen evaluation system.

- A strong and coherent message must be sent by the EU to those holding the responsibility for implementing the SBC at local levels, in order to prevent negative impacts on the common European area of free movement and the core rights of EU citizens. Training and awareness-raising campaigns around EU border law, standards and the rights of travellers could be expanded beyond the traditional targets of national border authorities to include LRAs and relevant ground level actors. Exchange programmes for police officers and border guards could also be developed and expanded as a means to promote better standards and foster mutual trust.¹¹⁸
2. The fundamental rights and administrative guarantees afforded to third country nationals and asylum seekers attempting to enter the Schengen territory are at stake in both the Schengen Governance Package and the Smart Borders initiatives. Concerning Schengen governance, the current inter-governmental evaluation mechanism does not allow for an effective monitoring to test whether fundamental rights are being upheld in the daily management of the EU’s external border. Meanwhile the technological systems proposed by the Smart Borders Package raise serious concerns over their fundamental rights implications from a non-discrimination and data protection point of view. Ultimately, if a violation of the principles, rights and guarantees is being reported and confirmed in the conduction of external border checks / surveillance, the liability and responsibility for these infringements will lie primarily with the national, regional or local authorities concerned. Against this background, the following points could be considered:

¹¹⁸ See also, S. Carrera and G. Pinyol (2009), Local and Regional Authorities in Future Area of Freedom, Security and Justice: Towards a Multi-level Governance for the Stockholm Programme? Study for the Committee of the regions, November 2009.

- LRAs can play an important role in promoting a multi-level protection of fundamental rights,¹¹⁹ including at EU internal and external borders. For instance, they could take a greater role in evaluation/monitoring the fundamental rights impacts of EU border policies and surveillance technologies (as explored above). Systematic consultation mechanisms can help feed the experiences and observations of local level practitioners such as social and medical staff, judges, police, civil society, coast guard etc. into wider assessments and evaluations of EU border policy approaches and surveillance systems, including through the EU Ombudsman and Data Protection Supervisor and national networks of ombudsmen and data protection bodies. Rights-based training and awareness raising among relevant practitioners at national, regional and local levels, particularly as regards the risks and correct/incorrect applications of new and unfamiliar border surveillance systems like the EES could also contribute to avoid unlawful and discriminatory uses of such systems.
 - Alongside, new powers could be granted to the FRA for it to carry out independent evaluations of the implementation of EU law having direct repercussions over fundamental rights and freedoms of individuals envisaged in the EU Charter of Fundamental Rights, which would include the SBC and EU *acquis* on external border crossings. In addition, the Schengen system and its evaluation mechanism should feature the figure of a new border monitor (independent from the Commission and Frontex) who could carry out (announced and unannounced) on site visits at national level and impartially monitor the activities of member states' border control authorities and Frontex in light of the rules and guarantees envisaged in the SBC.¹²⁰
3. Examination of the cost/efficiency balance of EU funding on external border control raises serious doubts about the prioritisation and programming procedures for these financial instruments. Question marks over the necessity and value of the EES and RTP have not prevented the earmarking of a significant allocation of the Internal Security Fund to establish these systems. The note also identifies wider deficiencies in EU border related funding; funding to local and regional actors under the European Borders and Refugee Funds have been found to be deficient. Also EU funding for

¹¹⁹ See Opinion of the Committee of the Regions on the 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' OJ C 009, 11/01/2012.

¹²⁰ See also S. Carrera (2011), 'An Assessment of the Commission's 2011 Schengen Governance Package: preventing abuse by EU member states of freedom of movement?' CEPS Liberty and Security Series, Centre for European Policy Studies, Brussels.

external border management both for EU member states and third country partners reflects an overwhelming focus on security while fundamental rights considerations are overlooked. In this regard we offer the following points for reflection:

- Attention should be paid to examining how LRAs could play a greater role in shaping EU budgetary priorities in the field of border management. Stronger obligations should be placed on national governments to consult LRAs in the programming of EU funding. Alternative channels of consultation and dialogue with LRAs could be explored in order to gather their input over EU budgetary priorities for border management as well as migration and asylum funding. In this vein, the CoR could reiterate calls to cement the role of LRAs as leading players in the domain of migration and asylum “in accordance with their competences in the national context, by means of instruments which allocate Union funds to them, without the intervention of central government authorities.”¹²¹
 - In addition, the new Internal Security Fund and Asylum and Migration Fund should be implemented according to the ‘Partnership Principle’, with the engagement and consultation of relevant civil society organisations and international NGOs to help evaluate the impact and added-value of initiatives funded at EU and national level and their repercussions for the safeguarding of fundamental rights.
 - The identification that a member state is experiencing “serious and persistent deficiencies” in the control of its external border, should be based on an objective and balanced assessment as possible with input from a wide range of actors and information sources. Full participation and engagement of LRAs is required in the evaluation of the situation on the ground, and in consultations concerning funding priorities, in order to ensure that financial resources are channelled to those border infrastructure and services which are in most urgent need of support.
4. The necessity and proportionality of establishing an EES and RTP has already proved a point of controversy in inter-institutional debates on the Smart Border Package. Justifications for introducing the systems focus on border efficiency, countering irregular migration and furthering the fight against serious crime, although the evidence to support the efficacy of the EES and RTP in achieving these policy goals is scant. By contrast, this note finds that the implementation of these electronic border surveillance systems

¹²¹ Committee of the Regions Opinion on *The Global Approach to Migration and Mobility*, 96th Plenary Session, 18-19 July 2012. See also Resolution of the Committee of the Regions on *Dealing with the Impact and Consequences of Revolutions in the Mediterranean*, 90th Plenary Session, 12 May 2011.

could negatively impact cross border mobility, with detrimental effects for cross border cooperation and the economic and social cohesion of cross border communities. Furthermore, they imply a progressive transfer of power and discretion as regards the control and uses (processing) of the data collected to various EU levels and actors beyond the classical national authorities and individual border guards, with important implications for questions of subsidiarity.

- Given the important practical effects of border technologies for cross-border regions, greater consultation of LRAs and the Committee of the Regions in the design and impact of future border technologies would appear a necessary requirement of the EU decision-making process as regards the introduction of major new border surveillance systems. This is particularly important when one considers that the perception of border management at local level can be markedly different from the interests guiding central or national level authorities with national policymakers often prioritising national security concerns while for border communities, a speedy clearance of cross border traffic can be a daily demand from citizens, commuters and the business community. Furthermore, this consultation process should engage more deeply into the questions surrounding the impact that these technologies will have over the traditional European approach to border controls in the long term, including on the structure and competences of national border controls services and their effects over the principle of subsidiarity.
- There is a need to further investigate the assumptions on which the Smart Borders proposals are based from the perspective of necessity, proportionality, efficacy and costs. Before negotiating the legislative proposals the European Parliament should conduct its own (independent) impact assessment of the Commission's Smart Border Package paying special attention to the necessity, suitability and wider societal implications implied by the development of these large-scale information systems. A genuine proportionality test should be accompanied by an in-depth and independent evaluation of already existing Entry-Exit Systems and Registered Traveller Programmes running at national level among member states as well as by third countries.
- The Smart Borders systems – as well as any other future JHA large-scale information systems – should foresee non-discrimination by default and should place the safeguarding of data protection principles (right to access information, effective remedies and individual consent for data processing) as a priority, in particular as regards more vulnerable categories of TCNs as data subjects. Possibilities for 'function creep' and

in-built flexibility as regards access by authorities and use of data should be avoided both in the operational design of systems and in the EU legislation governing their application.

Annex 1. List of national services in charge of external border controls in the scope of the SBC¹²²

	Member states	National services	Competent ministries
1	Austria	– Federal Police (<i>Bundespolizei</i>)	– Ministry of the Interior
2	Belgium	– Federal Police (<i>Police Fédérale / Federale Politie</i>)	– Ministry of the Interior
3	Bulgaria	– Directorate-General for Border Police of the National Police Service	– Ministry of the Interior
4	Cyprus	– Cyprus Police – Customs and Excise Department	– Ministry of the Interior – Ministry of Finance
5	Czech Republic	– Alien and Border Police Service – Customs	– Ministry of the Interior – Ministry of Finance
6	Denmark	– Danish Police (<i>Danske Politi</i>)	– Ministry of Justice
7	Estonia	– Police and Border Guard Board (<i>Politsei-ja Piirivalveamet</i>) – Tax and Customs Board (<i>Maksu-ja Tolliamet</i>)	– Ministry of the Interior – Ministry of Finance
8	Finland	– Border Guard (main responsibility) – Customs – Police	– Ministry of the Interior – Ministry of Finance
9	France	– <i>Direction Centrale de la Police aux Frontières</i> – <i>Direction Générale des Douanes et Droits Indirects</i> – <i>Direction Générale de la Police Nationale</i> – <i>Gendarmerie Nationale</i> and <i>Marine Nationale</i>	– Ministry of the Interior – Ministry of Defense – Ministry of Finance
10	Germany	– Federal Police (<i>Bundespolizei</i>) – Customs (<i>Zoll</i>) – Federal State Police in Bavaria, Bremen and Hamburg	– Federal Ministry of the Interior – Federal Ministry of Finance

¹²² According to Article 2.9 of the SBC ‘border controls’ are defined as “the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance”.

11	Greece	<ul style="list-style-type: none"> – Hellenic Police (<i>Helliniki Astynomia</i>) – Hellenic Coast Guard (<i>Limeniko Soma</i>) – Customs (<i>Telonia</i>) 	<ul style="list-style-type: none"> – Ministry of Citizen Protection – Ministry of Finance
12	Hungary	<ul style="list-style-type: none"> – National Police – Customs and Finance Guard (<i>Vám-és Pénzügyorség</i>) 	<ul style="list-style-type: none"> – Ministry of Justice and Law Enforcement – Ministry of Finance
13	Italy	<ul style="list-style-type: none"> – <i>Polizia di Stato</i> – <i>Carabinieri</i> – <i>Guardia di Finanza</i> 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Defense – Ministry of Finance
14	Latvia	<ul style="list-style-type: none"> – State Border Guard (<i>Valsts robežsardze</i>) 	<ul style="list-style-type: none"> – Ministry of the Interior
15	Lithuania	<ul style="list-style-type: none"> – State Border Guard (<i>Valstybes Sienos Apsaugos Tarnyba</i>) 	<ul style="list-style-type: none"> – Ministry of the Interior
16	Luxembourg	<ul style="list-style-type: none"> – Special Police Division at the Airport (<i>Service de Contrôle à l'Aéroport</i>) 	<ul style="list-style-type: none"> – Ministry of the Interior
17	Malta	<ul style="list-style-type: none"> – Immigration Police – Customs Department – Armed Forces 	<ul style="list-style-type: none"> – Ministry of Justice and Home Affairs – Ministry of Finance
18	Netherlands	<ul style="list-style-type: none"> – Royal Border Guard (<i>Koninklijke Marechaussee</i>) – Customs (<i>Douane</i>) – Rotterdam (port) District Police 	<ul style="list-style-type: none"> – Ministry of Defense – Ministry of Finance
19	Poland	<ul style="list-style-type: none"> – Border Guard 	<ul style="list-style-type: none"> – Ministry of the Interior and Administration
20	Portugal	<ul style="list-style-type: none"> – <i>Serviço de Estrangeiros e Fronteiras</i> – <i>Brigada Fiscal da Guarda Nacional Republicana</i> 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Defense
21	Romania	<ul style="list-style-type: none"> – Border Police – National Customs Authority 	<ul style="list-style-type: none"> – Ministry of the Interior and Administration Reform – Ministry of Public Finance
22	Slovakia	<ul style="list-style-type: none"> – Border Police – Customs 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Finance
23	Slovenia	<ul style="list-style-type: none"> – Slovenian Police (<i>Slovenska Policija</i>) 	<ul style="list-style-type: none"> – Ministry of the Interior
24	Spain	<ul style="list-style-type: none"> – National Police (<i>Cuerpo Nacional de Policía</i>) – Civil Guard (<i>Guardia Civil</i>) – Customs (<i>Servicios de Aduanas</i>) 	<ul style="list-style-type: none"> – Ministry of the Interior – Ministry of Finance – Ministry of Defense
25	Sweden	<ul style="list-style-type: none"> – Police (main responsibility) – Coast Guard – Customs – Migration Board 	<ul style="list-style-type: none"> – Ministry of Justice – Ministry of Defense – Ministry of Finance – Ministry of Integration and Gender Equality.

26	Iceland	– Directorate-General of National Police – District Police Chiefs	– Ministry of Justice
27	Norway	– Police (main responsibility) – Customs – Coast Guard	– Ministry of Justice and the Police – Ministry of Finance – Ministry of Defense
28	Switzerland	– Cantonal Police Force (Geneva, Zurich, Bern, Soleure, Vaud, Valais, Saint-Gall and Les Grisons) – Border Guard Service	– Federal Department of Justice and Police – Federal Customs Administration

Sources:

List of national services responsible for border-controls for the purposes of Article 15(2) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 247 of 13.10.2006, p. 17.

Notification by Romania to the European Commission according to the provisions of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2007 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 77 of 5.4.2007, pp. 11-14.

Update by Malta the of list of national services responsible for border controls for the purposes of Article 15(2) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) as published in Official Journal of the European Union C 247 of 13 October 2006, p. 17, OJ C 153 of 6.7.2007, p. 13.

Notification by Bulgaria to the European Commission according to the provisions of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2007 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 153 of 6.7.2007, p. 3.

Notification by the Swiss Confederation to the European Commission pursuant to Article 34(1) of Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ C 331 of 31.12.2008, pp. 13-20.