

SCHENGEN BORDERS CODE AMENDMENTS: MORE HOSTILE BORDERS; LESS SPACE FOR HUMAN RIGHTS

ECRE'S ASSESSMENT OF THE COMMISSION PROPOSAL FOR AMENDMENTS TO THE SCHENGEN BORDERS CODE.

I. INTRODUCTION

On 14 December 2021, the European Commission presented 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 or SBC amendments"). The targeted changes aim to bring greater EU coordination and better equip Member States to deal with emerging challenges when managing both the EU's common external border and internal borders within the Schengen area. The update also addresses public health crises and situations of the "instrumentalisation" of migrants by third countries.

The proposal can be viewed as part of a mini-package, along with the Regulation addressing situations of instrumentalisation in the field of migration and asylum (COM(2021) 890) (the "Instrumentalisation Regulation") and the proposed Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, that came out earlier in December 2021.

For the provisions relating to epidemics, ECRE welcomes the fact that requesting asylum and humanitarian grounds would be considered as essential travel and would, therefore, be exempt from restrictions at EU borders.

Nonetheless, ECRE has serious concerns about many of the other SBC amendments, including the necessity and proportionality of the measures; the definition of instrumentalisation; the limiting of number and opening times of border crossings; the expansion of border surveillance; the broad exercise of imprecise public powers; the increases in the transfer of people across internal borders with fewer safeguards; and amendments to the Return Directive that could mean a proliferation of bilateral readmission agreements and people being subject to return decisions without an individual assessment.

For these reasons, ECRE recommends rejecting the most harmful amendments, such as the concept of instrumentalisation itself and the restriction of access at the border for people who could be seeking asylum. ECRE also proposes improvements should these concepts be maintained. A summary of ECRE's recommendations for the co-legislators is included at the end of this note, which should be read in conjunction with ECRE's more detailed Comments on the [Schengen Borders Code](#) amendments and the [Instrumentalisation Regulation](#).

II. ANALYSIS

The following are the main areas of concern for ECRE:

Necessity and Proportionality

ECRE has questioned whether the provisions in the Schengen Borders Code amendments meet the requirements of necessity and proportionality. For instance, the proposed measure to make 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, but it could have a very serious impact for those seeking asylum. It is also doubtful whether the measures are consistent with Article 77 of the Treaty of the Functioning of the EU (TFEU) "ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders," to which the Schengen Borders Code should contribute.

Definition of "Instrumentalisation"

ECRE has concerns about the definition of "instrumentalisation" that has been included in the amendments, as well as the strategy of responding to third countries' "instrumentalisation" with measures that make access to asylum in Europe more difficult. Actions by the EU and Member States should be directed against the third country itself, rather than people seeking asylum. In addition, the definition of instrumentalisation included in the Schengen Borders Code amendment is overly broad and includes ill-defined terms, such as actions, 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. ECRE recommends rejecting the concept of instrumentalisation and its codification in law, but if it is to be maintained then much greater clarity on the criteria and the authorisation procedure are needed.

Limiting the number of border crossings and their opening hours

The proposed Schengen Border Code amendments also include a new paragraph limiting the number of border crossing points in the event of the instrumentalisation of migrants. This will make it more difficult for people seeking international protection to reach points where they can apply for asylum. To ensure genuine and effective access to the asylum procedure, Member States must ensure that a sufficient number of registration points are functioning, that applicants receive relevant information about them, and that border guards are adequately trained, but also that applicants are able to safely and legally reach these points. Particular attention should be paid to access for vulnerable groups.

Expanding border surveillance

In a situation of instrumentalisation, the proposal requires Member States to "address the increased threat" by increasing "the resources and technical means to prevent an unauthorised crossing of the border." Drones, motion sensors and mobile units are all mentioned as technical means that can be used. There is no objective of saving lives or protecting people. Whilst the proposal refers to the actions and intentions of states that "use people" it is the people themselves that are presented as a threat and targeted by the measures. In reality, people who have been subject to instrumentalisation by third country governments are likely to have faced ill-treatment. They should not be seen automatically as a threat. Any suggestion that the arrival of migrants who have been instrumentalised at the EU's borders shall be met 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 authorisation. Any border surveillance undertaken needs to be carried out in respect of fundamental rights, including the right to asylum.

Exercise of public powers

The provisions related to public powers and authorised border checks are very broad and imprecise. The article differentiates between border checks (allowed) and border controls (not allowed) in the Schengen area. One of the checks that may not be considered equivalent to border control is a measure aiming 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”. Whilst it demands that Member States do not discriminate against persons on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, it is difficult to imagine how the measures will be carried out without intensified racial profiling. This generates the risk of discriminatory treatment, including of EU nationals, as well as obstruction of access to asylum in Europe and undermining of fairness towards third-country nationals. It also seems to contradict the overall objective of the SBC of ensuring the absence of border controls.

Procedure for transferring persons apprehended at the internal borders

The SBC amendments introduce a procedure for transferring people across internal borders. A range of conditions need to be fulfilled for the new procedure to take place, 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 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 policy cooperation. In these cases, the proposal suggests a procedure, 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 however the appeal will not have suspensive effect. Thus, the proposed procedure seems to be 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 which risks violating a range of fundamental rights.

Amendment to the Return Directive

The suggested amendments to the Return Directive are related to the transfer procedure at internal borders. It clarifies that the Member state who receives the third country national under the new transfer procedure, or another bilateral agreement or arrangement, would be required to issue a return decision. It is also proposed that current exceptions to issuing a Return Decision, such as on compassionate or humanitarian grounds, would not apply. At the moment, the current rule on return decisions following a transfer from another Member State is restricted to bilateral agreements that were in place on the date of entry into force of the Return Directive. Removing this restriction would contribute to the proliferation of bilateral readmission agreements among Member States, leading to divergent practices that undermine common procedures under EU law, and to people being subject to return decisions without individual assessments.

Good practice: Exemptions to travel restrictions

In the proposal, requesting asylum and humanitarian grounds are considered as essential travel and therefore would be exempt from restrictions on travel in case of an epidemic. This is in line with EU and international law, and is welcomed.

III. RECOMMENDATIONS

- ECRE rejects introducing the concept of instrumentalisation into EU law and argues it should be withdrawn (both its definition in the Schengen Borders Code amendments and the Regulation on Instrumentalisation itself). If instrumentalisation is codified in EU law, it must be defined narrowly and clearly. The authorisation procedure should be set out in a detailed way, including criteria to be fulfilled, information to be provided by Member States, and detailed description of the responsibilities of the European Commission, Council and the European Parliament in the process.
- ECRE recommends deleting Article 5(4) and the possibility to limit border crossings and their opening hours. If it is kept, then Member States should ensure that a sufficient number of border crossings and registration points are available for lodging an application for asylum and that all applicants are able to reach them safely and legally.
- ECRE requests the inclusion of an obligation for border surveillance to contribute to protecting and saving the lives of migrants. ECRE recommends deleting Article 13(5) that allows for increased surveillance and the use of modern technologies to prevent an unauthorised crossing of the border. If it is kept, it should be made clear that any measures must be necessary and proportionate and ensure the smooth operation of asylum and reception systems.
- ECRE suggests changing Article 23 to ensure that the exercise of public powers is based on specific evidence provided by the competent authorities, rather than just on general information or “experience”. It also recommends that combating irregular residence and stay and measures linked to irregular migration

be deleted from the list of measures that may not be seen as equivalent to border checks.

- ECRE further recommends deleting Article 23(a) – the procedure for the transfer of persons apprehended at the internal border – as well as the corresponding Annex XII. If it is maintained ECRE suggests including that the procedure is without prejudice to the right to asylum and that appeals of decisions refusing a right to stay will have automatic suspensive effect.
- ECRE suggests deleting the proposed amendment to Article 6(3) of the Returns Directive. If it is maintained, it should be limited so it does not encourage a proliferation of bilateral readmission agreements. The current exceptions to issuing a return decision on compassionate and humanitarian grounds should apply.
- ECRE welcomes the fact that seeking international protection and other humanitarian reasons would be seen as essential travel in times of an epidemic and, therefore, will not be subject to travel restrictions.