

Joint civil society statement on the Schengen Borders Code

20 April 2022



The undersigned civil society organisations would like to express their concerns with regard to several aspects of the [Commission's proposal amending the Schengen Borders Code](#).

Overall, the proposal embraces a very harmful narrative which assumes that people crossing borders irregularly are a threat to the EU and proposes to address it by increasing policing and curtailing safeguards. At the same time, the proposal fails to recognise the lack of regular pathways for asylum seekers, who are often forced to turn to irregular border crossings in order to seek international protection within the EU, and further complicates access to asylum. The measures put forward by the Commission would have a detrimental impact on the right to freedom of movement within the EU, the principle of non-discrimination, access to asylum and the harmonisation of procedures under EU law. Furthermore, the proposal would increase the use of monitoring and surveillance technologies, without any adequate safeguards.

Freedom of movement within the EU and violation of the principle of non-discrimination

Several provisions of the proposed amended Schengen Borders Code would encroach the right to freedom of movement within the EU (art. 3(2) TEU, art. 21 and 77 TFEU) by expanding the possibility to reintroduce internal border controls and facilitating the application of so-called “alternative measures” which in practice amount to discriminatory border controls. The discretionary nature of these border checks is very likely to disproportionately target racialised communities, and practically legitimise ethnic and racial profiling and expose people to institutional and police abuse.

While the amended Schengen Borders Code reiterates that internal border controls are prohibited in the Schengen area, it also introduces the possibility to carry out police checks in the internal border areas with the explicit aim to prevent irregular migration, when these are based on “general information and experience of the competent authorities” (rec. 18 and 21 and art. 23). In addition, the proposal clarifies the meaning of “serious threat” which justifies the temporary reintroduction of border controls (which was already possible under art. 25 of the 2016 SBC). Problematically, the proposed definition of “serious threat” also includes “a situation characterised by large scale unauthorised movements of third country nationals

between member states, putting at risk the overall functioning of the area without internal border control” (art. 25).¹

Such provisions, together with the new procedure set by article 23a and analysed below, will in practice legalise systematic border controls which target people based on their racial, ethnic, national, or religious characteristics. This practice is in clear violation of [European and international anti-discrimination law](#) and a breach to migrants’ fundamental rights.

[Research](#) from the EU Fundamental Rights Agency in 2021 shows that people from an ‘ethnic minority, Muslim, or not heterosexual’ are disproportionately affected by police stops, both when they are walking and when in a vehicle. In addition, [another study](#) from 2014 showed that 79% of surveyed border guards at airports rated ethnicity as a helpful indicator to identify people attempting to enter the country in an irregular manner before speaking to them.

The new provisions introduced in the amended Schengen Borders Code are likely to further increase the discriminatory and illegal practice of [ethnic and racial profiling](#) and put migrant communities at risk of institutional violence, which undermines the right to non-discrimination and stands at odds with the European Commission’s commitments under the recent [Anti-Racism Action Plan](#).

Lack of individual assessment and increased detention

The proposed revisions to the Schengen Borders Code set a new procedure to “transfer people apprehended at the internal borders”. According to the proposed new rules, if a third country national without a residence permit or right to remain crosses the internal borders in an irregular way (e.g., from Germany to Belgium, or from Italy to France) and if they are apprehended “in the vicinity of the border area,” they could be directly transferred back to the competent authorities in the EU country where it is assumed they just came from, without undergoing an individual assessment (art. 23a and Annex XII). This provision is very broad and can potentially include people apprehended at train or bus stations, or even in cities close to the internal borders, if they are apprehended as part of cross-border police cooperation (e.g. joint police patrols) and if there is an indication that they have just crossed the border (for instance through documents they may carry on themselves, their own statements, or information taken from [migration or other databases](#)).

The person will be then transferred within 24 hours.² During these 24 hours, Annex XII sets that the authorities might “take appropriate measures” to prevent the person from entering on the territory – which constitutes, in practice, a blanket detention provision, without any safeguards nor judicial overview. While the transfer decision could be subject to appeal, this would not have a suspensive effect. The Return Directive would also be amended, by introducing an obligation for the receiving member state to issue a return decision without the exceptions currently listed in article 6 (e.g., the possibility to issue a residence permit for

¹ In this regard, it is relevant to highlight that, while temporary reintroduction of internal border controls should only be a measure of “last resort”, this has been done in [more than 300 cases](#) since 2006.

² Third country nationals “transferred” from one EU member state to another would be handed to the police in the receiving member state. The only requirement to carry out this procedure is to fill out a simple form which states the person’s identity, the way the person’s identity was established, the grounds for refusal and the date of the transfer. If the third country national refuses to sign, it will be enough for the authorities to indicate this in the comments section.

humanitarian or compassionate reasons). As a consequence, transferred people would be automatically caught up in arbitrary and lengthy detention and return procedures.³

Courts in [Italy](#), [Slovenia](#) and [Austria](#) have recently ruled against readmissions taking place under informal or formal agreements, recognising them as systematic human rights violations with the potential to trigger so-called chain pushbacks. The courts found the plaintiffs were routinely returned from Italy or Austria through Slovenia to Croatia, from where they had been illegally pushed back to Bosnia and Herzegovina.

In practice, this provision would legalise the [extremely violent practice](#) of “internal pushbacks” which have been broadly [criticised](#) by civil society organisations across the EU and [condemned](#) by higher courts. The new procedure, including the possibility to detain people for up to 24 hours, would also apply to children, even though this has been [deemed illegal by courts](#) and despite international consensus that child detention constitutes a [human rights violation](#).

Access to asylum

The new Code introduces measures which member states can apply in cases of “instrumentalisation of migrants”, which is defined as “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” (art. 2). In such cases, member states can limit the number of border crossing points and their opening hours, and intensify border surveillance including through drones, motion sensors and border patrols (art. 5(4) and 13(5)). The definition of instrumentalisation of migrants should also be read in conjunction with the [Commission’s proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum](#), which provides member states with numerous derogations to the asylum *acquis*.

These measures unjustifiably penalise asylum seekers by [limiting access to the territory](#) and *de facto* undermining art. 31 of the Refugee Convention which prohibits States from imposing penalties on refugees on account of their entry or presence in their territory without authorization, and are therefore in violation of international law.

Harmonisation of procedures under EU law and asylum *acquis*

The proposal lifts the standstill clause introduced by the 2008 Return Directive (art. 6(3)) which prohibits member states from negotiating new bilateral readmission agreements. When negotiating the 2008 Return Directive, both the Commission and the European Parliament had clarified that bilateral readmission agreements should remain an exception, as they undermine the objective of harmonising procedures under EU law.

By incentivising states to adopt new bilateral agreements, and proposing a new internal transfer procedure, the Commission’s proposal promotes the proliferation of exceptional

³ These risks are exacerbated by the lack of harmonisation of protection standards for stateless persons.

procedures, which are outside the framework set by the Return Directive and the asylum *acquis*, and circumvents the procedural safeguards included in the Dublin Regulation.

The proposed provisions undermine the substantive and procedural guarantees for third country nationals, such as the right to request asylum, the respect of the principle of *non-refoulement*, and the right to an effective remedy.

As mentioned above, several national-level courts have ruled on the unlawfulness of readmissions carried out under formal and informal agreements, which often led to instances of chain-refoulement. There is a serious risk that readmission agreements, if they remain a part of the current legislative proposal, could be further abused to perpetrate chain refoulement and collective expulsions, which are in violation of Article 4 of Protocol No. 4 to the European Convention on Human Rights and Article 19 of the Charter of Fundamental Rights of the European Union.

Use of monitoring and surveillance technologies

Lastly, the proposal also facilitates a more extensive use of monitoring and surveillance technologies, by clarifying that these are part of member states' responsibility to patrol borders (art. 2). In addition, article 23, analysed above, clarifies that internal checks, including to prevent irregular migration, can be carried out "where appropriate, on the basis of monitoring and surveillance technologies generally used in the territory".

By removing obstacles for a more extensive use of monitoring and surveillance technologies, these provisions would create a loophole to introduce technologies which would otherwise be discouraged by pre-existing EU legislation such as the [General Data Protection Regulation](#).⁴

Artificial Intelligence (AI) and other automated decision-making systems, including profiling, are increasingly used in border control and management for generalised and indiscriminate surveillance. Insofar as such systems are used to 'detect human presence' for the purpose of 'combating irregular migration', **there is serious concern that such systems can facilitate illegal interdiction, violence at border crossings, and further limit access to asylum and other forms of protection.**

Furthermore, these technologies disproportionately target racialised people, thus further exacerbating the risks of increased racial and ethnic profiling. Indeed, monitoring and surveillance technologies which make use of artificial intelligence by nature violate the right to non-discrimination insofar as they are trained on past data and decision-making, and therefore codify assumptions on the basis of nationality and other personal characteristics, which is prohibited by international racial discrimination law.⁵

⁴ See, for instance, Article 22, which states that "data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her", or Article 9, which imposes specific rules regarding the collection and use of sensitive data.

⁵ UN Convention for the Elimination of all Forms of Racial Discrimination, 1965; EU Charter of Fundamental Rights, Article 21; UN Convention on the Rights of Persons with Disabilities, Article 5.

Recommendations

In light of the concerns discussed above, the undersigned civil society organisations:

- Express their concerns on the harmful impact of narratives which consider people crossing borders irregularly as a threat, and recommend the European Parliament and the Council to delete such references from recital 29, article 23 and article 25(1)(c);
- Call on the EU institutions to uphold the right to freedom of movement and the principle of non-discrimination, including by prohibiting the use of technologies which make use of artificial intelligence and other automated decision-making systems. In this regard, we recommend the European Parliament and the Council to amend article 23, paragraph (a) by deleting the reference to “combat irregular residence or stay, linked to irregular migration” in point (ii) and deleting point (iv) on monitoring and surveillance technologies;
- Urge the EU institutions to uphold the right to apply for asylum, and recommend deleting the definition of ‘instrumentalisation of migration’ in article 2, paragraph 27 and all the ensuing provisions which would apply in this circumstance;
- Condemn the proliferation of exceptional procedures which undermine the right to an individual assessment, and recommend deleting article 23a, annex XII the proposed amendment to art. 6(3) of the Return Directive;
- Express their concerns at the glaring inconsistency between some of the proposed provisions and the European Commission’s commitments under the EU Action Plan against Racism, i.e. with respect to ending racial profiling, and call on the EU institutions to uphold their commitment to address and to combat structural and institutional discrimination and include explicit references to the Action Plan against Racism in the text of the Schengen Borders Code.

Signatories:

❖ European/ international networks and organisations

Access Now
Action Aid International
Border Violence Monitoring Network
Caritas Europa
Centre for Youths Integrated Development (CYID)
Danish Refugee Council
European Digital Rights (EDRi)
European Network Against Racism (ENAR)
Equinox Initiative for Racial Justice
EuroMed Rights
Fair Trials
La Strada International
Oxfam International

Platform for International Cooperation on Undocumented Migrants (PICUM)
Sea-Watch e.V.

❖ **National level networks and organisations**

11.11.11 - **Belgium**

Association for the Social Support of Youth (ARSIS) - **Greece**

Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) - **Italy**

ASTI - Association de soutien aux travailleurs immigrés - **Luxembourg**

Centre for Peace Studies - **Croatia**

Digitale Gesellschaft - **Switzerland**

FAIRWORK Belgium - **Belgium**

Fundacion Cepaim - **Spain**

KISA - Action for Equality, Support, Antiracism - **Cyprus**

Mujeres Supervivientes - **Spain**

NGO Legis – **North Macedonia**

Platform minors in exile - **Belgium**

Progress Lawyers Network - **Belgium**

Red Acoge - **Spain**

Refugees Welcome - **Denmark**

Servicio Jesuita a Migrantes (SJM) - **Spain**

Stichting LOS (Landelijk Ongedocumenteerden Steunpunt) - **The Netherlands**

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