



# **BVMN - ASGI: JOINT ANALYSIS ON SCHENGEN BORDER CODE REFORM**

## **Executive Summary**

The European Commission (EC) Proposal introduces several concerning amendments to the Schengen Borders Code (SBC) that we argue would have devastating consequences for the fundamental human rights of people-on-the-move. We will focus on the main concerns raised by the Proposal with regard to specific elements related to the management of external borders (point I, II, III), and of internal border controls (point IV, V) and analyse them against the background of already existing harmful practices of pushbacks and denial of rights at both internal and external borders that we have been documenting through our monitoring activities. Some of the most worrisome aspects of the Proposal negatively impact on the rights of people-on-the-move both at external and at internal borders and will thus be analysed jointly: they relate with the use of technologies and with ethnic profiling. With this collaborative legal and policy analysis, we seek to highlight concerns relating to the impact this reform would have on the realities of people-on-the-move navigating European borders, whose fundamental rights we have already proven to be at risk of violation in the form of pushbacks and other types of state-sponsored violence. In conjunction with other legislative documents of the New Pact, such as provisions for pre-screening procedures that heavily rely on the arbitrary detention of people-on-the-move and the failed attempts at implementing Independent Border Monitoring Mechanisms (IBMM) in Croatia and Greece, the SBC contributes to the emergent paradigm in European migration policy that frames movement as a security concern and disregards fundamental human rights provisions. In order for the Proposal to be in line with the fundamental rights of people-on-the-move we call for the removal of some key concepts and procedures, and reiterate the necessity of obligations that are in line with respect for human rights and fundamental freedoms.

# 1

# INSTRUMENTALISATION

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## Introduction

The Proposal for the SBC reform introduces the concept of 'situation(s) of instrumentalisation of migration (see **Recitals 8, 9, 10**, and **Article 2, paragraph 27**) and allows for Member States (MS) to limit the number of border crossings when such a situation occurs (see **Recital 12** and **Article 5, paragraph 4**). Moreover, the Proposal provides for specific competences and powers to be conferred to the European Border and Coastguard Agency (ECBGA/Frontex) in cases of instrumentalisation (see **Recital 14** and **Article 13**).

The use of the term 'instrumentalisation of migrants' throughout the proposal proves problematic. As the below analysis will demonstrate, this term is employed as a securitising rhetorical tool to justify the suspension of human rights obligations and safeguards at external borders during time periods of increased movement flows. This sort of policy action has its roots in the shifting framework of migration management that originated in 2001 after the September 11 US terror attacks, which were rhetorically linked to incoming migratory flows and marked the initiation of an ongoing state of exception in handling the issue of migration. Unfortunately, the proposed reform of the SBC seeks to further the securitising rhetoric that puts in question the necessity to fulfil international human rights obligations in situations of 'emergency', outlined here as situations in which migrants are 'instrumentalised'.

## Case Study 1:

### Greece/Turkey (2020), Poland/Belarus (2021)

To better understand how this dynamic has played out on the ground, we must turn to the events at the Greece-Turkey land border in February and March 2020, and the Poland-Belarus border in May and July 2021. The Commission evidently had both of these situations in mind when elaborating the concept of 'instrumentalisation' in the SBC reform and yet both had shocking repercussions for people-on-the-move and their fundamental non-derogable rights to asylum, *non-refoulement*, and to life.

#### Greece-Turkey

On 17th February 2020, Turkish President Erdogan decided to "open the border"<sup>1</sup> to Greece amidst claims that the EU had failed to live up to its responsibilities under the EU-Turkey deal, concluded in early 2016. As an estimated 10,000-20,000 began to gather in an effective no-man's land at the land border, on the 1st March 2020, the Greek National Security Council announced the "temporary suspension, for one month [...] of the lodging of asylum claims by all people entering the country illegally" and their "immediate deportation without registration, where possible, to their countries of origin or transit"<sup>2</sup>. Multiple international agencies and NGOs affirmed in the following days that the suspension of asylum rights and the principle of *non-refoulement* is not permitted under international nor European law. Furthermore, actual violence was enacted on people-on-the-move gathered at the land border with Greek military and police personnel employing methods such as water cannons, tear gas, rubber bullets and live ammunition to target them. There was one confirmed death during this time and, whilst it was not confirmed that the shots were fired by Greek officers, the authorities did not carry out further investigations to ascertain whether or not this was the case<sup>3</sup>.

#### Poland-Belarus

In May and July 2021, Belarusian President Alexander Lukashenko officially declared that Belarus would no longer stop people-on-the-move from Afghanistan, Iran and Iraq from crossing the border with the EU<sup>4</sup>, would not allow the EU to return people who do not qualify for asylum back to Belarus<sup>5</sup>, and that the readmission agreement concluded with the EU was suspended<sup>6</sup>. In the beginning of August, the Polish Border Guard began reporting daily on the number of people-on-the-move who were 'prevented' from entering Poland. This, in fact, refers to pushbacks as people-on-the-move have been apprehended on Polish territory and returned to the border line with Belarus. Statistical data indicated around 8,500 border crossings had been 'prevented' by the end of September 2021<sup>7</sup>, with at least 19 deaths<sup>8</sup> due to the freezing temperatures and a lack of access to food, water, shelter, warm clothes, or healthcare. As a result, in August 2021 Poland started constructing a 2.5-metre-high fence<sup>9</sup> along its border with Belarus, and in September the President of Poland declared a state of emergency in the provinces in direct vicinity to the border, prohibiting entry to that area<sup>10</sup>.

Both of these cases represent situations in which third countries have been accused of 'instrumentalising migration' in an attempt to destabilise the Union. In the case of Turkey, President von der Leyen travelled to the Evros land border region on 3rd March 2020 and gave a joint press conference with the Mitsotakis, the Greek Prime Minister, where she praised the Greek authorities, border guards, coastguards and Frontex for their work 'making sure order is maintained at the Greek external border, which is also a European border' and announced the deployment of a Frontex Rapid Border Intervention Team (RABIT) as well as EUR 700 million in financial assistance to Greece<sup>11</sup>. Instead of denouncing human rights violations by Greek authorities at the borderzone, the authorities carrying out these infringements were praised and Greece was rewarded for 'protecting' the bloc. Similarly, in a statement on 8th November 2021, President von der Leyen called out 'the instrumentalisation of migrants for political purposes' by Belarus, and expressed the EU's solidarity with Poland and intention to support them in their efforts to deal with 'this crisis'<sup>12</sup>. Again, there was no mention of the systematic human rights violations taking place at the EU's external borders on behalf of protecting the internal polity of the bloc. These cases serve to demonstrate how non-derogable rights and international obligations are easily discarded in the name of 'security', when a 'state of emergency' is declared.

#### Relevant articles and recitals

Recitals 8, 9, 10, 11, 12, 14, 16; Art. 2 (27); Article. 5 (4); Art. 13 (6)

# Analysis

## Lack of definitions and specificity

Throughout the relevant recitals and articles there is a distinctive lack of **objective elements and facts** when determining a situation of so-called 'instrumentalisation of migrants', such as the number of irregular arrivals at the border or on the territory. The vague definition employed by the legislator might be used to invoke a range of derogations from the asylum acquis. The criteria and procedure of such an assessment are not defined and seem to rest on the **intention** of the third country which is not a sufficient factor to frame legally relevant behaviour. The framing in the relevant legislation suggests a **political assessment** rather than an **objective** one, which again leaves the specificities down to the discretion of a Member State rather than conferring powers to the Commission and relevant JHA agencies in situations at external borders that may supposedly jeopardise the internal security of the bloc. Generically referring to the movement of "third country nationals" as a risk factor (with no sufficient and clear definition of the phenomenon, i.e. determining the arrival rates which could trigger the measures described) hampers the notion of objective and reasonable justification. Such insufficiencies in the current legislation leave open-ended the situations in which MS might use 'instrumentalisation of migrants' to call a 'state of emergency' and therefore suspend the fundamental, non-derogable rights of people-on-the-move. Indeed, in April 2021, changes to the International Protection Act (IPA) and the Foreigners Act in Slovenia came into force which allowed for situations of 'complex migration crises' to be activated, allowing for authorities to escort people entering Slovenia irregularly to the border and return them to the country they arrived from. All this, in clear contravention of the right to asylum (UDHR, Art 14) and individualised assessment. Furthermore, it is important to note that, as part of the New Pact legislative package, there are already provisions for a Blueprint Network that can be convened by the Commission to address emerging trends or issues on specific migratory routes. In this way, there is already a proposal by the Commission which outlines tools that might be deployed in situations of crisis and force majeure. This second provision on 'instrumentalisation' in the SBC overemphasises the linkages made by the lawmaker between immigration and territorial integrity; framing immigration as a factor that

could potentially put at risk the territorial integrity of a MS goes against the core belief that any person should be able to lodge an application for international protection without being considered a 'threat'.

## Closure of Borders - Access to Procedures and Possibility of Refoulement and Collective Expulsion

The measures proposed as a response to situations of the 'instrumentalisation of migrants' will have severe impacts on access to asylum and connected fundamental rights guarantees at the EU's borders. Namely, the legislation puts forward the **imposition of restricted measures**, an intention to **limit border traffic** and **close border crossing points**. These provisions do not specifically and exclusively seek to block migration flows or prevent the movement of people and, as such, constitute more 'neutral' measures. In this sense, they might be more difficult to critique from a legal standpoint and could more easily elude the control of legitimacy by judges in national courts and at the ECtHR. Nevertheless, we stipulate that these actions would exacerbate the difficulties faced by people-on-the-move when lodging applications for international protection and thereby runs the risk of undermining Article 3 (2) which stipulates that the application of the SBC should be "without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*". All MS have an obligation under Article 6(2) of 2013/32/EU (Asylum Procedures Directive) to ensure that all persons entering the territory of a MS have the "effective opportunity to lodge it [an application for international protection] as soon as possible". Furthermore, Article 18 of the Charter legislates that access to asylum should be ensured in the Union and Article 19 prohibits collective expulsions. In the absence of legal pathways to access asylum and in accordance with the Charter and international human rights instruments, asylum seekers should be allowed to lodge an asylum applications at the border when they enter irregularly. When border traffic is limited through the suspension of asylum procedures, as seen in the 2020 case of Greece-Turkey, or border crossing points are closed such fundamental rights are undermined.

In addition to this, Recital 11 stipulates the provision of "**specific measures in the area of asylum and return**", while respecting the fundamental rights

of the individuals concerned and in particular by ensuring the respect of the right to asylum". There are no stipulations as to how respect for fundamental rights at border areas in states of

emergencies might be monitored, and no further elaborations on what sanctions might be for MS who infringe on these fundamental rights.

## Case Study 1a

In the case of Turkey-Greece 2020, BVMN operatives were present on the ground and able to take testimonies from people-on-the-move who were affected by Greece's response to the so-called 'state of emergency' that was unfolding at the Evros land border. One respondent reported being pierced in the arm by a bullet fired from the Greek side of the border whilst assisting another gunshot victim bleeding on the ground<sup>13</sup>. In the case of Poland-Belarus 2021, crucially neither journalists nor NGOs were permitted to the borderzone to independently monitor and report on cases of violations<sup>14</sup> in spite of clear evidence that they were, in fact, taking place.

As it stands, situations described to entail the 'instrumentalisation of migrants' will be matched with restrictive measures that might constitute breaches of the Asylum Procedures Directive, Articles 4, 18 and 19 of the CFREU and Articles 3 and 4 (particularly Protocol 4) of the ECHR. In a worst case scenario, the proposal should at the

very least be met with robust safeguards which are currently fundamentally lacking. However, in order to ensure full respect for fundamental rights instruments at the international and European levels, the entire concept of instigating a state of emergency in response to 'instrumentalisation' has no place in EU legislation.

## Case Law (ECtHR):

### Article 4, Protocol 4 of the ECHR:

The prohibition of collective expulsion is vital for people-on-the-move who are forced to move irregularly due to a lack of safe and legal pathways for protection. It extends to every foreigner and refers to any measure which expels a group of non-nationals to leave a country, without a reasonable and objective examination of the situation of each individual concerned. This is salient to the proposed situations of 'instrumentalisation of migrants' which, as detailed above, have previously led to situations which could easily be considered collective expulsions. Furthermore, the jurisprudence of the ECtHR (particularly in the case of *Hirsi Jamaa and Others v. Italy*) shows that a refusal of entry may also amount to collective expulsion.

#### Positive Case Law:

- The Court has found a violation in cases in which the individuals targeted for expulsion had the same origin
  - » Roma families: *Conka v. Belgium*<sup>15</sup>; *Georgia v. Russia (I)*<sup>16</sup>
  - » Georgian nationals: *Shioshvili and Others v. Russia*<sup>17</sup>; *Berdzenishvili and Others v. Russia*<sup>18</sup>
- The Court has further found violations of that provision in cases concerning the return of an entire group without individualised assessment, or verification of individual identities of group members:
  - » *Hirsi Jamaa and Others v. Italy*<sup>19</sup>
  - » *Sharifi and Others v. Italy and Greece*<sup>20</sup>
  - » *M.K. and Others v. Poland*<sup>21</sup>
  - » *D.A. and Others v. Poland*<sup>22</sup>
  - » *Shahzad v. Hungary*<sup>23</sup>
  - » *M.H. and Others v. Croatia*<sup>24</sup>
  - » *Moustahi v. France*<sup>25</sup>



## Case Law of Concern:

- N.D and N. T. v. Spain<sup>26</sup>
  - » In the case of N.D. and N.T. v. Spain the Court found that Spanish law had, in fact, afforded the applicants several possibilities to seek legal admission to the national territory and therefore the lack of individual removal decisions was the result of the applicants' own behaviour rather than a violation of Article 4, Protocol 4 on the part of the State.
- A. A. v. North Macedonia<sup>27</sup>
  - » Similarly as in the above case, the Court found that Macedonia law had provided the applicants a possibility of entering at border crossing points if they fulfilled the entry criteria or sought asylum. The Court found that no certificates of an expressed intention to apply for asylum were issued at the location on the dates concerned, and therefore concluded that, as the applicants did not make use of existing legal procedures, their fundamental rights had not been violated.

In spite of previous cases that uphold the rights outlined in Article 4, Protocol 4, the judgement of the Court in these two recent examples represents a dangerous precedent for cases in which the mass pushback of people-on-the-move occurs. Concluding that any mass expulsion is lawful goes against the essence of Article 4, Protocol 4 which is enshrined in the European Charter of Human Rights. We seek to reiterate our great concern at this shift in the attitude of the court that represents a denial of human rights en masse.

## Role of Frontex

The proposed Schengen Regulation envisions a bigger involvement from the European Border and Coast Guard Agency (Frontex) in addressing challenges of "instrumentalisation of migrants". The Agency is meant to support Member States "with implementing the operational aspects of external border management, including information exchange, the provision of equipment, capacity building and training to national border guards, targeted information and risk analysis, as well as the deployment of the Standing Corps" (Recital 13).

Frontex has shown to be an opaque agency, continuously scrutinised in the past 2 years by the European Court of Auditors, the European Ombudsman, and OLAF. Frontex has not aligned its activities to ensure full respect for fundamental rights. Most recently, the Agency's Executive Director, Fabrice Leggeri, resigned after a 200-page report was submitted by OLAF proving the misconduct of several people at the top of Frontex, allegations of harassment and, at the very minimum, knowledge of violent and illegal pushbacks. Whilst the Commission have sought to present Leggeri's resignation as a liberating blow, attempting to pinpoint the blame for all these

scandals on one individual, we ascertain that these crises are central to the institutional make-up of Frontex and cannot be solved by a simple change in Executive Director.

Not only is there evidence to support, at the very minimum, knowledge of illegal activities at the borders, Frontex's increase of deployments at these external borders and in the Western Balkans to 'secure' them has shown substandard results in preventing irregular entries. The 2021 special report from the European Court of Auditors found that Frontex fails to effectively contribute to "implementing European integrated border management, and thus supporting Member States to prevent, detect and respond to illegal immigration and cross-border crime". The report goes on to refer to multiple issues observed by the Court of Auditors: lack of transparency, ineffectiveness, impact-cost assessment of own operations, limitations in effectively fighting cross-border crime, among others are worth mentioning<sup>28</sup>.

## Case Study 2: Frontex and Pushbacks

BVMN has recorded, throughout the so-called Balkan migration route, testimonies where Frontex officers either witnessed or contributed to pushbacks, or failed to refer people-on-the-move to international protection mechanisms<sup>2930</sup>. In these reports, one respondent who was pushed back from Albania to Greece reports that at the time of apprehension “a black range rover in which the police arrived had an Hungarian licence plate, and had not any signs or colours on it. There were four policemen and one police woman, the latter being dressed in civilian clothes and one man wearing black clothes with the Hungarian flag on it, as well as ‘the flag from the European Union, blue with stars’”. One other pushback survivor reports that “there were three police officers present. One from Albania, one from Poland and from Romania. The plate of the car that they used was from Poland. The Polish and Romanian officers had blue Frontex armbands worn over their national uniforms”.

BVMN has filed 3 individual complaints in July 2021 to the Fundamental Right Officer (FRO) of Frontex for potential breach of fundamental rights in Albania. In two cases, the respondents reported that they were apprehended by Frontex officers and requested to be referred for medical care. In both cases the respondents were visibly vulnerable. However, Frontex officers proceeded to hand the respondents over to the national law enforcement officers who eventually pushed them back<sup>31</sup>

# 2 INFECTIOUS DISEASE MEASURES

One of the central justifications for such a comprehensive reform of the SBC lies in MS response to the COVID-19 pandemic and the lack of uniformity in responses at internal and external borders across the bloc. The Commission argues that such an adoption of inconsistent and diverging measures threatens the functioning of the entire Schengen area. In light of this, the SBC puts forth a new procedure at the external border to be applied in a situation of infectious disease with epidemic potential. This would include restrictions, or the prohibition, of travel in a targeted, non-discriminatory and proportionate manner, and conditions for lifting them. This is of particular concern given the disproportionate enforcement of travel restrictions to people-on-the-move during the first phases of the COVID-19 pandemic, and the construction of them as ‘threats to public health’.

### Relevant articles and recitals

*Recitals 5,6,7; Article 21(a)*

## Analysis

In the Spring of 2020 when the first wave of COVID-19 was at its peak, EU MS rapidly increased border security by sending law enforcement authorities and army personnel

to patrol borders, and suspended freedom of movement in an attempt to prevent the spread of the virus. The intersection of health restrictions and border violence saw tightened measures for people-on-the-move, with inequality sharpened for transit communities labelled as a threat to public health. The new powers afforded to actors managing border and asylum regimes have been disproportionately applied to people-on-the-move. Throughout the pandemic, pushbacks have persisted, adapted and even been augmented by institutional responses to COVID-19, which might be attributed to the framing of securitisation which has formed the backdrop for both official policy developments at the EU level and informal ad-hoc response measures by MS. The World Health Organisation (WHO) compared COVID-19 with terrorism, understanding its transmission as an invasion. Similarly to the aforementioned situations of the ‘instrumentalisation’ of migrants, responsibilities towards crime and migration are merged in a concerning manner. Whilst restricting movement is necessary to reduce the spread of the virus, the application of securitised policy under the umbrella of public health measures has disproportionately targeted transit populations along the so-called ‘Balkan Route’. In the absence of an immediate coordinated response at the EU level, MS diverged in their managing of the COVID-19 pandemic in the first months with some opting for more integrative approaches to the

crisis, such as Portugal granting temporary citizen status, and others such as Greece and Croatia, framing people-on-the-move as risks to public health that require management not protection.

It is of great concern that restrictions on freedom of movement are being formally written into EU policy with these recitals and articles. Under the Geneva Convention, an individual cannot be punished for crossing into another territory with the purpose of seeking international protection, yet on 16th March 2020 the Commission implemented measures entailing the closure of external borders aimed at halting all non-essential travel to the EU. In spite of this being coupled with the caveat of exempting “person[s] in need of international protection or for other humanitarian reasons respecting the

principle of non-refoulement”, the continuation of wide-spread pushback regimes across the bloc represents a starkly different reality. Furthermore, the Commission ruled to allow border officials to “refuse entry to non-resident third country nationals where they present relevant symptoms or have been particularly exposed to risk of infection”, which invites further breaches of international law and, as will be expanded upon later, is linked to racial discrimination and profiling. In a similar vein to situations entailing the ‘instrumentalisation of migrants’, invoking a state of emergency is used to legitimise tougher border controls and to circumvent fundamental rights guarantees, all at the expense of transit communities.

## 3 BORDER SURVEILLANCE AT EXTERNAL BORDERS

In this package of reforms to the SBC, the Commission introduces provisions regarding the reinforcement of border control through additional measures, particularly technical means and modern technologies. The key amendment of Article 2(12) states that MS would be able to rely on “preventative measures to detect and prevent unauthorised border crossings or the circumvention of border checks”, without providing a definition of the concept.

### Relevant articles and recitals

*Recital (15); Article 2(12); Article 13*

## Analysis

### The Use of Preventative Measures

Under the ECHR, state authorities must take preventive measures within the scope of their powers in situations where they know or ought to know of a real and immediate risk to the life of an individual or individuals<sup>32</sup>. However, the proposal does not further specify what is a “preventative measure” nor what forms these measures can take as part of border surveillance. Furthermore, the measures that might be undertaken are not matched with concurrent protective elements that guarantee the fulfilment of the fundamental

rights of people-on-the-move. The practice followed by Greek authorities in the Eastern Aegean is illustrative of the dangers of a lack of clear definitions regulated in EU legislation. The measures implemented by the Hellenic Coast Guard in the Aegean Sea include: “vessel manoeuvres in high-speed near refugee boats; confiscation of fuel and/or destruction of engines; pointing of guns at the individuals on board refugee boats; towing of the boats towards Turkey, leaving people adrift on often unseaworthy and overcrowded dinghies and putting their lives at risk. In some cases, the reports received referred to the following conduct: ramming of the refugee boats; firing of shots near the refugee boats or in the air”<sup>33</sup>. Such practices are undoubtedly conducted with the knowledge and acquiescence of the Greek state and engages fundamental rights violations as well as of the EU asylum acquis.

Hungarian police officers have been reported to use dogs in apprehending actions, purposefully using the animals to inflict injuries<sup>34</sup>. Use of dogs as a “preventative” technique has been reported at multiple border locations in EU member states such as Bulgaria and Croatia. In 2021, eight out of 17 testimonies of pushbacks from Bulgaria, reported police dog attacks<sup>353637</sup>. Croatian border guards also employ K9 units to inflict injuries to people on the move, in practices that amount to inhumane and degrading treatment<sup>38</sup>



### **Case Study 3: Preventative Measure in Features of the Hungarian Border Fence**

BVMN testimonies have given insights into the way the Hungarian border fence functions as a tool of violence, surveillance and deterrence. First built in 2015, and stretching the entire 175 kilometre border between Hungary and Serbia, the barrier forms both a physical and symbolic piece of architecture within EU border securitisation. Attention to the various functions of this fixed border installation illustrate that it is far from “just a fence”, but embodies the encroachment of technological surveillance into processes of border violence.

The barrier itself is made up of two fences, stands four metres high, and includes rolls of concertina razor wire. The specification is designed to inhibit transit and, for those who must risk crossing it, the threat of serious injury is ever-present. In an incident in early March 2021, one respondent describes falling from the first fence and breaking his leg upon landing. Such injuries, coupled with the cuts from razor wire, are common experiences for those who have no legal options of entry into Hungary from Serbia. Hospitalisation from these injuries is not a reprieve from pushbacks; the respondent was described as being removed to Serbia despite needing further treatment.

Alongside this violent deterrence, the fence is also designed to make illegal removals more efficient. Pushbacks from Hungary are intensive processes that are carried out by a variety of police divisions and military personnel who operate in the border area, alongside private security and vigilante groups. One of the functions of the barrier is to connect up mobile units from these authorities, who are dispersed along its length in patrol vehicles, watch towers and border stations. This is achieved with a service road which runs between the two fences. The road acts as a thoroughfare for the fast arrival of apprehending officers and the transportation of captured transit groups for pushbacks.

The Hungarian authorities are alerted to crossings by a web of cameras and thermal sensors, and recent testimonies suggest that respondents have heard alarms being set off when in proximity to the fence. After apprehension, a network of small gates feed off the security road, allowing Hungarian officers to carry out collective expulsions into rural Serbian farmland on the other side of the border. At these gates, officers often use handheld cameras to record the pushbacks of transit groups, but a recent testimony also referred to fixed speaker systems which play automated messages in multiple languages (such as Arabic, Pashto and Urdu).

A Reuters report from 2017<sup>39</sup> confirms the fact that speaker systems were indeed installed along the border fence in order to broadcast automated messages which directed asylum seekers towards the transit zones. Yet with these transit zones closed since May 2020, and access to asylum all but shut off within Hungary, these PA transmissions only help to reaffirm the dissonance between high tech automated border regimes and freedom of movement.

# 4 CONTROLS AT INTERNAL BORDERS

## Introduction:

### Internal Border Controls and Migration

The Schengen area is defined by the European Commission as part of Europe's DNA. It entails the free movements of EU and non-EU citizens legally residing in the territory, who shall not be subject to checks at internal borders (art. 22 SBC). In this scenario, **internal border controls can only be introduced in exceptional situations, as a measure of last resort**. However, between 2015 and 2020 Member States reintroduced border checks 205 times in response to migration crisis, terrorist threats, and the spread of Covid-19. This happened despite the fact that under the current SBC "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" (Recital 16).

The 2021 Commission Proposal on the amendment of the SBC has been presented as an answer to the crises and challenges faced by the Schengen area in recent years. Even though the Impact Assessment Report accompanying the Proposal points to the fact that migratory flows have returned to the levels before 2015 and do not justify the reintroduction of internal borders, in the Proposal migration is again presented as a threat for the functioning of Schengen areas, that shall be dealt with the use of police powers (Article 23) or, to certain extent, through the reintroduction of internal borders (Articles 25-30).

#### Relevant articles and recitals

*Alternative measures: Recitals 18 - 24; Article 23;*  
*Reintroduction of border controls: Recitals 30-45;*  
*Articles 25-30*

## Analysis

### Controls that are not 'Border Controls': the Use of Alternative Measures

The Proposal amends Article 23 of the SBC, which refers to "alternative measures", and lists a set of circumstances under which public and police powers are allowed at internal border areas, "insofar as the exercise of those powers does not have an effect equivalent to border checks". This would be the case when: a) they do not have border control as objective; b) they aim at combating threats to public security or public policy and, in particular, "irregular residence or stay, linked to irregular migration"; c) they are not systematic; d) they are carried out "on the basis of monitoring and surveillance technologies generally used in the territory" (art. 23, para 1).

According to Recital 20 of the Proposal, those checks may entail "the verification of the identity, nationality and residence status of persons provided that such verification are non-systematic and carried out on the basis of risk analysis". Moreover, under Article 23, Member States retain the possibility of maintaining "security checks at transport hubs carried out by the competent authorities or by carriers, provided that such checks are also carried out on persons travelling within a Member State", as well as of conducting checks "for security purposes of passenger data against relevant databases", therefore allowing for the control of migrants against databases such as VIS and Eurodac at transport hubs.

Since 2017, the Commission has stressed the need for Member States to carry out police checks, including at internal borders, insofar as they do not amount to measures equivalent to border checks. Under the new Proposal, checks on identity and residence status of people crossing EU borders would apparently be allowed, including when the controls are implemented at airports, train and bus stations or directly on board of passenger transport services.

However, given that the aim of border checks is to ensure that persons may be authorised to enter the territory of the Member State and, second, to prevent persons from circumventing border checks, **it is difficult to understand how measures targeting (supposedly irregular) third country nationals** who attempt to move from one Member State to another, with the purpose

of checking whether they have the necessary authorization and documentation to enter the State, **do not amount to measures having an equivalent effect to border controls.**

According to the case law of the Court of Justice, national legislation enacting police powers "shall provide the necessary framework for that power to guarantee that its practical exercise" does not have an effect equivalent to border control<sup>40</sup>. The controls cannot be systematic and must be subjected to certain limitations, posed by national

legislations, as regard to their intensity and frequency. Based on field observations by ASGI at Ventimiglia train station, the Italian police request individuals to exhibit not only identity documents but often travel documents. These practices take place on a daily basis and are always aimed at checking people leaving towards the French border. This is often not the case. For instance, in Italy police powers are not regulated by specific laws. Instead, the rules for such exercises are contained in operational protocols that are not publicly available.

## **Access to Operational Protocols Related to Police Powers in Border Area**

ASGI has made several requests for public access to documents using the so-called FOIA to obtain copies of police operational protocols. The requests were all rejected because they either related to international relations or to avoid "concrete prejudice to public order and safety". With the Decree of 16 March 2022, the Ministry of the Interior amended the rules on the categories of documents excluded from the right of access. According to this new decree, the following acts are excluded from the right of access:

- Documents relating to intergovernmental cooperation agreements and technical agreements concluded for the implementation of military development, procurement and/or joint support or programmes for international police cooperation, as well as those relating to technical and operational arrangements for international police cooperation, including border and immigration management.
- Documents relating to cooperation with the European Border and Coast Guard Agency for border surveillance of the external borders of the European Union which coincide with those of Italy and which are not already withheld from access by the application of confidentiality classifications.

Those limitations will only exacerbate the **lack of transparency on the normative and operational framework related to police patrols at the border.**

As there is no coherent legal framework, nor access to documents that regulate police powers, it is therefore impossible to guarantee that the practical exercise of these powers does not have an impact equivalent to border controls. On the other hand, it is easily demonstrable that these practices have contributed to the increase of fatalities, especially along the Italian - French border.

Already in 2022, three people-on-the-move have been reported dead following their attempt to cross the border: ASGI has denounced these deaths. On 1 February 2022, Ullah, who had left Afghanistan the previous June, was found dead near the railway tracks a few kilometres from Oulx, the last transit point before crossing the border to Briançon, in France. On the same day, another tragic event took place in Latte, a small village near Ventimiglia. In order to avoid police controls, a person-on-the-move climbed onto the roof of the train headed to France and was electrocuted a few kilometres from his destination. The condition

of the body did not allow for his identity to be ascertained. A month earlier, in early January, another body was found, this time on the other side of the border, near Modane. These are not isolated incidents. Border control policies, intensified in recent years, contribute, at the very least, indirectly to the increase in deaths at the border.

If the proposed amendments are adopted there will be a juxtaposition between police and border controls: the overlapping nature of these will make it more difficult to distinguish one from the other and almost **impossible to respect the principles arising from the CJEU case-law**. Conversely, their exercise could have a detrimental impact on the lives and well-being of people-on-the-move, as well as on the right to family and private life and to non-discrimination of both EU and non EU citizens. As police checks can be carried out to prevent irregular migration, controls would most likely be based on racial grounds (see part. IV).

# The Reintroduction of Border Controls

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Starting in September 2015, Germany, Austria and Slovenia communicated to the European Commission the reintroduction of border controls, and they were followed by France, Hungary and Sweden in October, and Norway, Denmark and Belgium in the following years. In March 2016, the Commission intervened to reiterate the need for a return to the normal functioning of the Schengen System<sup>41</sup>. Following this intervention, on 12 May 2016 the Council adopted, based on a Commission proposal, an implementing decision<sup>42</sup> with a recommendation for the reintroduction of temporary internal border control for five Member States (Austria, Germany, Denmark, Sweden and Norway), among the most affected by the secondary movements of potential asylum seekers coming from Greece. The temporary extension of the controls was therefore made possible through the use of Article 29 of the SBC, which entails a mechanism that can be used in the event of exceptional circumstances threatening the overall functioning of the area without internal border controls. The Council further adopted additional recommendations allowing Austria, Germany, Denmark, Sweden and Norway to reintroduce internal border controls for further 12 months. Thereafter, despite the decrease in arrivals at the external borders, at the end of the last extension period based on Article 29 of the SBC, Austria, Germany, Denmark, Sweden and Norway have drawn upon the mechanism provided for in Article 25 of the SBC to prolong the reintroduction of checks at the external borders. Although some of the concerned Member States still preserve internal border controls, **the Commission has so far never intervened in a conclusive manner to condemn the reintroduction of border controls**, as has been recently underlined by the Court of Justice in the case *NW*<sup>43</sup>.

The EC is now attempting to limit the possibility of reintroducing internal border controls: along with expanding the scope of alternative measures, the Proposal also extensively amends Chapter II of the SBC. Once again, migration is framed as a threat to the Schengen area. Article 25 lays down the general requirements for the reintroduction of border controls, identified in the existence of a serious threat to public policy or internal security and in the necessity and proportionality of the measure<sup>44</sup>. **Migrants' secondary movements are presented as a "serious threat"**, in particular where "large scale unauthorised movements

of third country nationals put at risk the overall functioning of the area without border control". Article 25a defines the procedures according to which Member States can reintroduce controls by distinguishing between unforeseeable and foreseeable events. It is then established that "the maximum duration of border control at internal borders shall not exceed 2 years".

When Member States introduce or prolong border controls, they shall notify their decision to the Commission, through a procedure set out in Article 27. A risk assessment is mandatory for the extension of border controls for more than 6 months, and **a role of EU Agencies is envisaged in the production of information and data to be included in the assessment**. Following the receipt of notification, the Commission may activate a consultation process during which the institution can issue an opinion on the necessity and proportionality of the measure (Article 27a). However, the Commission cannot impose any obligation on Member States regarding the withdrawal of internal border controls.

Finally, a new "Schengen area safeguard mechanism" is established in Article 28. It is triggered by situations "where the serious threat puts at risk the overall functioning of the areas without internal border" and aims at centralising the decision at the EU level, instead of leaving it to Member States. The mechanism allows the Council to adopt an implementing decision, upon a proposal by the Commission, in order to authorise the reintroduction of border controls. The decision can be adopted on the basis of individual notification received from Member States, or of a risk assessment conducted by the Commission or a Member State and, once adopted, it becomes the single basis for a "coordinated response". The decision covers a period of 6 months and can be extended for further 6 months.

It must be emphasised that, so far, the role of the Commission has never been decisive in evaluating the decisions on the reintroductions of internal borders and **the decision making process followed by Member States has been characterised by lack of transparency and lack of assessment on the potential impact of such controls on fundamental rights**. This lack of incisiveness and transparency have been compounded by a substantial ineffectiveness of the Schengen evaluation mechanism established by EU Regulation 1053/2013 and now subject to another reform proposal (Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify



the application of the Schengen acquis, repealing Regulation (EU) No 1053/2013, COM(2021) 278 final - 2021/0140(CNS). The need to pay more attention to the impact of Schengen measures on fundamental rights has been underlined by the European Parliament in its Schengen annual report<sup>45</sup>, where it is stressed that the Schengen acquis must be implemented in compliance with the ECHR.

The amendments to the mechanisms for the reintroduction of internal borders shows the will of the Commission to reinforce the role of EU institutions, with a view to limit the persistent lack of coordination among MS in the Schengen area and the proliferation of reintroduction of border controls. However, the role of the institution mainly consists in the adoption of opinion where the necessity and proportionality is assessed. **The Proposal does not provide for specific enforcement measures to be adopted by the Commission**, in order to sanction the introduction, or extension of internal borders up to 2 years, and when the decision of Member

States does not comply with the requirements of necessity and proportionality. Overall, **while a strong preference for alternative measures is established throughout the Proposal, it is not accompanied by real incentives for Member States that might prevent them from the reintroduction of controls at internal borders.**

To sum up, the amendments related to the management of migration at internal borders reiterate the assumption that irregular migration is a threat to public policy and internal security and it shall be dealt with by the exercise of police powers, with a restrictive approach. This might increase the use of police violence, which can also lead to risks for the lives of people-on-the-move and, as it will be analysed in the following sections, imply several violations of their fundamental rights. On the contrary, while attempting to limit the reintroduction of border controls, **the Commission does not introduce measures to oblige Member States to cease the maintenance of internal border controls.**

## The CJEU Judgement of 26th of April 2022: Border Controls Cannot be Extended for More than 6 Months

On this point, it shall be underlined that, according to the recent case law of the European Court of Justice (NW), the Schengen Borders Code permits a Member State, where there is a serious threat to its public policy or internal security, to temporarily reintroduce border control.

However, **the Court holds that such a measure, including all possible prolongations, cannot exceed a maximum total duration of six months.** This period was established precisely with the view of striking a "fair balance" between, on the one hand, the objective of establishing an area without internal frontiers in which the free movement of persons is ensured and, on the other, the possibility to adopt measures to safeguard internal security and public order, including when the threats arise, supposedly from migration.

After the period of six months, the Member State can reintroduce controls again, **only if it is faced with a new serious threat to public order or public security.** It follows that the period of six months provided for under Article 25 of the SBC **"is mandatory, with the result that, should it be exceeded, any internal border control reintroduced under Articles 25 and 27 of that code after it has elapsed is necessarily incompatible with that code"** (par. 78). As an additional consequence, the Court holds that a person cannot be obliged, on pain of penalty, to present a passport or identity card on entry from another Member State when the reintroduction of border control is contrary to the Schengen Borders Code (par. 98).

In addition, the Court also reprimanded the Commissions reluctance to address the violations of the SBC, by noting that the Regulation establishes a procedure whereby the EC shall issue an opinion if it has concerns over the proportionality of the extension of border controls: however, this did not happen in the case presented here.

The judgement is salient because, even though the case concerned a European citizen, the principles stated by the Court clearly indicate that **the norms related to the reintroduction of internal borders shall be applied and interpreted strictly.** Therefore, it is not permissible that such rules are circumvented by Member States, with the tacit acceptance of the Commission



# 5 ETHNIC PROFILING

The new Article 23 would allow the police to carry out controls with the aim of preventing and combating 'irregular residence or stay, linked to irregular migration'. According to Recital 46, Member States shall not, 'when implementing this regulation, discriminate against person on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

## Relevant articles and recitals

*Recital 21, 26, 46; Article 23,*

## Analysis

The European Commission appears to be aware of the potential impact that police checks, particularly at internal borders, and of the use of high-tech surveillance might have on the right to non-discrimination of people-on-the-move. As police authorities would be authorized to carry out controls targeting 'irregular migrants', there is a high risk that profiling practices would proliferate across the EU. The text of the proposal to amend the SBC, and in particular Article 23 allowing these controls at internal borders, is clearly opening the door for these practices to be legitimised and strengthened.

Profiling can be understood as categorising individuals according to personal characteristics, whether these are fixed or immutable. In the framework of checks at state borders, ethnic profiling takes place when, in the absence of grounds for suspicion, police use elements such as race, colour,

languages, religion, nationality or ethnic origins, as justification for controls and surveillance. According to the Commissioner for Human Rights of the CoE, "government policies may provide excessive discretionary powers to law enforcement authorities, who then use that discretion to target groups or individuals based on their skin colour or the language they speak"<sup>46</sup>.

Most often, ethnic profiling is related to the performance of additional identity checks or interviews of persons or groups at border crossing points and transportation hubs such as airports, metro and railway stations and bus depots. A systematic referral to second line checks of all persons of a specific nationality risks becoming discriminatory: "nationality can be a legitimate part of risk profiles to detect irregular migration or presumed victims of trafficking in human beings, but must not be the sole or primary trigger of a second line check". Furthermore, as in other contexts, differential treatment based on nationality becomes discriminatory and therefore unlawful when it is used as a proxy for discriminating on protected grounds that are closely linked to nationality, such as race, ethnicity or religion<sup>47</sup>.

Police controls that can amount to ethnic profiling have been recorded all over Europe. A report from the Financial Times in August 2018 has highlighted how some of the border checks along the German-Austrian border in Bavaria were increasingly becoming subject to racialised practices<sup>48</sup>. Another example is represented by a national police programme in the Netherlands, the 'Moelander' project<sup>49</sup>.

## Case Study 4: Italian Internal Borders

The scheme proposed in the Regulation is already an established pattern at the Italian internal border. For instance, at the Italian French border joint police patrols systematically check migrants in proximity to border areas. This happens at the Ventimiglia train station as well as on the train from Ventimiglia (Italy) to Menton (France). Controls do not target every passenger, but specifically people from minority backgrounds who, since 2020, are checked on the train platform and prevented from boarding or stopped directly at the station<sup>50</sup>. In cases where people from minority backgrounds are noticed on board a train coming from Italy to the Menton-Garavan train station he/she immediately undergoes a further police check.

According to some testimonies collected in the report "The Brutal Side of the French Riviera", "there

are usually police officers at the station, and they always ask for people's documents. They do not check every passenger though, only those who are black. *Contrôle facial*, says one policeman quite openly after drawing the ire of one black French passenger, the only person on the train to be asked for papers. 'They check the toilets, where migrants often hide. If you try to resist, they use pepper spray to force you off the train,' explain Keshia Niya activists. 'The cops aren't mean if you stay quiet. If you struggle, they beat you and use pepper spray' says 21-year-old Ibrahim M. from Sudan. Migrants found to have no European papers are taken off the train, searched on the platform and taken to the PAF office<sup>51</sup>.

Similar practices have been reported at the train station of Bolzano, along the Italo-Austrian border: on the platform Italian police have been known to stop and control the ID only of non-white people, while on intercity trains the controls are carried out by joint patrols<sup>52</sup>.

## Case Study 5: The Balkan Region

BVMN, in its Balkan region report of December 2019<sup>53</sup>, describes behaviours that can easily be classified as racial profiling. During winter, as the weather gets worse, and sometimes becomes life-threatening, most people try to find alternative solutions to travel, such as public and private transport. As this happened, in winter 2019, BVMN registered an increase of police controls.

*"One marker of illegality within these enhanced controls is the screening of persons with darker skin by authorities. Respondents report the regular spot checks, based on racial profiling, that Croatian authorities carry out around transport hubs like bus and train stations. The respondents report the regular spot checks, based on racial profiling, that Croatian authorities carry out around transport hubs like bus and train stations. Checks also allegedly rely on information from transport operators and members of the public, and occur on private vehicles too"*<sup>54</sup>

The same report also describes two single episodes of racial profiling and violence against people on the basis of their supposed ethnicity. In one of the cases, two Nigerian students were detained on a tram, brought to a police station and expelled into Bosnia despite the validity of their documents, and simply because they were mistaken for undocumented third-country nationals. A similar practice has been documented in Bosnia. One example of the systemic use of racial profiling and discrimination is the behaviour of police officers in Ključ, a city 100 km far from Bihać. There, systematically, the buses that come from Sarajevo are stopped, and the documents of individuals with dark skin colours are checked, as police presume that they are heading to the north-west of Bosnia to then migrate further into Europe. They are often expelled from buses, left with no other way than walking to their destination, even during harsh winters, even with children and the elderly.

Ethnic profiling can amount to a violation of EU and international law: first and foremost, it can constitute a violation of the principle of non-discrimination (Art. 14 ECHR; Art. 21 EU Charter). The ECtHR has recognised that discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination<sup>55,56</sup>. The Human Rights Committee has acknowledged that "when the authorities carry out checks at the border, the physical or ethnic characteristics of the people subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country"<sup>57</sup>. Several national and international Courts ruled against practices of ethnic profiling, recognizing the violation of a right to non-discrimination<sup>58</sup>.

Besides the issues that the violation of the principle of non-discrimination generates, there is a further point of concern. The proposal amending the SBC clearly aims to further increase surveillance and controls over non-EU citizens crossing internal and external borders. **Allowing the increase in the use of technology, it would practically legitimise ethnic and racial profiling.** For instance, drones can contribute to further creating opportunities of discrimination and racial profiling of vulnerable people-on-the-move. A drone cannot differentiate between a trafficker and a person in need of international protection. This can be done at a point of entry managed by humans. Similarly, a vulnerable person-on-the-move cannot be identified by a drone or other technology, but a vulnerability can be ascertained by a correctly

trained and instructed agent.

Moreover, **the definition of the technologies that would be allowed for the surveillance of borders is very vague, which leaves much to the discretion of MS.** An effective way to avoid racial profiling and, in general, discriminatory outcomes in the use of technology would be to better

define the kind of technological means available to authorities, through national legislation of the member states. An important point would also be to collect and render public statistical data on policing - disaggregated by nationality, language, religion and national or ethnic background. This would allow for the identification of any existing profiling practices and increase the transparency and accountability of law enforcement authorities

## 6 THE USE OF HIGH-END TECHNOLOGIES IN BORDER SURVEILLANCE

The Proposal repeatedly refers to the use of surveillance and monitoring technologies, both at external (Article 13) and at internal borders (Article 23). According to Recital 21, the prohibition of internal border controls should not be understood as preventing the lawful exercise of police, including those “that entail the use of monitoring and surveillance technologies which are generally used in the territory or that are based on a risk assessment for the purpose of protecting internal security”. The use of such technologies for checks should therefore not be considered as equivalent to border controls. Accordingly, Article 23 excludes that measures carried out on the basis of monitoring and surveillance technologies “generally used in the territory, for the purposes of addressing threats to public security or public policy” are considered equivalent to border controls.

### Relevant articles and recitals

Recitals 15, 16, 21,47; Article 13 (5), Article 23 (1)

## Analysis

The increased use of high-end technologies for border surveillance at the EU’s external and internal borders reveals an increased unification of border policies for internal (EU) and external security. Introducing such measures is reflective of the EU’s failure to address migration challenges with other means, such as creating legal pathways for people to migrate, for asylum seekers to travel safely and lodge applications for protection in a country of their choosing and for recognized

refugees to travel and reside legally in their state of destination.

The use of technologies, such as drones, in border surveillance is being advertised as a technical panacea for the consequences of those failed policies and politics while the real impact on border security remains under question with regards to their effectiveness and the increased security they are alleged to be providing<sup>59</sup>. Significantly, drone technologies alone create a regime of “violent dehumanisation and non-differentiation” of people<sup>60</sup>. Even though drones and other high-end technologies could help identify people-on-the-move in situations of risk in order to save lives, civil society organisations report that such technologies are, in fact, used to expel people at the EU’s external and internal borders and to facilitate other violations of fundamental rights such as *non-refoulement* and access to international protection.

Among others, drones have become the favoured technology in surveilling state borders within the EU and at its external borders, being deployed in border areas where reports of pushbacks have been documented. Devices like drones, thermal imaging cameras, and vehicle scanners have been weaponised against people-on-the-move, making them easier to detect and thus compounding their vulnerability and the dangers they face<sup>61</sup>

Since 2018, BVMN has recorded 24 testimonies where drones were used during a pushback, affecting an estimated 713 people. In 2021, a respondent informed BVMN of their pushback

from Hungary, and recalled “seeing a drone flying over” before being intercepted by Hungarian police and then being pushed back<sup>62</sup>. In 2020, a respondent informed BVMN that while they were being pushed back from Greece to Turkey “one of the ‘commando’ men launched a camera drone that he used to observe activity on the Turkish side of the Evros river. Meanwhile, some of the other officers and commandos got one rubber dinghy ready”<sup>63</sup>. In 2019, a respondent informed BVMN of a surveillance drone which had targeted them in Croatia before being ambushed by a police unit who then pushed the group back<sup>64</sup>. These are just a few examples of when drones have been used during pushbacks, posing grave issues pertaining to the facilitation of fundamental rights violations. In relation to internal borders, according to the information collected by ASGI during past surveys at the Swiss-Italian border, the Swiss border authorities make use of drones in order to surveil irregular movements of people-on-the-move along the boundary with Italy.

In the above-established context, it is imperative to mention that Frontex conducts border surveillance through the use of drones. We have assessed that drones are used to conduct pushbacks and thus violate EU law and international human rights law, in particular the prohibitions of *non-refoulement*, and that they pose grave ethical issues. Such issues arise potentially to the EU level itself by its agency Frontex, collecting and transmitting the data necessary to locate people-on-the-move that are subsequently pushed back.

Of particular relevance we have to take into consideration that Frontex has contracts for the supply and operation of border surveillance drones with private companies, which are deployed for maritime surveillance, including collection and sharing of data with Frontex, as well as the MS in question. For instance, Frontex provides drone data of people in distress in the Mediterranean Sea to the so-called Libyan Coast Guard, and withholds information for commercial ships or NGO-led search and rescue missions. This cooperation facilitates the return of migrants to Libya and violates the prohibition of *refoulement*. The sharing of data by Frontex with the so-called Libyan Coast Guard is, in essence, essential to boats in distress being located and subsequently pulled back to Libya; such a cooperative act amounts to aiding and assisting another state in the commission of an internationally wrongful act.

In addition, Frontex provided data on people-on-

the-move that they gathered in their Multipurpose Aerial Surveillance Western Balkan mission to Croatian authorities, entailing responsive measures by them. We are particularly concerned about the transfer of this data as Croatian authorities are repeatedly reported to conduct fundamental rights breaches towards apprehended people-on-the-move as well as illegal pushbacks.

High-tech surveillance is employed at internal borders as well. In Italy, the use of facial recognition systems was announced in Como, a city at the border between Italy and Switzerland, and was set to be employed by police authorities at external borders, particularly in the context of SAR operations. It was only the decision of the Italian Data Protection Authority – who ruled that the technologies have no sufficient legal basis – that temporarily put a strain on the use of AI systems in border areas<sup>65</sup>. However, such systems will most likely be deployed soon both at external and internal borders: 65 scout cameras have recently been bought by Friuli Venezia Giulia regional authorities, to be used in the context of border surveillance<sup>66</sup>.

### **The increased use of drones and other high-end technologies in border surveillance at the EU’s borders is to the detriment of safeguarding fundamental rights and data protection rights.**

The Commission proposal on the Artificial Intelligence Regulation classified AI used for immigration, asylum and border control purposes as “high risk” systems, because of the inherent vulnerability of migrants and asylum seekers and the impact that these technologies can have on fundamental rights such as their rights to free movement, non-discrimination, protection of private life and personal data, international protection and good administration. However, **in the SBC Proposal, the Commission does not seem concerned by the impact that surveillance technologies might have on the human rights of migrants**: for instance, it does not codify specific rules that Member States shall apply in the use of surveillance technologies, in order to grant that their implementation comply with fundamental rights. The wide margin of discretion left to enacting national legislation might result in broad, unclear or even undisclosed executive acts which would not grant sufficient guarantees.



# 7 TRANSFERS AND READMISSIONS OF FOREIGNERS

Since 2015, several Member States resorted to simplified and informal return procedures to manage migration flows at internal borders. Some did it on the grounds of the reconstruction of external borders, others made use of bilateral readmission agreements. In most cases, however, the safeguards contained in the agreements were not fully respected and summary returns or readmissions resulted in pushbacks. This occurred, for instance, at the border between Austria and Italy, as well as between Italy and Slovenia, and between Slovenia and Croatia<sup>67</sup>. Pushbacks represent a violation of the prohibition of collective expulsions and breach the right to access to asylum and to the principle of *non-refoulement*.

The new Article 23a implements a procedure for **the transfer of third country nationals apprehended “in the vicinity of the internal border”**. It allows the competent authorities of a Member State to “immediately transfer” third country nationals to the State from which the person entered or sought to enter, based on the assumption that they have no right to stay on the territory. The procedure is triggered by the apprehension of an irregular third country national (i.e. a person who does not fulfil the condition of entry set out by Article 6 of the SBC) in the context of joint police patrols, and if there are “clear indications that the person has arrived directly from another Member State”. To reach such a conclusion, authorities shall take into consideration the statements of the person, identity, travel and/or other documentation found on them and the results of database searches.

The procedure is detailed in Annex II, attached to the proposal. It requires Member States to adopt a written decision (through standardised forms) that shall state the grounds for finding that the person has no right to stay. A copy of the transfer decision shall be issued to the person, but there is no provision on the obligation to translate the decision. Third country nationals have a right to appeal, in accordance with national law, however the appeal does not have suspensive effects. The transfer shall take place within 24 hours.

The new transfer procedure is complemented by the proposed amendment to Article 6(3) of Directive 2008/115/CE. According to the

Proposal, Member States are exempted from the obligation of issuing a return order – in line with the guarantees provided for in the Return Directive – to third country nationals found on their territory, when they are taken back from another Member State according to the transfer procedure set out in Article 23a or “under bilateral agreements or arrangements”. Accordingly, Recital 27 points out that the transfer procedure should not affect the possibility to return irregular migrants in accordance with bilateral agreements, and it adds that “Member States should be afforded the possibility to conclude new agreements or arrangements”. The duty to adopt a return decision does no longer lies with the Member State where the person is found, but on the State that has agreed to take them back.

## Relevant articles and recitals

*Recitals 25-27; Article 23a; Article 6 (3) Return Directive*

## Analysis

The Proposal **fails to consider that secondary movements largely involve people-on-the-move in search for protection**, whose attempt to move within EU Member States must be addressed according to the EU asylum *acquis*, and in particular through Regulation 2013/604. The SBC is not fit for purpose to address dysfunctionalities of the Dublin Regulation, but at the same time many of the proposed measures – including the transfer procedure and reintroduction of border controls in case of “large scale unauthorised movements” – **will have detrimental effects on the right to apply to asylum and on the respect of guarantees accorded to asylum seekers**.

The new transfer procedure appears a clear attempt to legitimise unlawful practices of internal pushbacks that have been implemented at European internal borders since 2015. Summary returns, either when they were implemented outside a clear legal framework, or in the context of bilateral readmission agreements, **resulted in the violation of the right to apply for asylum, the right to an effective remedy and principle of non-refoulement**. Several Courts in different



Member States have recognized that “internal pushbacks” were characterised by the lack of an individual assessment, and the unlawful involvement of children. In July 2021, the Austrian Administrative Court Steiermark ruled that the readmission of a Moroccan national at the border with Slovenia was unlawful as his request for asylum was ignored<sup>68</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<sup>69</sup>. This ruling has been confirmed by the Slovenian Supreme Court in April 2021. The same individual was then readmitted to Croatia under a bilateral readmission agreement and chain-refouled to Bosnia Herzegovina<sup>70</sup>.

## Case Study 6: Summary Return and Readmissions at Italian Internal Borders

Summary return or readmission practices taking place at Italian internal borders vividly exemplify the many implications that border control has on human rights of migrants. Both at the land border between Italy and Slovenia and at the sea border between Italy and Greece, collective pushbacks occurred on the basis of bilateral readmission agreements and often implied chain *refoulement*.

### The Italo-Slovenian border

In 2020, cases of readmissions to Slovenia from Trieste and Gorizia were massively implemented without any formal procedure or decision. They found their legal basis on the Readmission Agreement signed by the Italian and Slovenian Governments in 1996. The systematic use of the agreement was confirmed by the Ministry of the Interior on the 13th of January 2021, which confirmed that these readmissions (over 1300 during the year 2020) took place without formal provisions and even involved foreign citizens who expressed the intention to apply for asylum (whose claim should have been examined under the framework of Dublin Regulation).

The readmissions also implied a *de facto* detention of migrants. Moreover, they often led to chain refoulement all along the Balkan Route – from Slovenia to Croatia and from Croatia to Bosnia or Serbia – with the result that migrants were unlawfully returned to Third Countries which cannot be considered Safe countries, without any individual assessment of their situation.

On 18th January 2021 the Civil Court in Rome ruled that such practices were in breach of international and European law, because they violated the right to *non-refoulement*, the right to apply for asylum and the procedural right to an individual assessment and an effective remedy. The Civil Court of Rome confirmed that the informal readmission procedure implemented on the Italian eastern border on the basis of the mentioned agreement that was never ratified by the Italian Parliament was unlawful. The Court also observed a *de facto* detention carried out without any order from the judicial authority and it further concluded that the procedure clearly exposed the person to risks of inhuman and degrading treatment, which, as documented by numerous NGOs, is a systematic practice at the Croatian border. According to the Court the Italian authorities could not deny knowing the mechanism of readmissions by chain carried out by Slovenian and Croatian authorities nor the situation of violence at the Croatian border as reported by several NGOs, international organizations and EU institutions. As confirmed by the access to the documents carried out in the name and on behalf of some of the people readmitted to Slovenia, the transfer to that country took place even if the people had expressed their intention to seek asylum, an intention that had been registered.

Furthermore, as documented in another case, the transfer represented only a short phase of the chain readmission mechanism. Within a few hours after a summary examination of his position, the same person was transferred to Croatia and from there pushed back to Bosnia. Reaching Italy and applying for asylum, he was recognized as a refugee.

### The Adriatic border

Summary readmissions take place on the basis of bilateral agreements between Italy and Greece too: for these actions, Italy was already sanctioned by the ECtHR in 2009. The Court found a violation of Article 4, Protocol 4 (prohibition of collective expulsion) and of Article 3 (prohibition of ill-treatment), since Greece was not considered a ‘safe country’ for asylum seekers. The pushbacks involved people-on-the-move in

search of international protection, including minors. Since 2009, informal pushbacks have not ceased: for this reason, the CoE Committee of Ministers supervision procedure on the implementation of the judgement is still pending. Several violations of the right to apply to asylum and of the principle of *non-refoulement* were found in 2021 and 2022 too, and many involved children.

## The Italo-French border

Finally, with regard to unlawful practices occurring at the Italo-French border, the French Council of State recognised that those actions breached the right to apply for asylum, and ruled that French authorities cannot return asylum seekers before engaging with the Dublin procedure. People-on-the-move are indeed often summarily returned by French police even though they expressed their will to apply for asylum in France. Similarly, minors crossing the borders were unlawfully returned because they were not registered as minors. Moreover, as recognised by the CGUE and the Council of State, French law related to the return of irregular people-on-the-move at the border - which allowed authorities to summarily expel them when they were found in the proximity of the border - was in direct contrast with the guarantees set by the Return Directive. In response, NGOs denounced the widespread use of violence by the police and of *de facto* detention in police stations (PAF) for up to 48 hours.

The examples provided here regarding the situation at Italian internal borders demonstrate that the exercise of border police powers and readmission procedures at internal borders lead to several violations of: a) the principle of *non-refoulement*; b) the right to asylum; c) the prohibition of collective expulsions; d) right to individual assessment and effective remedy; d) the right to liberty; e) the principle of best-interest of the child.

The Commission does not take sufficiently into account the impact of the proposed amendments on those rights. On the one hand, the Commission pushes for the adoption of bilateral agreements that already served as the basis for informal pushbacks, prioritising the objective of speedily returning TCNs over the adoption of common and harmonised rules for the Schengen area. The incentive for 'bilateral arrangements' will produce the proliferation of divergent rules and practices among Member States; moreover, the word 'arrangements' seems to allow for practices of informal agreements that could remain undisclosed and would raise several concerns with regards to transparency and accessibility of public authorities acts.

On the other hand, even though the new transfer procedure is based on an individual written decision, it will nonetheless lead to the violation of the right to liberty (as detention is not forbidden during the proceeding) and of the right to an effective remedy, as Annex II excluded the suspensive effect of the appeal. Moreover, the very same forced removal of TCNs can be qualified as a restriction of personal freedom and should be executed according to the guarantees of Article 5

ECTH and Article 6 of the Charter.

As for the risk of applying the transfer procedure to TCNs in search of protection - and in particular asylum seekers and minors - Article 23 does not mention explicitly the obligation to safeguard fundamental rights, to provide people-on-the-move with adequate information on the right to apply for asylum, and to apply the Dublin Regulation before the transfer form is filled in. This will increase the risk of the transfer of asylum seekers, not just at the border but "in vicinity of the internal border": the vague provision of Article 23 as for the geographical reach of the procedure allows Member States to carry it out with wide discretion.



# 8 CONCLUSIONS AND RECOMMENDATIONS

In light of the above analysis and of the concerns raised with regard to existing harmful practices, we propose the following conclusions and recommendations:

## I. Instrumentalisation

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We reject the use of the term 'instrumentalisation' to reflect situations of increased influx of movement into the EU. We do not support the measures proposed as they will have an adverse effect on the right to asylum and further connected fundamental rights. The situation of 'instrumentalisation' is ill-defined and, consequently, there is uncertainty as to the scope of the measures responding to such a situation, relating also to their necessity and proportionality. As a result, we would propose to remove the clauses from the proposal. Initiating a 'state of emergency' to justify the suspension of fundamental rights for transit communities has been utilised by MS in the past with devastating consequences for people-on-the-move, resulting in serious injury and death. Writing these caveats into EU law sets a dangerous precedent in which the right to life, amongst others, is seriously questioned.

## II. Infectious Disease Measures

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Whilst the proposal to establish a new mechanism is a welcome one which would ensure uniformity in response across MS, respect for fundamental rights must be guaranteed by this mechanism with specific measures in place to combat potential violations linked to restrictions on freedom of movement. This should be linked to the legislative package defining the proposal for an Independent Border Monitoring Mechanism (IBMM), a set of measures that ought to be intensified during epidemiological crises. Unfortunately, as it stands the proposed IBMM falls short of guidance necessary to ensure MS establish and implement a truly independent mechanism with sufficient mandate able to address severe human rights violations at EU borders. Indeed, the trial run of such a mechanism in Croatia was subject to an independent inquiry which revealed underspending, misreporting, and a subsequent cover-up of the fact that no independent border monitoring mechanism was ever established<sup>71</sup>. More recently, in Greece, the report of the National Transparency Authority was released with failed redactions that revealed the names and personal information of those surveyed for the report, 45% of whom were police and coast guard officers<sup>72</sup>. A monitoring mechanism with sufficient methodological scope, capacity, and true independence and institutional accountability would ensure that transit communities could access their rights and necessary healthcare during such a situation, following the more favourable approach of Portugal and approaching such crises through a humanitarian lens rather than one of containment and control.

## III. - IV. Border Control

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Whilst the will expressed by the Commission to avoid the reintroduction and maintenance of internal border control is an important standing point, especially in light of the border checks kept in place by several Member States, the aim of keeping Schengen a border-free area cannot be at expenses of the rights of citizens perceived as foreigners. Expanding the scope of police controls to those carried out in proximity of border areas with the aim of combating irregular migration is itself a form of criminalisation of people-on-the-move and would most likely result in racial profiling of both non-Caucasian third country nationals and EU citizens. Thus, the reference to "combat irregular residence or stay, linked to irregular migration" in Art. 23, point (ii) of the Proposal is highly problematised and should be removed.

As for the introduction and maintenance of border controls, in order to avoid Member States disregarding the time limits set in the Proposal, the Commission and the Parliament should be able to play a more central and effective role, which cannot be limited only to the adoption of informed opinions.

## V. Profiling

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Police controls, as well as border controls in case of their introduction and maintenance, cannot be carried out in a discriminatory way. MS have not only a negative obligation to refrain from violations of the principle of non-discrimination, but also a positive one enacting laws and practices that would prevent the use and perpetuation of discriminatory practices disguised in allegedly neutral tests. To tackle the issue, States should adopt precise legislation defining and prohibiting discriminatory profiling and circumscribing the discretionary powers of law enforcement officials. Effective policing methods should relate to individual behaviour and concrete information, instead of elements linked to the colour of people's skin or their perceived ethnicity. A reasonable suspicion standard should be applied across the bloc, and authorities should undergo continuous training in order to apply it in their daily activities.

## VI. Use of High-end Technologies

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In order to ensure that high-end technologies impact respect for fundamental rights, it is crucial that obligations inscribed in the EU Charter of Fundamental Rights, EU directives and regulations, as well as international human rights instruments are employed to hold EU Member States and EU agencies privy to information accessed through said technologies accountable of violations. Member States should be bind to lay down a legal framework for the use of high-tech systems in the context of police controls in border areas, that provides a right to data protection and accesso to data. Biometric identification systems used in border control management shall be classified as 'high-risk' systems under the AI regulatory framework and remote biometric identification shall be classified as unacceptable risk devices, because of the serious impact they would have on migrants' fundamental rights. The Proposal shall coordinate with the AI Regulation proposal in this regard.

In addition, the use of high-end technologies and drones for border surveillance at EU's internal and external borders cannot and should not replace the existence and functioning capabilities of official border crossings manned by correctly trained agents able to assess vulnerabilities and ensure access to international protection or other mechanisms in full respect of the rule of law. Therefore, the Commission's proposal "to limit border traffic to the minimum by closing some border crossing points" (Recital 12) runs counter to practical needs in rational and realistic migration management which should ensure that people in need of protection have access to legal mechanisms in official border crossings.

## VII. Transfers and Readmissions of Foreigners

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The new alternative measure for the transfer of foreigners represents - together with the amendments to the Return Directive on readmission agreements - the willing acceptance and institutionalization of pushbacks at internal borders. As it has been proved by looking at current MS practices, it will have a harmful impact on the right to apply for asylum and *non-refoulement*. This is even more concerning as there is no right to an effective, suspensive remedy and the procedure is to be conducted on the basis of a pre-filled form filled in by police authority and with no assistance of interpreters and lawyers. We reject the assumption that the transit of people-on-the-move, including both irregular migrants and asylum seekers, poses a threat to the Schengen area: this is proven by the fact that recent movements of citizens fleeing Ukraine across Europe had absolutely no impact on national security and public order despite their high numbers.

We thus propose to remove Article 23 from the Proposal. Only in the case the latter is maintained, we propose including a specific obligation to respect the right to asylum and the principle of *non-refoulement*, and the transfer procedure shall not affect the functioning of the Dublin system and the rights of minors on the move, who can never be subject to the procedure. Moreover, a provision on a right to appeal

with automatic suspensive effect shall be included in the Proposal, as well as a right to be assisted by an interpreter and by a lawyer during the entire procedure. Finally, the notion of 'border area' shall be further clarified.

We equally regard as highly critical the amendment to Article 6 (3) of the Return Directive, which would lead to the inconsistency of a common European system of asylum and migration management, exacerbating different and divergent practices across Member States.

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