

CM2205

COMMENTARY ON THE COMMISSION PROPOSAL AMENDING THE SCHENGEN BORDERS CODE (COM(2021) 891)

May 2022

According to the Meijers Committee, the Commission's proposal for an amendment of the Schengen Borders Code raises concerns as regards to the respect for fundamental freedoms, in particular the free movement of EU citizens, as well as fundamental rights, more specifically the right to asylum, the protection of personal data and non-discrimination. It also observes a return to intergovernmentalism, which contradicts the full integration of the Schengen acquis into the EU legal framework.

The comment focuses on the impact of these amendments in the following areas: i) external borders, ii) internal borders, iii) controls within the area of free movement.

 **Meijers
Committee**

Standing committee of experts on international immigration, refugee and criminal law

CM2205 Commentary on the Commission Proposal Amending the Schengen Borders Code (COM(2021) 891)

Amsterdam, May 2022

In December 2021, the European Commission submitted a legislative proposal to improve the functioning of the Schengen area, by strengthening the external borders and restoring free travel across internal borders, whilst enhancing security. The proposal flows from the Roadmap for a New Pact on Migration and Asylum, more specifically the Commission's "[Schengen Strategy](#)", published in June 2021.¹ The proposal contains an amendment to the Schengen Borders Code, as well as a targeted amendment of the Return Directive. The proposal should be read in conjunction with the Proposal for a [Regulation addressing situations of instrumentalisation in the field of migration and asylum](#) (Instrumentalisation Regulation)² and the [Proposal for a Council Recommendation on operational police cooperation](#).

In this Commentary the Meijers Committee will focus on the proposed amendments to the Schengen Borders Code (SBC). The amendments relate to 1) the management of the external borders, 2) the rules for exceptionally reintroducing checks at the internal borders, and 3) the exercise of public powers as an alternative to the reintroduction of border controls.

As a general comment, the Meijers Committee submits that, despite assurances to the contrary by the Commission, the proposal raises concerns in terms of the respect for fundamental freedoms, in particular the free movement of EU citizens, as well as fundamental rights, more specifically the right to asylum, the protection of personal data and non-discrimination.

The EU Treaties explicitly define the Area of Freedom, Security and Justice as a space without internal border controls. For EU citizens, the right to move and reside freely within the territory of the Member States is protected in Article 21 TFEU. Furthermore, in accordance with Article 67 TFEU, the Union must ensure the absence of internal border controls for EU and non-EU citizens. This was recently confirmed by the Court of Justice of the European Union in a case regarding the legality of the prolonged reintroduction of controls at the internal borders.³ The Commission, however, does

¹ In November 2020, the Meijers Committee published its [recommendations](#) for the Schengen Strategy as announced in the New Pact on Migration and Asylum in September 2020.

² The Instrumentalisation Regulation would provide for derogations to the EU's asylum acquis, as well as the Return Directive in case of instrumentalisation as defined in the Proposal Amending the Schengen Borders Code. It largely mirrors the provisions for the proposal for Emergency Measures based on Art. 78(3) TFEU for the benefit of Poland, Latvia and Lithuania when faced with the instrumentalisation of migrants by Belarus. Mutatis mutandis the criticism launched by the Meijers Committee on this proposal in its [letter](#) apply also to the Instrumentalisation Regulation.

³ Joined Cases C-368/20 and C-369/20, NW, 26 April 2022, para. 6

not consider the reinstatement of controls at the internal border as an impediment to free movement, even if it requires Member States to report on the likely impact thereof on the free movement of persons. The negative implications of the reintroduction of controls for the free movement of persons have been widely reported.⁴ At a very symbolic level the proposal even allows for the construction of speed limits or other physical barriers at road crossing points.

Finally, the Commission affirms with this proposal a sovereign right for Member States to reintroduce internal border controls, whilst remaining silent on the disproportionate nature of the scale and duration of internal border controls witnessed at Member States internal borders since 2015.

The Meijers Committee sees this as a worrisome confirmation of a return to intergovernmentalism in the Schengen area and the primacy of executive action by the Member States. This development puts at risk the primacy of the Schengen rules on the abolition of internal border controls, as integrated in the EU legal order. The establishment of a Schengen Forum in 2020, as well as the proposal of the French Presidency for a Schengen Council in February 2022,⁵ revive a past in which Member States are in the driver seat, with increased executive decision making in the Council and a more limited role for the Commission, Parliament and Court of Justice of the European Union (CJEU). This will negatively affect the democratic and judicial accountability of the Schengen area.

1. Amendments to the management of the external borders

a. Instrumentalisation

In its [letter](#) on emergency measures in response to the instrumentalisation of migrants by Belarus, the Meijers Committee already raised the point that a geopolitical issue should not be addressed through the EU's asylum and border policy, opposing the arrival of migrants as a threat *per se*. It should further be noted that the definition of instrumentalisation as proposed in the SBC amendments is broad and lacks clarity, including the risk of derogations from the EU asylum *acquis*.⁶

⁴ See e.g. Commission, 'Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19' [2020] OJ C 169; Fundamental Rights Agency, Coronavirus pandemic in the EU – Fundamental Rights Implications – Bulletin 6 available at <https://fra.europa.eu/en/publication/2020/covid19-rights-impact-november-1>.

⁵ Georgi Gotev, Macron seeks reform of Schengen mirroring the Eurozone, Euractive, 3 February 2022, available at <https://www.euractiv.com/section/justice-home-affairs/news/macron-seeks-reform-of-schengen-mirroring-the-eurozone/>.

⁶ ECRE comments on the Commission Proposal to amend the Schengen Borders Code, 7 March 2022. See also the ECRE Comments of January 2022 on the Commission proposal for a Regulation addressing situations of instrumentalisation in the field of Migration and Asylum COM(2021) 890.

b. Border Surveillance

The proposal provides for increased border surveillance aimed at preventing irregular entry of third-country nationals. However, it should be made clear that this may never result in a situation of refoulement. Although the European Court of Human Rights (ECtHR) has held in the case of *ND & NT v Spain* that the prohibition of collective expulsions does not prevent Member States from requiring an individual to lodge their request for international protection at a designated border crossing point, this does not affect the prohibition of refoulement.⁷

Consequently, people that are intercepted during border surveillance should be accompanied to a designated border crossing point if they indicate they wish to make such claim. Pushbacks outside border crossing points remain illegal under international and European human rights law, also within the proposed “instrumentalisation” framework.

In order for the right to request asylum to be effective, the number of border crossing points, as well as their opening hours, should be proportionate to the number of people willing to lodge such request. In *Shahzad v Hungary* the ECtHR confirmed that Contracting Parties must “make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border”.⁸ Those means, according to the ECtHR, should allow all persons who face persecution to submit an application for protection based on Article 3 ECHR, under conditions which ensure that the application is processed in a manner consistent with international norms.

c. Restrictions on Essential Travel

The Meijers Committee supports the introduction of an emergency procedure in case of restrictions to non-essential travel based on public health, from the point of view of legal certainty and uniformity. It also welcomes the explicit recognition of a right of entry for Union citizens, as well third country nationals holding a residence permit. Importantly, asylum seekers have been included in the category of essential travellers.

Given the disruptive nature of travel restrictions, the emotional and economic hardship they cause for individuals and the limited effectiveness thereof,⁹ the Meijers Committee advocates the introduction of an explicit proportionality requirement. In accordance with the general principle of proportionality, laid down in Article 5(4) TEU, this also implies the obligation for the Council to adopt a decision stipulating less restrictive measures to be applied to people crossing the external borders.

⁷ ECtHR, *N.D. and N.T. v. Spain* [GC] – 13 February 2020, appl.no. 8675/15 and 8697/15, pars. 210-212.

⁸ ECtHR, *Shahzad v. Hungary* – 8 July 2021, appl.no. 12625/17, para. 62.

⁹ Smirti Mallapaty, What the data say about border closures and COVID spread, *Nature*, 22 December 2020, available at <https://www.nature.com/articles/d41586-020-03605-6>.

2. Reinstatement of controls at the internal border controls

The Meijers Committee welcomes the proposal for stricter reporting obligations on both Member States and the Commission in case of the reinstatement of internal border controls. However, it notes that the possibility to reintroduce checks at the internal borders is significantly broadened and the time period in which this can be done extended. As such, the proposal runs counter to the general principle of free movement and the reinstatement of controls at the internal borders within the Schengen area as a means of last resort. The proposal would introduce, by way of example, a list of grounds that may give rise to a “serious threat to public policy or internal security”. This list introduces new grounds, including “large scale health emergencies”, as well as “large scale unauthorised movements”, providing current and past reinstatements of internal borders controls on these grounds with a legal basis.

The Meijers Committee is in favour of an explicit introduction of public health into the Schengen Borders Code for reasons of legal certainty, but underlines that for consistency it should be introduced as a separate ground and – given the contested efficacy of border controls – be accompanied with a clear and narrowly circumscribed definition. It should be noted that during the first phase of the COVID-19 pandemic in 2020, it was not so much border controls, as full border closures by the Member States that caused major disruption to cross-border movements within the EU.

The proposed definition of “large scale unauthorised movements” must be considered as too vague, leaving Member States with too much discretion to maintain controls at their internal borders based on so-called secondary movements, even where these do not create a reasonable risk for public policy or public order.

The Meijers Committee supports that Member States, in their notifications of reinstatements of border controls, must address the impact on the free movement of persons in cross-border regions. It also welcomes the stricter reporting obligations, including risk assessments, at the different stages of the procedure and the standardisation thereof.

The current proposal includes an obligation for the Commission to issue an opinion upon notification of a reinstatement of border controls (Article 27a(2)), however, only upon prolongation. The Meijers Committee proposes to add such obligation for every notification of a reinstatement of border controls. Under the proposed Article 28(7) the Commission may issue a recommendation indicating that there may be more suitable means to address threats to internal security and public policy. Also here, the Meijers Committee proposes to introduce an obligation on the Commission to issue an opinion, requiring it to clearly stipulate which less restrictive measures it envisages, as well as further actions to be taken by the Member State in question.

3. Alternative Measures in the Area of Free Movement

a Surveillance in Border Areas

The current text of Article 23 SBC leaves it in the hands of Member States to conduct police checks within its territory unaffected. The Commission proposal significantly broadens the scope of these checks by referring to the general “exercise of public powers” without taking full account of the case law of the CJEU on the legitimacy of checks in border areas.¹⁰ The extended definition of checks in the area of free movement, combined with generalised monitoring and surveillance, including by technological means, raises a number of fundamental rights concerns, which will be listed below in more detail.

Data Protection

First, despite the assertion that the use of technology will be subjected to European and national data protection rules, the question is whether these rules can be effectively enforced, given the already high case load of national data protection authorities. The use of EU large-scale databases (i.e. Schengen Information System, Eurodac, Visa Information System, Entry-Exit System, ETIAS, and ECRIS-TCN) together with the Regulation on Interoperability of these systems, resulted in not only a high workload for the supervisory data protection authorities, but also a complex legal framework. The complexity of rules makes it difficult for data subjects and supervisory authorities to understand not only which law applies, but also which state or organisation should be addressed with regard to the rights to access, correction or deletion of data, and effective judicial protection. Referring to the right to data protection in Article 8(3) CFR, the CJEU held that control by independent authorities of compliance with requirements of protection and security, carried out on the basis of EU law, “is an essential component of the protection of individuals with regard to the processing of personal data”.¹¹

Freedom of Movement

Second, the monitoring by technological means, although not physically hindering traffic flows, may still be considered a restriction to the free movement of individuals. The proposal removes also the use of Personal Name Records (PNR) or Advanced Passenger Information (API) on intra-Schengen connections. It should be emphasised that API can only be used for the purpose of migration control and its use inside the

¹⁰ Joined Cases C-188/10 and C-189/10, Aziz Melki and Selim Abdeli, 22 June 2010; C-278/12 Atiqullah Adil v Minister voor Immigratie, Integratie en Asiel, 19 July 2012; C-9/16, A, 21 June 2017.

¹¹ Joined cases C-293/12 and 594/12, Digital Rights Ireland Ltd v Minister of Communications, marine and natural resources and Others and Kärntner Landesregierung and Others, 8 April 2014, para. 68.

Schengen area would significantly broaden the original scope of the API directive. As regards the use of PNR, it should be recalled that the application of the PNR Directive to intra-Schengen connections is still the subject of preliminary questions regarding their compatibility with the EU free movement rules.¹²

Risk of profiling – Prohibition of Discrimination

Third, increased surveillance in border areas heightens the risk of profiling by law enforcement authorities based on racial, ethnic, national, or religious characteristics. It has been widely reported that when police checks are deployed in the context of immigration enforcement, the selection of those that have to undergo additional checks is often informed by prejudice.¹³

As submitted by other civil society actors, 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.¹⁴

The proposed procedure in Article 23 in the amended SBC increases the risk of discriminatory and illegal practice of [ethnic and racial profiling](#). This would be in breach of the right to non-discrimination as protected in international and EU law and contrary to the European Commission’s commitments under the EU [Anti-Racism Action Plan](#).¹⁵ The Meijers Committee therefore proposes, together with European Council on Refugees and Exiles (ECRE), to delete in the draft Article 23 (a) ii SBC, the aim of to “combat irregular residence or stay, linked to irregular migration” and to

¹² C-222/02. Also the compatibility of the Directive itself with the Charter is contested, although here Advocate General Pitruzella has concluded it is (Opinion of 27 January 2022 in Case C-817/19).

¹³ Open Society Justice Initiative Report, Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory (2009), available [here](#); Tim Dekkers en Maartje van der Woude, Acceptance Denied: Intelligence-led Immigration Checks in Dutch Border Areas, *European Journal of Policing Studies*, 2016, 4 (2) p. 242-265. See also the specific concerns raised by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, On emerging digital technologies in border and immigration enforcement context, [Report A/75/590](#) November 2020.

¹⁴ Joint Civil Society Statement on the Schengen Borders Code, 20 April 2022, available at <https://picum.org/joint-civil-society-statement-schengen-borders-code/>.

¹⁵ Communication A Union of equality: EU anti-racism action plan 2020-2025, COM (2020) 565 fin, 18 September 2020.

replace the provision “general information and experience of” by “specific evidence provided by”.¹⁶

Application of the EU Charter of Fundamental Rights

Our fourth concern relates to the applicability of EU law, including the EU Charter, to the exercise of public powers in border areas. The Meijers Committee submits that, because these powers are regulated in the SBC, Member States act within the scope of EU law and are therefore bound by EU law, including the Charter. The explanatory memorandum to the Commission proposal mentions that “Member States should (...) ensure that discretion exercised by competent authorities is carried out in full respect of fundamental rights, in particular the prohibition of discrimination”, but fails to explicitly refer to the source of that obligation. The Meijers Committee proposes to explicitly confirm in the text of the SBC that the exercise of public powers in border areas falls within the scope of EU law, including the Charter on Fundamental Rights.

b. “Summary Returns” at the Internal Borders

The proposal provides for a procedure for summary returns at the internal borders.¹⁷ Through a targeted amendment of Article 6(3) of the Return Directive, it also regularises existing practices of summary returns at Member States’ internal borders, by removing the standstill clause on bilateral readmission agreements within the area of free movement. Rather than contributing to the well-functioning of the Schengen area, this risks creating an expanding web of bilateral agreements and the concomitant proliferation of untransparent Member State practices at the internal borders in a field that is subject to EU competence.

Application of the EU Charter of Fundamental Rights

The procedure for summary returns raises a number of fundamental rights concerns. In its proposed Council Recommendation on joint police operations, the Commission notes that “rules and standards as defined in other areas of EU law remain applicable, in line with the obligation by Member States to respect fundamental rights as enshrined in the Charter of Fundamental Rights of the EU”.¹⁸ The proposal for an

¹⁶ See also ECRE Comments on the Commission Proposal to Amend the Schengen Borders Code, 7 March 2022, <https://ecre.org/ecre-comments-on-the-commission-proposal-to-amend-the-schengen-borders-code/>.

¹⁷ Commission Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final, Article 23 a.

¹⁸ Commission Proposal for a Council Recommendation on operational police cooperation COM(2021) 780 final.

amendment of the SBC, however, only refers to the applicability of the Charter in recital 26. The Meijers Committee submits that it should be made clear in the operative part of the proposal, that the Charter applies to *all* police activities in border areas unconditionally and in full, including where summary returns are carried out under bilateral agreements between the adjacent Member States.

Risk of profiling – Prohibition of Discrimination

The Meijers Committee stresses that the aforementioned risk of profiling based on racial, ethnic, national, or religious characteristics is equally present in relation to the procedure for summary returns, also because the introduction of this procedure is likely to increase surveillance in border areas.

The Right to Asylum

The procedure for summary returns risks becoming a way to evade the rules of the Dublin Regulation, which provides that an asylum request can be made at the Member State's border (Article 3(1) Dublin III Regulation). It also may result in violation of the prohibition of refoulement, of collective expulsions and the right to asylum, laid down in the EU Charter (Articles 4, 18 and 19).

The Meijers Committee proposes to include an additional condition in the proposed Article 23a SBC, namely that a person making a request for international protection cannot be returned other than after a determination of the responsible Member State under the Dublin procedure, and to include a cross-reference to Article 3 (b) SBC. This is necessary to comply with the case law of the ECtHR, including the *Sharifi v Italy* case, in which it was held that the direct return of third country nationals from one Member State to another constituted a violation of the prohibition of refoulement and collective expulsions.¹⁹ Such provision is of importance to prevent return to a Member State facing systemic deficiencies in its asylum system, or engaged in pushbacks at the external borders, risking chain-refoulement.

The Right to an Effective Legal Remedy

Finally, the Meijers Committee is concerned about the lack of any provision safeguarding the right to effective judicial protection in accordance with Article 47 of the Charter. The Meijers Committee, therefore, proposes to add a provision to the proposed Article 23a SBC ensuring that individuals have a right to an effective remedy before a court against the return decision.

¹⁹ See also C-411/10, *N.S. v. SSHD*, 21 December 2011.