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ECRE COMMENTS ON THE REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EU) 2016/399 ON A UNION CODE ON THE RULES GOVERNING THE MOVEMENT OF PERSONS ACROSS BORDERS

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SUMMARY OF VIEWS

Crossing of external borders (Article 5(3)): This Article allows Member States to use unspecified "necessary measures to preserve security, law and order" in cases where a large number of people attempt to cross the external border in "an unauthorised manner, en masse and using force." While the text also recalls the need for proportionality and the upholding of fundamental rights, the broad formulation of the provision could easily be misused by Member States. Additionally, the framing of refugees and other displaced individuals as a security threat perpetuates a narrative that overlooks or minimises their need for protection.

Closing border crossing or limiting their opening hours (Article 5(4)): Member States will be allowed to temporarily close specific border crossings or limit their opening hours including in – but not limited to – situations of instrumentalisation. This will adversely affect the right to seek asylum. When closing or restricting border crossings, Member States are obliged to ensure genuine and effective access to the asylum procedure, meaning that sufficient border crossing points should be available, that they can be reached safely, and that information about them is provided. Particular attention should be given to providing access to asylum for vulnerable applicants.

The inclusion of instrumentalisation (Recital 12 & Article 5(4)): ECRE regrets that the concept of instrumentalisation has been integrated into the Schengen Borders Code (SBC). The definition of instrumentalisation which appears in Article 1(4)b of the Crisis Regulation, is overly broad and contains several unclear terms. The mention of non-state actors as potential actors of instrumentalsation is particularly concerning. Measures allowed in response to instrumentalisation in the SBC do not require the formal process of an assessment by the European Commission and a Council Decision, which are, in contrast, required by the Crisis Regulation. This opens up the possibility that Member States will limit border crossings in a range of circumstances, claiming instrumentalisation.

Expanding border surveillance (Article 13): The Regulation highlights that the main purpose of border surveillance is to prevent unauthorised border crossings and to then deploy the necessary resources to discourage such crossings. The text prioritises the prevention of unauthorised border crossings over protecting and saving people's lives. The mention of accessing "all necessary resources, including modern technologies", raises concerns about data protection, privacy, and the right to a fair asylum procedure. It is therefore important to consider the impact of using new technologies for migration management on access to asylum.

Restrictions on travel to the EU (Article 21a): Restrictions on non-essential travel to the EU in cases of a health-related emergency do not apply to beneficiaries of international protection and their respective family members nor to people needing international protection or travel for other humanitarian reasons. Both provisions are welcome as they align EU and international law.

Checks within the territory (Article 23): The provisions related to exercising police or public powers and authorised border checks may generate discriminatory treatment, obstruct access to asylum in Europe, and undermine fairness towards third-country nationals. Furthermore, the language used in the Article has changed from "combating irregular residence or stay, linked to irregular migration" to "reducing illegal immigration", which perpetuates negative stereotypes.

Procedure for transferring persons apprehended at the internal borders (Article 23a): This new and optional procedure attempts to regularise and encourage summary returns at the EU's internal borders. While applicants and beneficiaries of international protection are supposed to be excluded from the scope, whether this will indeed be the cases remains questionable, particularly given current practices. There are fundamental rights concerns due to the limited safeguards attached to the procedure, including that children and vulnerable groups are not exempted, that the transfer takes place in 24 hours, and that the appeal does not have suspensive effect.

General framework for the temporary reintroduction or prolongation of border control at internal borders (Article 25) and Procedure for cases requiring action due to unforeseeable and foreseeable events (Article 25a): In exceptional situations that involve sudden and large-scale migration movements, Member States can introduce border checks at internal borders. In cases of unforeseeable events, they can be prolonged to up to 14 months and in cases of foreseeable events up to two years. It remains to be seen whether the revised rules will have any impact on Member States' current practices of unlawful border controls.

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 (the Schengen Borders Code (SBC)), hereafter referred to as the "SBC proposal".

The proposed amendments correspond to the particular context at the end of 2021 and thus presents a targeted reform of the SBC focusing particularly on three areas. First, provisions related to pandemics and health emergencies aimed to apply the learning from the Covid 19 pandemic and the related travel restrictions and management of borders in the Schengen area. Second, revisions of rules applicable to the application and prolongation of border checks and related activities not classed as border checks, given the persistent and ongoing use of internal border checks by certain Member States. Third, the introduction of the concept of instrumentalisation of migration as a response to the situation of people arriving at the EU's border with Belarus. In addition, a transfer procedure for people apprehended at internal borders was proposed.

These Comments only relate to the provisions that have been amended or added by the SBC proposal and the related reforms, rather than to the SBC as a whole.

The SBC proposal was presented alongside a proposal for a Regulation addressing situations of instrumentalisation in the field of migration (COM(2021) 890), ("the Instrumentalisation Regulation"), which built on the proposal for a Council Decision on provisional emergency measures for the benefit of three Member States bordering Belarus put forward on 1 December 2021 but never formally adopted by the Council.

The SBC and the Instrumentalisation Regulation were closely connected proposals in that the definition of instrumentalisation was included in the SBC. The Instrumentalisation Regulation, using the SBC definition, included a set of derogations to asylum and return standards which Member States could make use when facing instrumentalisation. As negotiations on the Instrumentalisation Regulation stalled in the Council – and never took off in the European Parliament – due to its controversial nature, the provisions on instrumentalisation were instead included in the proposal addressing situations of crisis and force majeure in the field of migration and asylum (COM(2020) 613) ("the Crisis Regulation"). Instrumentalisation is one of three special legal regimes which adapt the standard rules through access to increased solidarity and the use of derogations. The Crisis Regulation forms part of the New Pact on Migration and Asylum ("the Pact").

The final outcome of the negotiations between the Council and the European Parliament on the SBC proposal and the Pact was that the definition of instrumentalisation was moved from the SBC to the Crisis Regulation. The SBC references this definition and includes a set of measures that Member States can avail themselves of in such situations. The rules on when Member States can invoke instrumentalisation and how it will be assessed by the European Commission are set out in the Crisis Regulation. A detailed analysis of the relevant provisions and implementation considerations can be found in ECRE's Comments on the Crisis Regulation[1] which should be read in conjunction with these Comments on the SBC.

While the two proposals are closely connected through their provisions on instrumentalisation, the measures allowed in cases of instrumentalisation under the SBC are more lightly regulated, not requiring the European Commission's assessment and the Council Implementing Decision. This poses significant risks regarding the frequency with which the measure may be used, the impact on rights of people seeking asylum and the overall objective of harmonised border management.

The SBC is also closely linked to another Pact file, namely the Regulation of the European Parliament and of the Council introducing the screening of third-country national at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 ("the Screening Regulation"). The Screening Regulation forms part of the Schengen *acquis* and introduces a pre-entry screening process for third-country nationals at the EU's external borders and in the interior of EU Member States' territory for those apprehended in connection with irregular border crossings or found to be irregularly staying.[2] Despite the close connection between the pre-entry screening process and the management of borders, there is no reference to the Screening Regulation in the amended SBC. This is particularly note-worthy. First, provisions in the Screening Regulation such as the monitoring mechanism to be established could address concerns related to limiting access to asylum at the EU's external border. Second, at some points, provisions in the SBC seem to replicate provisions that exist under the Screening Regulation, as in the case of checks at the internal border.

1. See ECRE Comments on the Crisis Regulation (May 2024) available here: ECRE_Comments_Crisis-and-Force-Majeure-Regulation.pdf.
2. For a detailed analysis of the Screening Regulation, see ECRE Comments (February 2024) available here: ECRE_Comments_Screening-Regulation.pdf.

EXTERNAL BORDERS

ARTICLE 5: CROSSING OF EXTERNAL BORDERS

In Article 5 which regulates the crossings of the EU external border, a new paragraph is added to Article 5(3) which states that:

"Member States may take the necessary measures to preserve security, law and order, where a large number of migrants attempt to cross the external border in an unauthorised manner, en masse and using force."

This addition, which portrays the presence of "a large number of migrants" as a situation that may necessitate the implementation of measures to safeguard security or law and order, perpetuates the narrative that refugees and other displaced people are security threats rather people who require protection. It appears to selectively incorporate elements of the *N.D. & N.T.* judgment[3] into EU secondary legislation without consideration of the specific characteristics of the case.

The application of a selective interpretation of the judgement creates the risk of overlooking the numerous fundamental rights guarantees that remain applicable at every border and for every applicant, in particular, the right to asylum under Article 18 of the EU Charter of Fundamental Rights ("EU Charter"), and the protection against non-refoulement in EU primary and secondary law and international law.[4] This is particularly worrying as there is no definition of the "necessary measures" a Member States may take. Allowing Member States to use unspecified measures may lead to situations where excessive force is used, which could result in violations of Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the European Convention on Human Rights (ECHR). It may also lead to violations of the right to life, the right to integrity, and the protection from ill-treatment enshrined in the EU Charter.

To address this risk, Article 5(4c) states that these "necessary measures" would need to be implemented in a manner that is proportionate and takes full account of the rights of third-country nationals seeking international protection. This is consistent to the way in which other provisions, such as Article 14 on refusal of entry recognise that the right to asylum and access to protection constrains the implementation of the SBC. Thus, any "necessary measures" taken by Member States will need to be devised accordingly.

Implementation considerations

Terms such as "large" number of migrants, "en masse", and "using force" lack specificity, which could lead to varying interpretations and, therefore, would lead Member States to construe many situations as requiring the use of what they deem to be necessary measures, including the use of force. Unlike the Crisis Regulation which tightly regulates the use of the special regimes for exceptional situations, the SBC leaves it to Member States assess the situation and to decide on the measures to apply.

By allowing yet another case in addition to the ones detailed in the Crisis Regulation where Member States can take additional measures at the border there is a risk that the SBC further undermines the objective of achieving harmonised standards of management of the EU's external border.

ECRE Recommendations:

Member States must ensure that individuals have access to fair and effective asylum procedures as stipulated in Articles 4, 18 and 19(2) of the EU Charter. This has also been also been reaffirmed by the ECtHR in the case of *N.D. and N.T. v. Spain*, which states that attempting to cross an external border en masse and using force does not justify derogating from human rights obligations; effective access to asylum must be guaranteed.

3. ECtHR, N.D. and N.T. v. Spain [GC], Application nos. 8675/15 and 8697/15, 13 February 2020, Legal summary and judgment available at: https://bit.ly/2PgxBcm.
4. The Court reaffirmed that the conclusions reached do not call into question "the broad consensus within the international community that border arrangements should comply with the principle and the absolute nature of Article 3" (para 232). For ECRE's assessment of the N.D. and N.T. v. Spain judgment in light of subsequent jurisprudence, see ECRE's Legal Note 'Across Borders: The Impact of N.D. and N.T. v Spain in Europe.' Available here: Legal-Note-10.pdf.

While it is not required, in order to ensure uniform management of the Schengen area, Member States should inform the Commission of the necessary measures that they are taking under Article 5(3).

The European Commission should use the Schengen Evaluation and Monitoring Mechanism (SEMM) to assess the measures taken under Article 5(3) and their impact on the border management.

The Schengen and Border Scrutiny Working Group of the LIBE Committee should regularly inquire about the measures taken under Article 5(3) and the related impact on access to asylum.

Article 5(4) allows Member States to temporarily close specific border crossings or limit their opening hours, in particular but not limited to situations of instrumentalisation of migrants.

It states that "Member States may, in particular in a situation of instrumentalisation of migrants as referred to in Article 1(4), point (b) first sentence of Regulation (EU) 2024/1359 of the European Parliament and of the Council, temporarily close, or limit the opening hours of specific border crossing points as notified pursuant to paragraph 1, second subparagraph of this Article, where the circumstances so require."

Recital 12 refers to the definition of of instrumentalisation included in Article 1(4)b of the Crisis Regulation, which defines it as a situation "where a third country or hostile non-state actor encourages or facilitates the movement of third-country nationals and stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security".

The Crisis Regulation further clarifies that situations in which hostile non-state actors are involved in organised crime, in particular smuggling and humanitarian assistance operations, should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union as a whole or a Member State.

This definition of instrumentalisation is broad, which means that various instances at the EU's external border could be considered to fall under it. In addition, it includes a number of vague terms such as "hostile non-state actor" and it does not specify what could constitute encouragement of third-country nationals and stateless persons to the border.[5] Both the breadth and the lack of clarity are concerning as they could lead to a situation where Member States frequently argue that they are facing an instrumentalisation situation.

The inclusion of non-state actors is of particularly concern due to the potential misuse by Member States seeking to limit civil society activity. ECRE welcomes the fact that some humanitarian assistance operations should not be considered as instrumentalisation of migrants. However, the exemption only applies to humanitarian operations that do not "aim" to destabilise the Union or a Member State which raises concerns because there are no clear criteria provided to determine "intent", nor does the Regulation define "humanitarian operations".

In addition, while the initial proposal from the European Commission mentioned the possibility to close or limit opening times of border crossings only cases of instrumentalisation for which an authorisation process is set out in the Crisis Regulation, the agreed SBC text suggests that there are other situations where Member States would be able to do so. The unclear formulation, referring to "where the circumstances so require", potentially broadens the scope of application of this provision considerably.

Recital 14 clarifies that, instead of an assessment and decision by the Council being mandatory pre-requisites for Member States to restrict border crossings, it is required only that Member States "take into account" whether the European Council has acknowledged that instrumentalisation is taking place. This suggests that there is no formal process during which Member States would be required to demonstrate that they are subject to instrumentalisaton.

Closing or limiting the hours of border crossings can adversely affect the ability of individuals seeking asylum to reach safe points where they can make an asylum claims, particularly when, as stipulated in Recital 14, Member States will be allowed to limit border traffic "to the minimum". This may potentially undermine Article 3(b), which stipulates that the application of the SBC should be "without prejudice to the rights of refugees and

5. For a detailed analysis and critique of the definition of instrumentalisation, please see ECRE's Comments on the Crisis Regulation, page 9 ff.

persons requesting international protection, in particular as regards non-refoulement".[6]

Again, there is an attempt to address this obvious risk by including a reminder to Member States in Recital 14 that they should "guarantee genuine and effective access to international protection procedures" and that limitations should be applied "in a manner that ensures that obligations related to access to international protection, in particular the principle of non-refoulement, are respected". The CJEU has clarified that the effectiveness of the right to asylum under Article 18 of the EU Charter depends on the applicant's unhindered and timely access to the asylum procedure.[7]

Whether genuine and effective access to asylum can be guaranteed when the grounds for limiting access to border crossings are so broadly defined remains questionable.

Implementation considerations

Given the broad definition of what constitutes instrumentalisation and the fact that under the SBC Member States can claim to be confronted with a situation of instrumentalisation without following the assessment process detailed in the Crisis Regulation, it is likely that a number of Member States[8] will regularly claim that they are facing instrumentalisation and therefore have to restrict (access to) their border crossings.

It is therefore essential that the European Commission and national oversight bodies closely monitor the situation to ensure that they are aware when a Member State has invoked Article 5(4), how border crossings have been restricted, and what the impact is on access to asylum.

It is expected that the monitoring mechanism to be established under Article 10 of the Screening Regulation[9] records those instances because a reduction or restriction of border crossing points would of course also affect the management of the screening process at the external border.

ECRE Recommendations:

Member States must at all times ensure that they provide genuine and effective access to international protection procedures.

For the purpose of consistency, Member States should only make use of measures permitted under Article 5(4) if a case of instrumentalisation has been established as per the procedure set out in Chapter II of the Crisis Regulation.

In cases where Article 5(4) is invoked, the European Commission should request information from the respective Member State how they guarantee genuine and effective access to asylum.

Both the monitoring mechanism under the Screening Regulation and the SEMM should assess measures taken under Article 5(4).

The EP, particularly the Schengen and Border Scrutiny Working Group of the LIBE Committee, should request regular updates on the measures taken by Member States under Article 5(4).

ARTICLE 13 BORDER SURVEILLANCE

The revised Article 13 includes specific provisions on border surveillance with the aim of clarifying what measures are available to Member States.

Article 13(1) underlines that the main purposes of border surveillance are to prevent unauthorised border

6. For examples 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; Judgment of 17 December 2020, Commission v Hungary, CJEU, C-808/18, ECLI:EU:C:2020:1029, para 77.
7. CJEU, Judgment of 22 June 2023, European Commission v Hungary, C-823/21, ECLI:EU:C:2023:504, para 44.
8. At the time of writing these Comments, 6 Member States regularly state that they are faced with instrumentalisation.
9. See ECRE Comments on the Screening Regulation for a detailed analysis of the monitoring mechanism, page 22. Available at: ECRE_Comments_Screening-Regulation.pdf.

crossings, contribute to raising situational awareness, counter cross-border criminality, and take measures against persons who have crossed the border irregularly.

Article 13(2) further foresees that border guards shall use all necessary resources so as to prevent and discourage people from unauthorised border crossings. Recital (16) clarifies that the technical means could include modern technologies, including drones and motion sensors, as well as mobile units, and, where appropriate, all types of stationary and mobile infrastructure.

Compared to the initial EC proposal, Article 13(1) and Article 13(2) both contain provisions that clarify that surveillance should be carried out in full compliance with the rights of people seeking asylum and fundamental rights. In addition, Article 13(3) specifies that border surveillance should also be used to reduce the loss of lives of migrants at or close to the border. However, in Article 13(4), only the aim to "prevent unauthorised border crossings or to apprehend individuals in connection with unauthorised crossings" is mentioned.

The Article is the outcome of the negotiations between the Council and the European Parliament with the Council and the Commission seeking to expand the use of border surveillance to prevent irregular crossings and the European Parliament seeking to balance this objective with access to asylum and respect for the fundamental rights of people at the EU's external border. Following amendments from the European Parliament, provisions proposed by the Commission which would have required Member States to intensify border surveillance in situations of instrumentalisation were not adopted.

Implementation considerations

While the references to fundamental rights obligations are welcome, increased border surveillance using "all necessary resources, including modern technologies" poses significant risks for data protection, privacy, and the right to a fair asylum process. The challenges of ensuring digital technology respects the principles outlined in the General Data Protection Regulation (GDPR) and the EU Charter have been highlighted by different studies[10] and should be taken seriously by both Member States and the European Commission.

In addition to managing and mitigating the fundamental rights risks that stem from reinforced border surveillance, it is useful to consider how the information and evidence gathered by border surveillance could be used in investigations of allegations of ill-treatment at the border. Both the Fundamental Rights Agency (FRA) and the European Ombudsman have pointed to the fact that currently, the evidence from border surveillance is not used in related investigations[11] which has also been raised in recent case law.[12]

ECRE Recommendations:

FRA should issue guidance on how Member States can ensure that increased border surveillance can be carried out in full compliance with fundamental rights.

Both country-specific and thematic assessments under the SEMM should specifically assess the impact of border surveillance and application of new technologies on access to asylum.

The monitoring mechanisms to be established under Article 10 of the Screening Regulation should have access to border surveillance data and information for the purpose of investigating allegations of ill-treatment.

10. European Migration Network (EMN), February 2022, The use of digitalisation and artificial intelligence in migration management, available at: Joint-EMN-OECD_Digitalisation_and_AI_inform.pdf; Ozkul, D. 2023. Automating Immigration and Asylum: The Uses of New Technologies in Migration and Asylum Governance in Europe. Oxford: Refugee Studies Centre, University of Oxford; Border Monitoring Violence Network, 2021, OHCHR Submission: The role of technology in illegal push-backs from Croatia to Bosnia-Herzegovina and Serbia, available here: bit.ly/4aQZs8S.
11. FRA (2024) Guidance on Investigating Alleged Ill-Treament at Borders. Available at: Guidance on investigating alleged ill-treatment at borders | European Union Agency for Fundamental Rights; European Ombudsman (2024) Conclusions of the European Ombudsman on EU search and rescue following her inquiry into how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations in the context of its maritime surveillance activities, in particular the Adriana shipwreck. Available at: https://bit.ly/3CDrO9M.
12. ECtHR, A.R.E. v. Greece, App No 15783/21, para 132.

ARTICLE 21A: RESTRICTIONS ON TRAVEL TO THE EUROPEAN UNION

The SBC contains new Article 21a, which sets out rules for the uniform application of restrictions on non-essential travel to the EU in the case of large-scale public health emergencies.

As per Article 21a(3)(b), these restrictions do not apply to beneficiaries of international protection and their respective family members. Article 21a(4) and Annex XI of the SBC further clarify that the restriction listed shall not be applied to "persons in need of international protection or for other humanitarian reasons." ECRE welcomes these provisions which are in line with the European Commission's guidance during the Covid 19 pandemic.[13]

INTERNAL BORDERS

ARTICLE 23: CHECKS WITHIN THE TERRITORY

Article 23 clarifies the circumstances under which Member States are allowed to carry out activities in their territory and in internal border areas, given the Schengen rules removing border controls at EU internal borders. It provides a cumulative list of conditions that have to be met in order for the actions of Member States' police or other public powers to be permissible through not reaching the threshold to be considered as equivalent to border checks.

One of the conditions is that the activities are based on general police information and "the experience of the competent authorities regarding possible threats to public security or public policy and aim, in particular to reduce illegal immigration" (Article 23(a)(ii)). This formulation differs from the EC's original proposal, which read "combating irregular residence or stay, linked to irregular migration". Using the term "illegal immigration" instead of "irregular immigration" perpetuates negative stereotypes and fuels anti-immigrant sentiments. It is also important to recall Recital 26 SBC, according to which "Migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security". Thus, the objective of reducing irregular migration should not be construed as automatically bringing activities within the remit of Article 23.

Moreover, migration status is often complicated and may involve various legal intricacies. It is important to note that not all irregular migrants have necessarily broken laws. Some may have valid claims to asylum or other forms of protection under international law. Therefore, referring to all irregular migrants as "illegal" oversimplifies their situations.

Recital (20) also reflects this change in language and further elaborates that the reduction of illegal immigration and of cross-border crime linked to it 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 assessment".

Granting permission to check identity documents will likely lead to increased racial profiling at EU borders. As actions taken under Article 23 do not constitute border checks, it could be argued that the explicit requirement of the SBC to not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation which is stipulated in Article 7(2) in relation to border checks does not apply. However, the Treaty obligations 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" (TFEU Article 67(2)) and "to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia" (TFEU Article 67(3)) are of course applicable.

13. European Commission (2020) 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. Available at: EUR-Lex - 52020XC0417(07) - EN - EUR-Lex.

Implementation considerations

The reform was introduced in the context of the prevalence of internal border checks and the fact that a number of Member States have been conducting them uninterrupted for years.[14] The intention was to encourage Member States to apply measures under Article 23 instead of border checks through broadening the circumstances under which Member States can carry out activities in their territory and at internal borders that do not amount to border checks. Whether this will in fact be taken up by Member States remains to be seen.

In addition, it is unclear how the activities under Article 23 interact with the possibility for Member State to conduct screening processes inside their territory under Article 7 of the Screening Regulation.[15] The screening process in the interior is required for third-country nationals who "have crossed an external border to enter the territory of the Member States in an unauthorised manner and have not already been subjected to the screening in a Member State".

Measures taken under Article 23 will likely lead to intensified racial profiling which is already prevalent in the EU.[16] In order to address this, mitigating measures such as increased training[17] of police and other relevant authorities is needed.

ECRE Recommendations:

Member States should ensure that they have adequate policies and training in place to ensure the obligation of non-discrimination is respected in practice.

National anti-discrimination and equal rights bodies should assess practice by police and border authorities under Article 23; their input should be sought as part of the assessment done via SEMM.

ARTICLE 23A: PROCEDURE FOR TRANSFERRING PERSONS APPREHENDED IN BORDER AREAS

Article 23a lays down a new optional procedure for transferring people apprehended at internal border areas to the Member State they are leaving. It could be considered an attempt to regularise actions that some courts have considered unlawful practices at European borders, sometimes referred to as "internal pushbacks".[18]

In order for the new procedure to apply, two conditions must be met. First, the individual in question must be apprehended during checks conducted by the competent authorities of both Member States within the framework of bilateral cooperation which can include joint police patrols. Second, there must be clear indications that the person has arrived directly from the other Member State and does not have the right to stay in the territory of the Member State they are seeking to enter. In such cases, Annex XII of the SBC provides for a procedure that involves filling out a form and transferring the third-country national from one Member State to the other within 24 hours.

The form includes the personal data of the individual, date, time and place, mode of transport and a section to detail why the person has no right to stay in the Member State. While individuals have the right to appeal in accordance with national law, such an appeal does not have suspensive effect. The form requires that each Member State must provide information about the relevant procedures regarding the right to appeal in the form. The transfer decision shall take immediate effect. Given the extremely short time window of 24 hours, the lack of legal aid, and the fact that appeals do not have suspensive effect, it is questionable whether the person

14. At the time of writing the Comments in February 2025, 10 EU Member States and Schengen Associated Countries had reintroduced temporary border control. Austria, Denmark, France, Germany, Sweden and Norway have conducted border controls at their borders since 2015.
15. For a detailed analysis of this provision, see ECRE's Comments on the Screening Regulation page 14ff.
16. Stop discrimination and ethnic profiling in Europe, FRA report https://fra.europa.eu/en/news/2023/stop-discrimination-and-ethnic-profiling-europe, July 2023.
17. Fundamental Rights Agency (2018) Preventing unlawful profiling today and in the future: a guide. Available at: Preventing unlawful profiling today and in the future: a guide | European Union Agency for Fundamental Rights.
18. In January 2021, the Italian Court of Rome ruled that the 1996 readmission agreement with Slovenia breached Italian and EU law and, therefore, could not form a legal basis for returns to Slovenia. Decision of Ordinary Court of Rome, N.R.G.56420/2020, 18 January 2021, available at: https://bit.ly/3MatUiY

concerned can actually make use of their right to appeal, particularly once they have already been transferred to the other Member State.

Children are not exempted from the procedure. Instead a reference to ensuring "that all measures are taken in the best interest of the child and in accordance with their respective national laws" is included in Article 23a(1). There is no mention of vulnerabilities that people undergoing the transfer may have and how those would be addressed.

There is no reference to making this form available in appropriate languages, so this will be at the discretion of Member States. However, CJEU jurisprudence on the right to be heard will be relevant. The CJEU argued that the effective exercise of the right to be heard inherently requires that individuals comprehend the information and decisions presented to them.[19] The person concerned is asked to sign the form but may refuse to do so, in such cases the refusal should be recorded.

Each Member State issuing the transfer decision shall inform the European Commission annually about the transfers, covering the Member States to which they have transferred persons, the grounds for transfer, and the nationalities of the persons concerned. This obligation to communicate data on the transfer mechanism shall start in July 2025 and information shall be made available on an annual basis (Article 23a)(7).

This procedure can 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. The Regulation states that applicants for and beneficiaries of international protection will not be subject to this procedure. For the former, the AMMR framework for bilateral cooperation applies. However, whether this will be upheld in practice is questionable, considering the existent widespread practice of summary returns at the borders,[20] which has been condemned by the ECtHR for breach of Article 3 of the EU Charter.[21]

In addition, the SBC paves the way for other forms of bilateral return cooperation between Member States. Recital (29) states that this optional transfer procedures "does not affect the existing possibility for Member States to return illegally staying third-country nationals in accordance with bilateral agreements or arrangements". The approach is at odds with the objective stated in the Explanatory Memorandum that "A well-functioning Schengen area requires rules to be applied uniformly, both at the external and internal borders". Instead of more harmonisation, the SBC gives Member States *carte blanche* to arrange bilateral cooperation which may lead to a proliferation of such agreements.[22]

As the current practices in the AIDA reports on Austria, Croatia and Slovenia describe, bilateral readmission agreements constitute a parallel system outside the CEAS provisions in which individuals are not issued a return decision, do not have the right to appeal and do not have the right to free legal aid or representation. This is a source of concern also because cases of chain refoulement to countries outside the EU have taken place where people have been handed over from different EU Member States to a country outside the EU e.g. from Austria, via Slovenia and Croatia to Bosnia-Herzegovina.[23]

Implementation considerations:

As an optional provision, it remains to be seen whether Member States actually take up the use of the transfer procedure as set out in this Article, particularly as the SBC also grants Member States the possibility to use existing – and establish new – forms of bilateral cooperation with the same objective.

19. The Court underlined that "observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement" (para 39). "Thus, when the authorities of the Member States take measures which come within the scope of EU law, they are, as a rule, subject to the obligation to observe the rights of defence of addressees of decisions which significantly affect their interests" (para 40). CJEU, Judgment of 11 December 2014, Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, C, ECLI:EU:C:2014:2431, paras 39, 40. See also: CJEU, Judgment of 5 November 2014, Sophie Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis, Case C-166/13, paras 42, 43.
20. See for instance the reports of Protecting Rights at Borders available here: Protecting Rights At Borders | DRC Danish Refugee Council; Incidents recorded by the Border Violence Monitoring Network available here: Home - BVMN.
21. ECtHR, H.T. v. Germany and Greece App No 13337/19.
22. This is also mentioned explicitly in the 2024 State of Schengen Report: "The Schengen Coordinator will continue to discuss the implementation of bilateral readmission agreements and arrangements and promote cooperation between Member States' authorities on the effective use thereof" (p.27).
23. See AIDA Report Austria (2023) pp 24 on cases of unlawful return to Slovenia and then Croatia and Bosnia Herzegovina available at: AIDA-AT_2023-Update.pdf; AIDA Report Slovenia (2023), pp. 24 on several cases of readmission from Slovenia, via Croatia to Bosnia Herzegovina available at: AIDA-SI_2023-Update-final.pdf; AIDA Report Croatia (2023) pp. 27 on readmission and push-back practices to Bosnia Herzegovina available at: AIDA-HR_2023-Update.pdf

Under both the newly established transfer procedure and other forms of bilateral cooperation acute concerns regarding access to asylum arise.

ECRE Recommendations:

If Member States chose to make use of the optional transfer mechanism they should:

» Exempt children and other vulnerable individuals from the procedure

» Ensure that the form is available in languages that are understood by the people transferred

» Make information on legal aid providers available in the form

As stipulated in Recital (32), the SEMM should pay particular attention to the transfer procedure, particularly but not limited to the context of unannounced visits.

The European Parliament, in particular the Schengen and Border Scrutiny Working Group of the LIBE Committee, should request the information provided by Member States to the European Commission about transfers under Article 23.

ARTICLE 25: GENERAL FRAMEWORK FOR THE TEMPORARY REINTRODUCTION OR PROLONGATION OF BORDER CONTROL AT INTERNAL BORDERS AND ARTICLE 25A PROCEDURE FOR CASES REQUIRING ACTION DUE TO UNFORESEEABLE AND FORESEEABLE EVENTS

The revised Article 25 provides the general framework applicable to the reintroduction or prolongation of internal border controls. It gives examples of the type of threat that may lead to unilateral reintroduction of border controls and circumstances under which they can be prolonged.

Article 25(1)(c) repeats the presentation of movements of third-country nationals, including people seeking protection, as a serious threat to public policy or internal security, alongside "terrorist incidents" and "serious organised crime" (Article 25 (1)(a)), and includes it as a ground for the reintroduction of border checks.

The final text suggests an exceptional situation which needs to be evidenced by data. It also refers to the fact that it can only be invoked if well functioning and resourced authorities are struggling to cope, in order to prevent a situation where a Member State claims to be struggling when they have simply not adequately funded the relevant asylum and reception systems.

It reads that in an "exceptional situation characterised by sudden large-scale movements of third-country nationals between the Member States, putting a substantial strain on the overall resources and capacities of well prepared competent authorities and which is likely to put at risk the overall functioning of the area without internal border control, as evidenced by information analysis and all available data, including from relevant agencies."

This formulation, together with the requirement in Article 25(2) that border control shall be a measure of last resort and that it should not exceed what is strictly necessary, tries to contain the risk that Member States use border controls excessively. However, whether that objective will be met remains to be seen. Current practice is not encouraging.

The 2023 State of Schengen Report notes that during 2023, "Member States have resorted to reintroducing or prolonging internal border controls on 28 occasions, of which 19 are related to prolonging existing long-lasting internal border controls that have been in effect since 2015".[24] The report indicates that that there are several Member States which have continued internal border controls for eight years. The CJEU has clarified that this is unlawful.[25]

24. European Commission (2023) State of Schengen Report 2023, available at: resource.html

25. Joined cases C368/20 and C-369/20, NW v Landespolizeidirektion Steiermark, ECLI:EU:C:2022:298. ECRE thanks the support on case law research provided by the "Human Rights and Migration Law Clinic" at the Ghent University.

There also is no correlation in practice between the numbers of people arriving and the introduction of border controls. In 2024, according to Frontex, irregular border crossings were at their lowest since 2021[26], however the year also saw the highest number of Member States introducing internal border controls.[27] The following Member States put or had temporary border checks in place in 2024, including in response to increases in irregular migration: Denmark, Czechia, Poland, Slovakia, and Austria. Germany and Italy also introduced border checks with reference to increased smuggling activity and the risk of terrorist infiltration of migration, and France introduced border checks related to the Paris Olympics which also referred to migration.[28]

Article 25a allows for the possibility for Member States to reinstate and consecutively prolong border controls for up to 14 months in cases of unforeseeable events and up to 2 years in cases of foreseeable events which overall constitutes an extension of the timeframe from the previous rules. The formulation regarding migration which speaks of "sudden large-scale movements of third-country nationals" would suggest that migration-related border controls would fall in the first category of unforeseeable events.

Implementation considerations:

The agreed formulation in Article 25 on border checks in response to migration should only allow for very few exceptional circumstances where this would be permitted. The consecutive Articles 26, 27, 27a and 28 introduce a more stringent system that formalises requests for introduction and extension of border controls, requiring evidence and justifications and, in cases of prolongation, risk assessments in addition. However, given the current practices of Member States, and related lack of disciplinary measures taken by the European Commission,[29] it is uncertain whether this will have any impact on the prevalence of internal border controls.

26. European Commission (2025). EU sees 38% drop in irregular border crossings in 2024. EU sees 38% drop in irregular border crossings in 2024 - European Commission
27. InfoMigrants (2024). Is the rise in internal border controls ending the EU dream? Is the rise in internal border controls ending the EU dream? - InfoMigrants
28. European Commission (2025). Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code. Available at: 11934a69-6a45-4842-af94-18400fd274b7_en
29. As described in the State of Schengen 2024 report, the European Commission pursues a strategy of dialogue with the Member States concerned. pp 26 available at: resource.html

European Council on Refugees and Exiles
Avenue des Arts 7/8
Brussels 1210
Belgium
T. +32 232 900 40
ecre@ecre.org
www.ecre.org