

**ECRE COMMENTS ON THE COMMISSION  
PROPOSAL FOR A REGULATION  
AMENDING REGULATION (EU) 2016/399  
ON A UNION CODE ON THE RULES  
GOVERNING THE MOVEMENT OF  
PERSONS ACROSS BORDERS  
COM(2021) 891**

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## SUMMARY OF VIEWS

The fundamental rights affected by the proposal include the right to human dignity (Article 1 EU Charter of Fundamental Rights (CFREU)), the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU), the right to liberty and security (Article 6 CFREU), protection in the event of removal, expulsion or extradition (Article 19 CFREU), the rights of the child (Article 24 CFREU) and the right to an effective remedy (Article 47 CFREU).

ECRE questions whether the provisions meet the relevant requirements of necessity and proportionality. For instance, the proposed measure of making fewer border crossing points available for a more limited amount of time is unlikely to have any impact on the motivations and actions of third country governments engaged in instrumentalisation and the related policy objective of responding to instrumentalisation. It is also doubtful whether the measures are consistent with the objective of the Treaty of the Functioning of the EU (TFEU) Article 77 of “ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders” which the Schengen Borders Code is supposed to contribute to.

**Definition of “Instrumentalisation” (Article 2(27)):** ECRE has concerns about the definition of “instrumentalisation” and with a strategy based on responding to the actions of third countries with measures that make access to asylum in Europe more difficult. Rather, actions by the EU and Member States should be directed against the third country engaged. The definition is overly broad and includes a number of ill-defined terms, such as action which are “indicative of an intention of a third country”. This creates legal uncertainty. Clarity of definition is essential given the significance of the actions that may be taken in a situation of “instrumentalisation”, including measures that would allow Member States to limit the number of border crossings and increase border surveillance, as well as allowing them to derogate from asylum law under the proposed Instrumentalisation Regulation. Greater clarity on criteria and authorisation procedure is indispensable. Rejection of the concept and its codification would be preferable.

**Limiting the number or border crossings and their opening hours (Article 5(4)):** To ensure genuine and effective access to the asylum procedure, the Member States concerned must not only ensure that a sufficient number of registration points, including at border crossings, are functioning and that applicants receive relevant information about them, that border guards are adequately trained, but also that the applicants are able to safely and legally reach these points. If the latter criterion cannot be met, genuine and effective access to asylum procedures is not ensured. Particular attention should be paid to access for vulnerable groups.

**Expanding border surveillance (Article 13):** People who have been subject to instrumentalisation by third country governments are likely to have faced ill-treatment and should not be described as a threat per se. (While the proposal refers to the actions and intentions of the states that use people, it is the people themselves that are presented as a threat and targeted by the measures.) Any approaches to border surveillance need to be carried out in respect of fundamental rights, including the right to asylum.

**Restrictions on travel to the EU (Article 21a):** The fact that requesting asylum and humanitarian grounds are considered as essential travel and exempted from restrictions on travel in case of an epidemic is in line with EU and international law and welcome.

**Exercise of public powers (Article 23):** The provisions related to public powers and authorised border checks are very broad and imprecise, generating the risk of discriminatory treatment, obstruction of access to asylum in Europe and undermining fairness towards third-country nationals.

**Procedure for transferring persons apprehended at the internal borders (Article 23a):** The proposed procedure is an attempt to regularise and encourage the practice of summary readmission, including through bilateral agreements and practices, which has been deemed unlawful in some national courts and risks violating several fundamental rights.

**Amendment to the Return Directive (Article 6(3)):** The suggested amendments, related to the transfer procedure at internal borders, would contribute to the proliferation of bilateral readmission agreements among Member States, leading to divergent practices undermining common procedures under EU law and people being subject to return decisions without individual assessments.

# INTRODUCTION

On 14 December 2021 the European Commission, published a proposal for a Regulation amending Regulation (EU)2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)<sup>1</sup> hereafter referred to as the SBC proposal or SBC amendments.<sup>2</sup>

The SBC proposal underlines that the objective of the Regulation is to strengthen the functioning of the Schengen area and that in accordance with the principle of proportionality, the Regulation does not go beyond what is necessary in order to achieve those objectives.<sup>3</sup>

The amendments relate to the management of the EU's external and internal borders and as stated in the explanatory memorandum, aim to address the following six policy objectives:

- a) uniform application of measures at the external borders in case of a threat to public health;
- b) response to instrumentalisation of migrants at external borders;
- c) creation of a contingency planning for Schengen in the situation of a threat affecting a majority of Member States at the same time;
- d) procedural safeguards in case of unilateral reintroductions of internal border controls;
- e) application of mitigating measures and specific safeguards for cross-border regions in cases where internal border controls are reintroduced; and
- f) increased use of alternative measures to address the identified threats instead of internal border controls

Among the measures included to meet the policy objectives are restricted access to border crossing points and increased surveillance in the case of instrumentalisation and a procedure for transferring persons apprehended at the internal borders to another Member State which is complemented by amendments to the Return Directive.

The SBC proposal was presented alongside a proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum<sup>4</sup> (hereafter the "Instrumentalisation Regulation"). The Instrumentalisation Regulation introduces a mechanism to derogate from the asylum acquis that would be available to Member State on a permanent basis, to be triggered in situations of instrumentalisation. The derogations set out in the Regulation are almost identical to the measures in the European Commission's proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland of December 2020, which followed a request to the Commission from the Council in response to the actions of Belarus.<sup>5</sup> ECRE has published Comments which look in detail at the proposed Decision<sup>6</sup> and the proposed Regulation<sup>7</sup> with a focus on the substantive articles. ECRE's Comments on the SBC should therefore be read together with ECRE's previous Comments.

This introduction provides a reflection on the necessity and proportionality of the proposal, general comments on the concept of "instrumentalisation" and on the main provisions in the SBC proposal which are relevant to the right to asylum and other relevant fundamental rights. The text then analyses these provisions in detail.

The proposed amendments by the European Commission may have a far reaching impact on the fundamental rights of people. In light of this, it is particularly important to highlight questions about the necessity and proportionality of the measures pursued. The link between the proposed amendments and related policy

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1. European Commission Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final, available at: <https://bit.ly/3zwqfV9>.
  2. As per recital 49 and 50 Denmark and Ireland are not taking part in the adoption of this Regulation and are not bound by it or subject to its application.
  3. See Recital 48.
  4. European Commission Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890 final, December 2021, available at: <https://bit.ly/3HCHerw>.
  5. European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM(2021)752 final, December 2021, available at: <https://bit.ly/3dxcoUK>.
  6. ECRE Comments on the Commission Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland COM (2021)752, available at: <https://bit.ly/3sWoKhH>.
  7. ECRE Comments on the Commission Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum. January 2022, available at: <https://bit.ly/35hVecr>

objective is not clear in several instances. By way of an example, how restricting access to border crossing will impact on third country government's motivation to instrumentalise people is not specified. Given the impact on the rights of people affected by the proposals, additional scrutiny as to the necessity and appropriateness of the measures is warranted. This should also include whether less onerous alternatives are available. Going even further, the link between the proposed measures and the objective laid down in Article 1 of the Schengen Border Code in providing for the "absence of border control of persons crossing the internal borders between the Member States of the Union" has not been demonstrated which gives rise to further questions about the necessity and proportionality of the measures.

The definition of "instrumentalisation" is of relevance not only for the SBC proposal but also because there is a whole separate piece of legislation, the proposed Instrumentalisation Regulation which includes a definition which is identical to the definition provided in the SBC proposal. The definition is broad and lacks clarity. This is particularly worrying because even though the term is vague instrumentalisation may be used to invoke a range of derogations from the asylum acquis. In addition, the SBC proposal does not explain how Member States should demonstrate that they are subject to instrumentalisation: the information to provide to the European Commission to make an assessment and decide on whether or not to propose a related Council Decision is not specified.

ECRE challenges why the actions of third country governments which use people, including those seeking international protection, to destabilise the EU should result in a significant negative impact on the rights of those people, including by the lowering of asylum standards and making it more difficult for people to apply for international protection in Europe. It is particularly questionable given that the current legal framework already provides flexibility for Member States to deal with changing events at their border. This includes being able to specify where asylum applications should be lodged<sup>8</sup>, extension of the registration deadline for asylum applications<sup>9</sup> and setting modalities for material reception conditions different from those generally required by the Reception Conditions Directive.<sup>10</sup>

In a situation of instrumentalisation, the SBC proposal encourages Member States to limit the number of border crossings and their working hours as necessary and increase border surveillance. How those measures will have an impact on intentions of third country governments who are responsible for the instrumentalisation is not detailed in the proposal and indeed the link between the measures proposed and the policy objectives is not clarified. Instead, it is clear that both measures will limit access to asylum in Europe and while the Commission proposal raises the need for compliance with fundamental rights in their application, the related safeguards are not sufficient. For instance, the relevant section on fundamental rights refers to Article 3, 4 and 7 of the Schengen Borders Code as well as freedom of expression, media freedom and freedom of association of civil society organisations but fails to directly include relevant safeguards in the proposed amendments. In addition, ECRE is concerned about the description of people, who because of instrumentalisation by third country governments have most likely experienced ill-treatment and have protection needs, as a threat to Member States.

It should also be noted that countries frequently manipulate displaced people. It is something that has happened throughout history and continues to happen for political and security reasons. There is no logical reason why manipulation of people should necessitate a different asylum regime or why it would justify the derogation from legal obligations set out in the Instrumentalisation Regulation. Actions by third country governments which try to destabilise the EU should be met by policy measures directed at those third country governments rather than people who have become victims of such actions. The introduction of the concept looks like a pretext for yet again proposing a model based on containing people seeking asylum in Europe (many of whom are in need of international protection<sup>11</sup>) at or beyond the EU's external borders, as well as for reviving proposals on derogation from EU asylum law which were included in early versions of the Pact but were largely removed from the final proposals (with the exception of certain measures in the Crisis Regulation); why measures that

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8. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Article 6(3)

9. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) Article 6(5).

10. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Article 18(9).

11. Even looking at first instance decision making alone in 2021 provides an indication for this. According to Eurostat, in 2021, 35% of EU first instance asylum decisions resulted in positive outcomes. This is not a reliable indicator of protection needs overall, given that a significant number of negative decisions are successfully challenged on appeal. ECRE has previously issued a range of considerations related to shortcomings in the way information is collected and presented as explained [here](#).

were discarded should now reappear is unclear. .

Reflection is also necessary on the impact on the global protection system of allowing derogation from obligations under EU and international law in situations that are – at least if the broad definition is accepted – commonplace. Will other countries and regions follow suit? The definition reveals that the group of proposals run counter to international refugee law by penalising people seeking protection for the manner of their arrival (“instrumentalisation”), prohibited by Article 31 of the 1951 Convention. The introduction of references to territorial integrity – with the suggestion that people seeking protection constitute a threat – further undermines the spirit of International Refugee Law.

The impact on other areas of EU law of building in expansive and vague grounds for derogation should also be considered.

The SBC proposal also tries to tackle the persistent practice of Member States of conducting border controls at their internal border. While the proposal suggests that the measures are without prejudice to freedom of movement, it is likely that they will de facto have negative consequences and not contribute to obtaining a Schengen zone free of border controls for people of all nationalities as per Article 77 TFEU. It proposes a wide range of activities that can be carried out by different actors which would not constitute border controls but qualify as (authorised) border checks. The fact that any activity aimed at reducing irregular migration is permitted may be harmful for people in need for protection and lead to discriminatory practices.

A new element is a transfer mechanism for third country nationals at EU internal borders. The suggested conditions for application of the mechanism and the fact that they are cumulative may limit its use. Nonetheless, the proposal regularises practices that have been considered unlawful by some national courts as they may lead to the denial of access to asylum for the individuals concerned. In addition, amendments, including to the Return Directive, encourage Member States to review and conclude bilateral readmission agreements which will likely lead to a proliferation of bilateral readmission practices, thus undermining the EU’s legal framework, including the application of the Dublin Regulation.

## I. DEFINITION OF “INSTRUMENTALISATION” (ARTICLE 2(27))<sup>12</sup>

The definition in Article 2(27) reads as follows:

“instrumentalisation of migrants’ refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;”

It is overly broad and contains a number of unclear terms and elements including the reference to assessing the intention of the third country concerned. It is enough that the third country is “actively encouraging” the travel of people, not just facilitating it, which covers a multitude of different potential actions. The number of people involved is not specified, unlike in comparable legislation and legislative proposals, where the numbers may need to be large in absolute or relative terms before justifying a change in obligations on the state.

The criteria and procedure of the assessment of whether the action of a third country amounts to instrumentalisation is not defined. It is not explained how the intention of a third country will be assessed nor who will make the decision as to what these indicators are and which indicators of intention to consider. Mere intent by a third country government should not be able to trigger a set of derogations from Member State responsibilities. This is particularly the case because intent is difficult to assess and not strictly defined.

Similarly, what criteria will be used to judge whether actions put “essential State functions” or territorial integrity at risk are not specified throughout the proposal. It is not required that the actions actually put at risk these functions, only that they are “liable” to do so, further broadening the definition when to “put at risk” is already broad and unclear. The reference to “territorial integrity” is concerning, as it may be read as implying that

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12. All article numbers mentioned in the Comments refer to the relevant articles in the SBC that are proposed to be amended rather than the numbering in the proposed amended SBC regulation.

crossing of borders by refugees is akin to a threat to or breach of territorial integrity, such as to allow the legitimate use of force by a state under international law. Introducing into EU law the notion or suggestion that the movement of displaced people is a threat to territorial integrity – in situations of instrumentalisation or otherwise – creates the risk of misrepresenting the position of refugees in international law, and suggest unwelcome “norm entrepreneurship” in relation to running together refugee protection and wider questions of territorial integrity of states.

As the arrival of even a small number of “instrumentalised” people can allow states to evade fundamental obligations, the proportionality of the proposals are even more questionable.<sup>13</sup>

Both the broadness and the lack of clarity mean that many situations could be construed as falling under the definition. Indeed, many of the current situations at the EU’s external borders arguably fit within it. The reference to “those already present” in Recital 9 or “from within its territory” in Article 2(27) seem designed to include the situation in Turkey or Libya, for example.

Questions can be raised as to why the definition of the term is included in the SBC proposal but the authorisation procedure to invoke a situation of instrumentalisation is included in the Instrumentalisation Regulation. First, given the severity of the measures contained in the Instrumentalisation Regulation, it is inconsistent that the definition of the phenomenon that triggers these measures appears in a complete different legal instrument.

Second, in its current form, the authorisation procedure, which only appears in the Instrumentalisation Regulation and not in the Schengen Border Code, fails to clarify the criteria for making the assessment that instrumentalisation has occurred and the information a Member State needs to provide to justify invoking it. Again, given the implications of the measures that may be taken in response to instrumentalisation, it is essential that, besides a definition, the criteria for what constitutes instrumentalisation, the procedure of assessing it, and the responsibilities of different EU institutions in the assessment are spelled out clearly.<sup>14</sup>

When Member States claim instrumentalisation they will be able to invoke the related reduction of border crossing points (Article 5(4)) and the increase in border surveillance (Article 13) in the SBC proposal, as well as the derogations included in the Instrumentalisation Regulation. Both sets of measures will be permanently available and it seems likely that some Member States will try to use them more or less permanently. Given the seriousness of the measures that can be invoked, and the implications for fundamental rights, at very least, there needs to be clarity and a narrowing of the definition.

ECRE rejects the introduction of a mechanism for derogations from asylum and return standards which is included in the Instrumentalisation Regulation related to the concept of instrumentalisation for which the proposed SBC provides the definition.

ECRE recommends rejecting the introduction into EU law of the concept of “instrumentalisation” in any form.

If the European Parliament and the Council decide to legislate, the following amendments are aimed at improving the related provisions to ensure clarity and avoid a situation where Member States try to fit within the definition of instrumentalisation in order to evade their responsibilities.

#### Recital (9):

Instrumentalisation of migrants ~~can~~ refers to situations where irregular travel of a **significant number of** third country nationals **in absolute terms and relative to the asylum capacity of the Member State in question** has been actively ~~encouraged or~~ facilitated by a third country onto its own territory to reach the external border of the Member States ~~but can equally refer or~~ to the active ~~encouragement or~~ facilitation of irregular travel of a **significant number of** third country nationals already present in that third country **with the aim to destabilize that Member State. Instrumentalisation of migrants may also entail the imposition of coercive measures, intended to prevent the third country nationals from leaving the border areas of the instrumentalising third country, in a direction other than through a Member State.**

#### Article 2(27):

13. On proportionality, see ECRE Comments on the Commission Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, January 2022, available at: <https://bit.ly/35hVecr>
14. See ECRE Comments on the Commission Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, January 2022, available at: <https://bit.ly/35hVecr>

A situation of instrumentalisation of migrants may arise where a third country ~~instigates irregular migratory flows into the Union by~~ actively ~~encouraging or~~ facilitates the movement of a *significant number of* third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, ~~where such actions are indicative of an intention of a third country to destabilise the Union or a Member State~~, where the *Member State affected can clearly demonstrate that the* nature of such actions ~~is liable to put at risk~~ *has undermined or will undermine* essential State functions, including its territorial integrity, the maintenance of law and order ~~and/or~~ the safeguard of its national security.

## II. LIMITING THE NUMBER OF BORDER CROSSINGS AND THEIR OPENING HOURS ((ARTICLE 5(4))

The SBC amendments add a paragraph to Article 5 SBC which deals with crossing of external borders. The proposed new paragraph 4 allows Member States to limit the number of border crossing points in the event of instrumentalisation of migrants. The proposal fails to demonstrate how the measures are contributing to the overall objective of the SBC, namely maintaining the absence of internal borders.

The proposed measures will have an impact on access to asylum at the EU's external borders as it increases the difficulty for people in need of protection to reach points where they can claim asylum and thereby runs the risk of undermining Article 3(2) which stipulates that the application of the SBC should "without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement"<sup>15</sup> and Article 4 of the SBC. This potential impact is recognised by the European Commission which underlines in the proposal that any limitations must be proportionate and take full account of the rights of third-country nationals seeking protection.<sup>16</sup> Similarly, Recital 12 underlines that while Member States should be able to limit border traffic to a minimum in situations of instrumentalisation, this should be done while "guaranteeing genuine and effective access to international protection procedures" and that limitations should be "applied in a manner that ensures respect for obligations related to access to international protection, in particular the principle of non-refoulement". However, the proposal fails to make explicit reference to prerequisites for effective access to border crossing points and the asylum procedure.

In practice, Eurostat statistics already indicate a drastic increase in refusals of entry of third country nationals in recent years. The number of third country nationals refused entry at the external borders have more than doubled from 2015 to 2019, rising from 282,910 in 2015 to 670,795 in 2019. The number decreased to 137,840 refusals of entry in 2020, however, mostly due to the outbreak of the COVID-19 pandemic.<sup>17</sup> Not all the individuals refused entry at the external borders are seeking international protection, but nonetheless these figures indicate that there are likely to be more people seeking protection at borders than represented by the sole number of applications for international protection.

The proposed measures are disproportionate both because of their likely impact on access to asylum in Europe and because from the perspective of EU law, the current Asylum Procedures Directive (APD)<sup>18</sup> already allows Member States to require that applications for international protection are lodged in a specific designated place (Article 6(3)). The proposed Asylum Procedures Regulation (APR) includes a similar provision in Article 28(5). It is important to underline that this requirement may only be applied to the lodging of the application. The CJEU clarified that one of the objectives pursued by the APD is to ensure the easiest possible access to the procedure for granting international protection. In order to ensure such access, Member States have an obligation under Article 6 APD to ensure that persons who have applied for international protection have the "concrete possibility to lodge an application as soon as possible".<sup>19</sup>

This requirement thus cannot prejudice the obligation to ensure effective access to asylum. To be effective

15. For an example of relevant CJEU case law on this, see Judgment of 14 June 2021, ANAFE vs Ministre de l'Intérieur, C-606/10, ECLI:EU:C:2012:348, para 40

16. Article 5(4).

17. Eurostat, *Third country nationals refused entry at the external borders - annual data (rounded)*, [migr\_eirfs], Last update: 03-12-2021.

18. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

19. Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, paras. 63 and 64. See also Advocate General Szpunar conclusions on the same case, 30 April 2020, para 61.



the border points must be open and accessible and border guards must be able to carry out their duties effectively. This includes the obligation on Member States to provide authorities with appropriate means, including sufficient competent personnel, and to ensure that staff have the appropriate knowledge or receive the necessary training in international protection.<sup>20</sup> In the absence of objective possibilities to apply at a border control post (such as when border crossing points are tens of kilometres away), such a theoretical possibility may be ineffective. The ECtHR found that this practice may give rise to the risk of breaches of the non-refoulement principle and prohibition of collective expulsion stipulated in Articles 3 ECHR and Article 4 of Protocol 4 to the ECHR and Articles 4, 18 and 19 of the CFREU.<sup>21</sup>

As the ECtHR ruled on 8 July 2021 in the case *Shahzad v. Hungary*, the situation of foreigners crossing the border irregularly and pushed back to the external side of the border fence falls within the scope of the prohibition of collective expulsion under Article 4 of Protocol 4. The Court took into account the limited access to transit areas and the fact that there was no formal procedure accompanied by relevant safeguards guaranteeing the individual admission of people in such circumstances, and found that effective means of legal entry were not ensured.<sup>22</sup>

Accordingly, the expulsion of foreigners without examining their personal circumstances, and without enabling them to put forward arguments against expulsion, was recognised as collective and, therefore, in violation of the Protocol in *D.A. and Others v. Poland*.<sup>23</sup> In both this case and *M.K. and Others v. Poland*, the Court reiterated that decisions refusing entry taken as part of a wider policy of not receiving applications for international protection from persons presenting themselves at the border and pushing them back, are in violation of international law.<sup>24</sup>

A practice of limiting the number of border crossing points or their opening hours where the circumstances so require, will exacerbate the already existing difficulty of reaching formal border crossings in order to apply for asylum. Given the significant impact it may have on access to asylum in the EU, that the number of refusals of entry already significantly increased in recent years, the fact that the designation of specific places for lodging asylum applications is already possible under the current legal framework and that the Commission has not sufficiently explained why and how going beyond this would support the Member State in situations of instrumentalisation, ECRE suggests the deletion of the proposed paragraph 4. In addition, it is not clear that the measures help in any way to address the stated objectives in relation to maintaining the lack of internal borders.

ECRE therefore suggests deleting Article 5(4).

If co-legislators decide to maintain the proposed paragraph, ECRE proposes the following amendments to ensure effective access to the asylum procedure, in compliance with the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), protection in the event of removal, expulsion or extradition (Article 19 CFREU):

#### Article 5

“4. In a situation of instrumentalisation of migrants, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 ~~or their opening hours where the circumstances so require in limited and well-defined circumstances.~~

*Member States shall ensure that a sufficient number of registration points, including border crossing points, are designated, open and accessible for making, registering and lodging an application for international protection and that applicants are able to safely and legally reach them. Member States shall ensure border guards have appropriate knowledge on international protection and that specific safeguards for the treatment of vulnerable people are put in place.*

Any limitations adopted pursuant to the first subparagraph shall be implemented in a manner that is proportionate and that takes full account of the rights of:

20. The APD also contains provisions on training of relevant personnel: Art 4(1),(3) and (4); Article 14(1) APD.
21. For more on the ECtHR standards on the principle of non-refoulement and collective expulsion, see ECRE, Legal Note No 10: Across Borders: the Impact of N.D. and N.T. v. Spain in Europe, June 2021, link: <https://ecre.org/wp-content/uploads/2021/07/Legal-Note-10.pdf>
22. *Shahzad v. Hungary*, ECHR, 8 July 2021, Application No. 12625/17, para. 65: <https://bit.ly/2WCi6zh>
23. *D.A. and Others v. Poland*, ECHR, 8 July 2021, Application No. 51246/17, paras. 78-80: <https://bit.ly/3kFip4v>
24. *Ibid.*, para. 83; *M.K. and Others v. Poland*, ECHR, 23 July 2020, Applications No 40503/17, 42902/17 and 43643/17, paras. 208 – 210: <https://bit.ly/3DxtDKH>

- (a) the persons enjoying the right of free movement under Union law;
- (b) third-country nationals who are long-term residents under Council Directive 2003/109/EC<sup>25</sup>, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term visas, as well as their respective family members;
- (c) third-country nationals seeking international protection.

### III. BORDER SURVEILLANCE (ARTICLE 13)

In a situation of instrumentalisation, the proposal requires Member States to “address the increased threat” by increasing “resources and technical means to prevent an unauthorized crossing of the border”. Among the technical means mentioned are drones, motion sensors and mobile units. Article 13(1) underlines that the main purpose of border surveillance is to prevent unauthorised border crossings, Article 13(2) further foresees that surveillance shall be carried out in such a way as to prevent and discourage persons from unauthorised border crossings and Recital 15 refers to reinforced border control.

Different from relevant EU legislation on border surveillance, the scope that is provided in the SBC devoid of a protective element. Both the regulation establishing Eurosur and the Regulation establishing rules for the surveillance of the external sea borders includes the objective to contribute to protection and saving lives of migrants.<sup>25</sup>

ECRE therefore suggests the following amendments to Article 2(12):

‘border surveillance’ means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including preventative measures to **contribute to ensuring the protection and saving the lives of migrants and** detect and prevent unauthorised border crossings or the circumvention of border checks.

Article 13(1):

1. The main purpose of border surveillance shall be to detect and prevent unauthorised border crossings, to counter cross-border criminality and ~~to take measures against persons who have crossed the border illegally to contribute to ensuring the protection and saving the lives of migrants.~~

A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

*This shall be without prejudice to provisions set out in Article 3 (b) and 4 SBC.*

ECRE is concerned about the description of people, who because of instrumentalisation by third country governments have most likely experienced ill-treatment and have protection needs<sup>26</sup>, as a threat to Member States. This formulation and the insistence on preventing and discouraging border crossings is worrying particularly because it does not balance the management of Member States’ borders with the obligations of Member States to provide access to asylum and to fulfill human rights obligations at its borders. While the Explanatory Memorandum and the Recitals such as 11 and 12 refer to fundamental rights, the lack of explicit reference in the relevant Articles is of concern.

To recall, applicants for international protection often have to cross borders irregularly to apply for protection and this is not a criminal act. Given the widespread practice of violence against people seeking asylum in Europe<sup>27</sup>, any suggestion that the arrival of migrants who have been instrumentalised at the EU’s borders shall be met

25. See Regulation No 1052/2013 establishing the European Border Surveillance System (Eurosur), Article 1 and Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Recital 1 & 6;

26. Due to the lack of access to the border and the discrepancy of reporting by the EU Member States concerned, it is difficult to provide a detailed analysis of the profile of people who arrive at the EU’s border with Belarus. What is clear from a cursory analysis of the data that is available is that a significant number of them are from countries where a reasonable assumption of protection needs can be made, such as Syria, Afghanistan or Iraq. This is without prejudice to individual protection grounds regardless of nationality.

27. ECRE (2021), Asylum adjourned – the situation of applicants for international protection in 2020, available at: <https://bit.ly/3uIDY0r>; Border Violence Monitoring Network (2019) Black Book of Pushbacks available at: <https://bit.ly/3AODssZ>; Protecting Rights at Borders (2021), Human dignity lost at the EU’s borders, available at: <https://bit.ly/348Uw11>; UN Special Rapporteur on the human rights of migrants, 2021, Report on means to address human rights impact of pushbacks of migrants on land and sea, available at: <https://bit.ly/3riniFf>

with more resources and technology to prevent crossings could be understood to condone violence against people at the border. It also goes against the spirit of the Refugee Convention which prohibits States from imposing penalties on refugees on account of their entry or presence in their territory without authorization.<sup>28</sup>

Given the proposed increase of border surveillance activities, including technological equipment, the impact of using technology for migration management on access to asylum needs to be considered.<sup>29</sup> Also, the proposal suggests that it will not impact the EU's budget. This seems unlikely, particularly as reference to specific equipment is made. Rather, there is a risk that even larger sums of Member State and EU funding will be redirected to border management without relevant safeguards is concerning.

ECRE therefore suggests deleting Article 13(5).

If co-legislators decide to maintain the proposed paragraph, ECRE proposes amendments to ensure effective access to the asylum procedure, in compliance with the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), protection in the event of removal, expulsion or extradition (Article 19 CFREU) and Article 31 of the Refugee Convention. The amendments also provide a role for the EU Asylum Agency given the likely protection needs of people who have been subject to instrumentalisation. A reinforced role for the European Border and Coast Guard Agency is foreseen in the proposed measures.

#### Article 13(5)

In a situation of instrumentalisation of migrants, the Member State concerned ~~shall~~ **may** intensify border surveillance **provided that they are** as necessary **and proportionate in order to address the increased threat**. In particular, the Member States concerned shall enhance, as appropriate, the resources and technical means to **ensure smooth operation of asylum and reception systems**. ~~prevent an unauthorised crossing of the border~~

***This should include an evidence based assessment of operational and technical assistance that may be required from the EU Asylum Agency.***

***Those technical means may include modern technologies including drones and motion sensors; as well as mobile units to prevent unauthorised border crossings into the Union.***

## IV. RESTRICTIONS ON TRAVEL TO THE EU (ARTICLE 21A)

The proposal contains a new article that sets out rules for the uniform application of restrictions on non-essential travel to the EU in the case of a disease with an epidemiological potential as defined by the World Health Organisation.

It clarifies in Annex XI(vii) that the restrictions listed may not be applied to “persons in need of international protection or for other humanitarian reasons”. In fact, requesting asylum and humanitarian grounds is recognized as essential travel. This is an important provision to ensure that access to asylum, including registration of asylum applications and subsequent processing continues which was also underlined in the European Commission's guidance on asylum at the start of the Covid 19 pandemic.<sup>30</sup>

## V. EXERCISE OF PUBLIC POWERS (ARTICLE 23)

The proposal includes an article that describes what kind of border checks are authorised in the border area with a view of clarifying which activities have an equivalent effect to border controls and thus would be inconsistent with the objective of the Schengen area free of internal order controls. The border “checks” would be allowed, whereas border controls would not.

Both Article 23 and Recital 18 list a number of circumstances under which border checks do not have an

28. Convention relating to the status of Refugees (1951), Article 31.

29. Challenges have been highlighted by different studies, including most recently European Migrant Network (EMN), February 2022, The use of digitalisation and artificial intelligence in migration management, available at: <https://bit.ly/3JMMI4b>

30. European Commission, Communication from the Commission COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement 2020/C 126/02, available at: <https://bit.ly/3g65JBO>

equivalent effect to border controls. The list is broad and it would seem that many current practices by Member States would fall under it. The intention overall seems to be to give preference to police checks rather than border controls which builds on the European Commission 2017 Recommendation on proportionate use of police checks and police cooperation in the Schengen area<sup>31</sup>. However, the definition of actors involved in the described border checks is not precise but is framed as “the exercise of police or other public powers by the competent authorities” which provides the police and other agencies to be involved.

One of the instances in which checks may not be considered equivalent to border controls is when the measures aim to “combat irregular residence or stay, linked to irregular migration”. Recital 20 further elaborates that this could include “measures allowing the verification of the identity, nationality and residence status of persons provided that such verifications are non-systematic and carried out on the basis of risk analysis”.

While the proposal demands that Member States do not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation<sup>32</sup>, it is difficult to imagine how the proposed measures will be carried out without intensified racial profiling.<sup>33</sup> Such a practice would contradict the commitment of the TFEU Article 67(2) to “frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals” and the commitment “to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia” as stated in Article 67(3).

ECRE therefore suggests the deletion of the relevant line:

#### Article 23

The absence of border control at internal borders shall not affect:

a) the exercise of police or other public powers by the competent authorities of the Member States in their territory, including in their internal border areas, as conferred on them under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks.

The exercise by competent authorities of their powers may not, in particular, be considered equivalent to the exercise of border checks when the measures

i) do not have border control as an objective;

ii) are based on **specific evidence provided by** ~~general information and experience of the~~ competent authorities, regarding possible threats to public security or public policy and aim, in particular to

- combat cross-border crime

- ~~combat irregular residence or stay, linked to irregular migration;~~ or

- contain the spread of an infectious disease with epidemic potential as detected by the European Centre for Disease Control

## VI. PROCEDURE FOR TRANSFERRING PERSONS APPREHENDED AT THE INTERNAL BORDERS (ARTICLE 23A)

The SBC proposal introduces a procedure for transferring people across internal borders which could be considered an attempt to regularise what has been considered by some courts as unlawful practices at European borders. The proposed procedure allows for summary returns of third country nationals from one Member State to another without necessarily guaranteeing the individual's access to asylum.

For the new procedure, a range of cumulative and exhaustive conditions need to be fulfilled, namely that the person concerned is found in the vicinity of the border; does not fulfil the entry conditions laid down in the Schengen Borders Code and is not covered by a related derogation; the person is apprehended in the course of a cross-border police cooperation involving both the Member State from which the person is supposedly

31. European Commission, Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area, available at: <https://bit.ly/3JNP8Qb>

32. See Recital 46.

33. See also FRA Handbook, 2018, Preventing unlawful profiling today and in the future: a guide. Available at: <https://bit.ly/3rWsvSi>

coming and the Member State in which the person has entered; and there is evidence that the persons has arrived from another Member State. The definition of what would constitute such a “cross-border police operational cooperation” is provided in the Proposal for a Council Recommendation on operational police cooperation.<sup>34</sup>

In these cases, the proposal suggests a procedure detailed in Annex XII, including the completion of a form, which should result in the transfer of the third country national from one Member State to the other within 24 hours. The transfer decision is immediately enforceable. The person concerned shall have the right to appeal in accordance with national law and shall be provided with contacts of representatives competent to act on behalf of the third-country national, however the appeal will not have suspensive effect.

This proposed procedure could be considered an attempt to regularise the practices of some Member States which summarily return third country nationals to other Member States without assessing individual protection needs. In addition, it gives legal standing to the different levels of bilateral cooperation on readmission between Member States, which, particularly in the cases for informal cooperation is undermining the EU framework, including but not limited to the Dublin Regulation which stipulates in Article 18(1) what should happen in case a person whose asylum claim is pending, withdrawn or rejected applies for asylum or is found in an irregular situation in another country. It thereby risks undermining the efficiency of EU law and the achievements of harmonized practices across the Union. The approach seems at odds with the objective stated in the Explanatory Memorandum that “A well-functioning Schengen area requires rules to be applied in a uniform way, both at the external and internal borders”.

The practices of summary returns take place either under formal or informal readmission agreements as reported in ECRE’s Asylum Information Database (AIDA).<sup>35</sup> The legality of practices under these agreements, including the denial of access to asylum, has been successfully challenged in different Member States. The Italian Civil Court of Rome recognised the informal readmissions between Slovenia and Italy as unlawful in July 2020 and ordered the issue of a visa for a Pakistani man who did not have access to the asylum procedure due to the readmission to Slovenia.<sup>36</sup>

In July 2021, the Austrian Administrative Court Steiermark ruled that the readmission of a Moroccan national at the border with Slovenia was unlawful, that his request for asylum was ignored, the treatment of the persons was inadequate and it also came to the conclusion that it is credible that unlawful returns are applied partly as a method in Austria.<sup>37</sup> A similar ruling of the same Austrian court was issued in February 2022 on the case of a Somali national who was a child at the time of the border crossing.<sup>38</sup> In Slovenia, the Administrative Court ruled that the Republic of Slovenia violated the applicant’s right to asylum, the prohibition of collective expulsions and the principle of non-refoulement by denying a Cameroonian national access to asylum, despite making three verbal requests.<sup>39</sup> This ruling has been confirmed by the Slovenian Supreme Court in April 2021.<sup>40</sup> He was then readmitted to Croatia under a bilateral readmission agreement and chain-refouled to Bosnia Herzegovina.

While the possibility of an appeal is introduced, the fact that this will not have suspensive effect is a shortcoming, especially given that the transfer should be carried out within 24 hours. Short time limits to lodge an appeal may raise concerns regarding the right to an effective remedy as they create increased difficulties in appealing the transfer decision, accessing information and legal assistance, and put individuals at risk of refoulement if the risk of ill treatment upon return is not thoroughly assessed.

In ECRE’s view, providing a third country national and potential applicant for international protection with the automatic right to remain on the territory and adequate legal support during the period within which the right to an effective remedy is exercised and pending the outcome of the remedy is the best guarantee of the right to an effective remedy and the principle of non-refoulement. Considering the well documented deficiencies in Member

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34. ‘Joint operations’ means police operations, including joint patrols and other joint operations in the field of public order, public security and crime prevention, jointly carried out either in intra-EU border areas or in other areas within the Union by officers of the competent law enforcement authorities of two or more Member States, whereby officers from one Member State act on the territory of another Member State”. <https://bit.ly/3GVz2SO>

35. See AIDA, Country report Austria: Update on the year 2020 (2021) pp. 21; AIDA, Country report Italy : Update on the year 2020 (2021), pp. 20; AIDA , Country report Slovenia: Update on the year 2020 (2021), pp. 19;

36. Civil Court of Rome, 18 January 2021, available at: <https://bit.ly/33d0VnE>.

37. Landesverwaltungsgericht Steiermark, 1 July 2021, available at: <https://bit.ly/3IWEAh5>

38. ORF, 19 February 2022, Illegal Pushback, LDF verurteilt, available at: <https://bit.ly/3H9g6zT>

39. See Border Monitoring Violence Network, July 2020, Court finds Slovenian State guilty of chain pushbacks to Bosnia Herzegovina, available at: <https://bit.ly/3AUWNZS>; See AIDA, Country report Slovenia: Update on the year 2020 (2021) pp. 21

40. See Border Monitoring Violence Network (2021), Open Letter in Support of Plaintiff Chain Push-Backed from Slovenia, available at: <https://bit.ly/33L9AId>

States' asylum and reception systems and the violations of rights of those in need of protection documented by the numerous sources and extensive litigation across the Union, it cannot be automatically assumed that the level of protection and access to it is comparable across the EU. Therefore, the lack of suspensive effect may result in undermining the right to effective remedies and other fundamental rights under Charter. This is particularly concerning given that individuals in formal or informal readmission cooperation between Member States have been subject to chain refoulement to countries outside the EU. Cases of refoulement of people through different EU Member States to a country outside the EU (e.g. from Austria, via Slovenia and Croatia to Bosnia-Herzegovina) have been documented in AIDA and other sources.<sup>41</sup> Moreover, the resources that will need to be allocated to remedy the instances of unlawful transfers should be considered.

The fact that bilateral readmission cooperation may be aimed at circumventing Dublin III can be illustrated by the case of Germany, which had introduced a procedure based on administrative regulations and special administrative readmission agreements that enables the Federal Police to refuse entry at the border and send people back to Greece and Spain within 48 hours if they have previously applied for asylum there. The legality of the procedure has been questioned by legal experts,<sup>42</sup> and forced returns that took place on its basis were subject to court challenges, including requests for interim measures to bring back the forcibly returned applicants. The administrative court of Munich ordered the German Federal Police to bring back the asylum seeker from Greece in two cases in 2019 and 2021.<sup>43</sup> While the two cases are still pending, the 2021 decision on interim measures states that the Dublin Regulation has to be applied instead of the procedure foreseen by the administrative regulations agreements, and that the removal cannot take place without an examination by the Federal Office for Migration and Refugees, which is the competent authority for the Dublin procedure.<sup>44</sup> Latest information indicates that the two agreements are no longer used.

Recital 25 even encourages a proliferation of related agreements and practices by suggesting that Member States should be “able to take additional measures to counter irregular movements between Member States, and combat illegal stays”. Recital 27 further clarifies that the new “transfer procedure should not affect existing bilateral agreement or arrangement where such persons are detected outside of the vicinity of internal borders. To facilitate those agreements and to complement the objective of protection the area without internal borders, the Member States should be afforded the possibility to conclude new agreements or arrangements and update existing ones”.

A requirement for Member States to notify the European Commission on modifications or updates of readmission agreements is introduced but this fails to include the obligation on the part of the European Commission to review compliance with EU law and does not address the concern that bilateral practices are encouraged within EU law.<sup>45</sup>

The proposed practices have been frequently deemed unlawful in national courts where individual protection needs were not assessed and risk violating the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), protection in the event of removal, expulsion or extradition (Article 19 CFREU) through proposed EU legislation. The suggestion that it should be “subject to safeguards and carried out in full respect of fundamental rights and the principle of non-discrimination enshrined in Article 21 of the Charter to prevent racial profiling” is only mentioned in Recital 26 rather than the relevant Article. It is not sufficient to address the considerable concerns that persist. Also, the proposed geographic description leaves too much room for interpretation when it comes to how close to the border a person would have to be in order to be subject to the proposed measures.

ECRE therefore suggests deleting Article 23(a) and the related procedure set out in ANNEX XII.

If co-legislators decide to maintain the proposed paragraph, ECRE proposes the following amendments to Article 23a to ensure effective access to the asylum procedure, in compliance with the right to asylum (Article

41. See AIDA Austria Report (2021), p. 21; AIDA Slovenia Report (2021), pp. 21; Info Kolpa (2019), Report on illegal practice of collective expulsion on Slovene-Croatian border, available at: <https://bit.ly/3rmyUHG>; Protecting Rights at Borders Project (2021) available at: <https://bit.ly/3H6Tznm>

42. A collection of statements by various experts and institutions can be found at: <https://bit.ly/2zwUPTs>. See also Anna Lübke, Vereinbarkeit der Zurückweisungspraxis unter dem deutsch-griechischen »Seehofer-Abkommen« mit unionsrechtlichen Vorgaben zum effektiven Rechtsschutz, 6 December 2018, available in German at: <https://bit.ly/2VyPGQq>; ECRE, Bilateral Agreements: Implementing or Bypassing the Dublin Regulation?, December 2018, available at: <https://bit.ly/2GgVoEf>.

43. Administrative Court Munich, Decision M 22 E 21.30294, 4 May 2021 – see Asylmagazin 7-8/2021, 292, available in German at <https://bit.ly/3ID8113>; Decision M 18 E 19.32238, 8 August 2019 – see Asylmagazin 10-11/2019, 371; available in German at: <https://www.asyl.net/rsdb/m27488/>.

44. See forthcoming AIDA Germany Report (2022).

45. For more information, see ECRE Policy Note “Making the CEAS work starting today” available at: <https://bit.ly/3LYlx8G>

18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), protection in the event of removal, expulsion or extradition (Article 19 CFREU):

Article 23a:

1. This Article applies to the apprehension of a third-country national in the *immediate* vicinity of internal borders, in circumstances where all of the following conditions are fulfilled:

- a) the third country national concerned does not or no longer fulfils the entry conditions laid down in Article 6(1);
- b) the third country national is not covered by the derogation laid down in Article 6(5) **point (a)**;
- c) the third country national is apprehended as part of cross-border police operational cooperation, in particular, during joint police patrols;
- d) there are clear indications that the third country national has arrived directly from another Member State, on the basis of information immediately available to the apprehending authorities, including statements from the person concerned, identity, travel or other documents found on that person or the results of searches carried out in relevant national and Union databases.

***This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection as set out in Article 3(b), 4 and 14 (1).***

2. The competent authorities of the Member State may, based on a finding that the third country national concerned has no right to stay on its territory, decide to **immediately** transfer the person to the Member State from which the person entered or sought to enter, in accordance with the procedure set out in Annex XII.

***Appeals of decisions refusing the right to stay shall have automatic suspensive effect and the third country national shall remain on the territory pending the outcome of the appeal.***

3. Where a Member State applies the procedure referred to in paragraph 2, the receiving Member State shall be required to take all measures necessary to receive the third country national concerned ***in accordance with the procedures if the decision refusing the right to stay is upheld on appeal set out in Annex XII.***

4. From [one year following the entry into force of the Regulation] and annually thereafter, Member States shall submit to the Commission the data recorded in accordance with point 3 of Annex XII, regarding the application of paragraphs 1, 2 and 3.”

There are also a list of amendments to the related procedure described in Annex XII that should be considered to further clarify the process and ensure additional safeguards are in place. This relates particularly to the question of which authority is in charge of completing the standard form and whether they are adequately trained and equipped to consider international protection requests and vulnerabilities.

While the completed form should be handled to the third country national, the person concerned does not have the possibility to comment on the information provided therein. Given that the information recorded in the form may be subject to a subsequent appeal proceeding, ensuring this possibility to comment is key. This is also in line with the comments of the European Data Protection Supervisor (EDPS) on the proposed Screening Regulation.<sup>46</sup>

To address the heightened risk of chain-refoulement and other violations of fundamental rights, the presence of relevant independent national authorities with the mandate to monitor human rights a requirement to inform and provide access to them when transfers are happening should be introduced.

“ANNEX XII PART A Procedure for transferring persons apprehended at the internal borders

1. Decisions shall state the grounds for finding that a person has no right to stay. They shall take effect immediately.
2. The decision shall be issued by means of a standard form, as set out in Part B, completed by the

46. In relation to the debriefing form in the proposed Screening Regulation, the EDPS “underlines that the accuracy of the information is crucial as it will to great extent determine the situation of the data subject, including their procedural rights”. See EDPS Opinion on the New Pact on Migration and Asylum (2020), available at: <https://bit.ly/3lgFxRB>

competent national authority **in accordance with relevant guidance by the Fundamental Rights Agency**. The completed standard form shall be handed to the third-country national concerned, who shall **be able to comment on the information therein**, acknowledge receipt of the decision **and that it was provided in the language s/he understands** by signing the form and shall be given a copy of the signed form. Where the third-country national refuses to sign the standard form, the competent authority shall indicate this refusal in the form under the section 'comments'.

3. The national authorities issuing a refusal decision shall record the following data:

- a) to the extent that these can be established by them, the identity and nationality of the third-country national concerned,
- b) the references of the identity document, if any,
- c) where available, copies of any documents or data relating to the identity or nationality of the third country national concerned, in combination with the relevant national and Union databases.

**New d) whether they have indicated their wish to apply for asylum**

- d) the grounds for refusal,
- e) the date of refusal,
- f) the Member States to which the third country national was sent back.

4. The national authorities issuing a refusal decision shall collect the following data:

- a) the number of persons refused entry;
- b) the number of persons refused stay;
- c) the number of persons sent back;

**New d) the gender and age of the persons referred to in points (a) to (c)**

- d) the Member State(s) to which persons were sent back;
- e) where this information is available, the nationality of the third country nationals apprehended;
- f) the grounds for refusal of entry and stay;

**New g) the number of persons who wished to apply for asylum**

- g) the type of border as specified in Article 2 point 1 of Regulation (EU) 2016/399 at which the third country nationals were sent back.

**This data should be made available publicly on regular basis and at least every six months.**

5. Persons refused entry or the right to stay shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide **legal aid, representation and interpretation information on representatives competent to act on behalf of the third-country national** in accordance with national law shall also be given to the third-country national in a language that they understand or are reasonably supposed to understand. Lodging such an appeal shall ~~not~~ have suspensive effect.

6. The authorities empowered under national law shall ensure that the third-country national subject to a refusal decision is transferred to the competent authorities of the neighbouring Member State **immediately and within 24 hours at the latest. The relevant national human rights institutions, Ombudsperson of National Preventative Mechanism of both Member States shall be informed about the transfer and be allowed access to monitor the transfer and subsequent treatment of the third country national.** The authorities empowered under national law in the neighbouring Member State shall cooperate with the authorities of the Member State to that end.

7. If a third-country national who has been subject to a decision referred to in paragraph 1 is brought to the border by a carrier, the authority responsible locally may:

- (a) order the carrier to take charge of the third-country national and transport him or her without delay to the Member State from which he or she was brought;
- (b) pending onward transportation, take appropriate measures, in compliance with national law and having regard to local circumstances, to prevent third-country nationals who have been refused entry from entering illegally.



## V. AMENDMENT TO RETURN DIRECTIVE ARTICLE 6(3)

Alongside the proposed procedure to transfer people from one Member State to another is a proposal to amend the Return Directive to make reference to the proposed procedure. It clarifies that the Member State who receives the third country national under the new transfer procedure proposed in Article 23(a) or a bilateral agreement or arrangement would be required to issue a return decision.

One change proposed for these cases is that none of the exceptions to the issuing of a return decision shall apply, including the possibility for Member States to grant residence permit for compassionate, humanitarian or other reasons.<sup>47</sup>

The current rule on return decisions following transfer from another Member States is restricted to bilateral agreements or arrangements that were in place on the date of the entry into force of the Directive. The European Parliament has expressed concern that these bilateral agreements do not offer adequate procedural safeguards, including notification to the person concerned of an individual measure and information regarding available and effective remedies and recourse to appeal.<sup>48</sup> The revised Article paves the way for the proliferation of agreements ahead of the coming into force of the change, as well as for the conclusion of new agreements on an ongoing basis.

Given the cumulative conditions that need to apply for Member States to make use of the procedure proposed in Article 23(a), including the practice of joint patrols in intra-EU border areas, the most likely impact of the European Commission's SBC proposal is actually not the application of EU rules related to readmission cooperation but the mushrooming of informal and formal readmission between Member States. The objective of the proposal seems to be to significantly expand Member States' practices of summary returns at internal borders under bilateral readmission agreements. This would undermine the effectiveness of rules set out in EU law, lead to divergent practices across Member States and have a negative impact on other areas where EU and Member States have shared competences. It also generates the risk of serious violations of rights, and likely result in legal challenges in national courts. The fact that these proscribed practices are connected to the automatic issuance of return decisions without consideration of individual circumstances exacerbates these risks.

ECRE therefore suggests deleting the proposed amendment to the Returns Directive.

If co-legislators decide to maintain the proposed paragraph, ECRE proposes the following amendments:

Article 6(3) of Directive 2008/115/EC is replaced by the following:

"3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State in accordance with the procedure provided for in Article 23a of the EN 49 EN Regulation (EU) 2016/399 of the European Parliament and of the Council\* ~~or under bilateral agreements or arrangements.~~

The Member State which has taken back the third-country national concerned in accordance with the first subparagraph shall issue a return decision in accordance with paragraph 1. ~~In such cases, the derogation laid down in the first subparagraph shall not apply.~~

~~Member States shall without delay notify any existing, amended or new bilateral agreements or arrangements to the Commission.~~

\* Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 077 23.3.2016, p. 1).

47. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive (2008)), Article 6(4).

48. European Parliament Resolution of 17 December 2020 on the implementation of the Return Directive, see: [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0362_EN.html)

## VII. TEMPORARY REINTRODUCTION OR PROLONGATION OF BORDER CONTROL AT INTERNAL BORDERS (ARTICLE 25 FF)

The SBC proposal includes several provisions that deal with the introduction of internal border controls, including the criteria for their introduction (Article 26), the notification process and related risk assessment (Article 27) and a so-called Schengen safe-guard mechanism if a majority of Member States are affected (Article 28). It is important to recall, however, that the reintroduction of border control at the internal borders must be applied as a last resort measure, in exceptional situations, and must respect the principle of proportionality. The scope and duration of reintroduced border control should be restricted to the bare minimum needed to respond to the threat in question.

The relevant provisions in the proposal repeat the presentation of movements of third country nationals, including people seeking protection, as threat to public policy or internal security.<sup>49</sup> As highlighted above, ECRE is concerned about the codification unauthorised movements of third country nationals as security threat. The proposed measures also facilitate a practice of violent containment of people in need of protection in the Member State of first arrival in Europe in the case of a serious and large scale displacement crisis. In a situation where deliberate or unintentional mistreatment of rights of people seeking asylum create the situation where people are trying to move, allowing reinstatement of border controls comes with significant risks for the rights of people concerned.

The SBC is not fit for purpose to address the lack of compliance of Member States with the asylum acquis and the dysfunctionalities of the Dublin Regulation. The proposed measures risk to exacerbate rather than alleviate the current challenges.

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49. See Article 25(1)(c): a situation characterised by large scale unauthorised movements of third-country nationals between the Member States, putting at risk the overall functioning of the area without internal border control;



**ecre**

European Council  
on Refugees and Exiles

**European Council on Refugees and Exiles**

Avenue des Arts 7/8

Brussels 1210

Belgium

T. +32 232 900 40

[ecre@ecre.org](mailto:ecre@ecre.org)

[www.ecre.org](http://www.ecre.org)