



INSIGHT

INSTRUMENTALIZATION OF MIGRANTS, SANCTIONS TACKLING HYBRID ATTACKS AND SCHENGEN REFORM IN THE SHADOWS OF THE PACT

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SCHENGEN REFORM: 'ALTERNATIVES' TO BORDER CONTROLS TO CURB 'SECONDARY MOVEMENTS'

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ABSTRACT: A series of challenges and crises have highlighted the deficits of the 'Schengen Area' both regarding its external and internal borders. This resulted in the undermining of trust between the Member States which is essential to sustain an area free from internal borders. Thus, the EU Commission presented in December 2021 new rules to strengthen the Schengen System. This *Insight* aims to analyse the promotion of 'alternative' measures to internal border controls as an attempt to curb secondary movements of third-country nationals without resorting to border controls, such as through increased joint police patrols. Special attention will be given to the introduction of a new 'alternative' measure envisaged in art. 23a of the proposal to amend the Schengen Borders Code that provides for a distinct transfer procedure for those apprehended at the internal borders in the context of cross-border police cooperation and who do not have a right to enter or stay. It is highly questionable though how this procedure will be implemented to be in line with the fundamental rights and the procedural safeguards envisaged in the asylum *acquis*, the EU Charter of Fundamental Rights, and the European Convention on Human Rights.

KEYWORDS: Schengen Borders Code – cross-border police cooperation – internal borders – secondary movements – transfer – fundamental rights.

I. INTRODUCTION

The 'Schengen Area', the area without controls at internal borders, is one of the biggest achievements of European integration. The 2015 refugee 'crisis', as labelled by the EU Commission, the increase of terrorist attacks, and the Covid-19 pandemic have exposed the deficits of the Schengen system and highlighted that a coordinated approach is

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needed to preserve the benefits of the Schengen *acquis* and simultaneously respond to the current challenges and constraints.¹

Thus, a proposal for the reform of the Schengen Borders Code (hereinafter proposal SBC) was presented in December 2021 and according to the Commission, it aims to bring targeted changes to reinforce existing rules and make the area without internal borders more resilient.² However, in principle, the proposal does not bring any substantive reform, rather it merely advances proposals for amendments. Specifically, the proposed rules have a twofold aim: first, to reinforce existing tools to manage external borders efficiently such as further surveillance of external borders to prevent unauthorized crossings from third countries,³ and secondly to ensure that unilateral decisions to reinstate internal border controls are reduced. As the second aim of the reform is to reduce unilateral decisions to introduce and maintain internal border controls, the Commission promotes the use of 'alternative' measures to ensure that without the need to resort to internal border controls, third-country nationals do not take advantage of the Schengen border-free area.

This *Insight* aims to deal with the proposed amendments to the current Schengen rules that have as a target to reduce internal border controls and promote 'alternative' measures to counter secondary movements of third-country nationals within the EU. One of these 'alternative' measures, introduced for the first time at the EU level in art. 23a of the proposal SBC for the purpose of curbing unauthorised secondary movements, is the transfer of third-country nationals apprehended at the internal borders, as part of cross-border police operational cooperation, to the Member State where they came from.⁴ This transfer will take place immediately and within 24 hours at the latest, when there are clear indications that the person has just crossed the internal border and does not have a right to enter or stay, and this will be proved by the lack of valid documents certifying the identity or their right to stay in the Member State.⁵

The *Insight* starts with a brief analysis of the EU response to secondary movements to date, to eventually get to the current Code proposal and refer to the new procedure envisaged in art. 23a. It will then proceed with the examination of the impact that the proposed amendments may have on the rights of third-country nationals, especially those seeking international protection.

¹ Communication COM(2021) 277 final from the Commission of 2 June 2021 on a strategy towards a fully functioning and resilient Schengen area.

² Communication COM(2021) 891 final of the Commission of 14 December 2021 on a proposal for amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

³ *Ibid.* art. 13.

⁴ *Ibid.* art. 23a.

⁵ Explanatory Memorandum to Communication COM(2021) 891 final cit. 21.

II. CROSS-BORDER POLICE COOPERATION TO COUNTER 'SECONDARY MOVEMENTS'

Police cooperation is enshrined in the Treaty on the Functioning of the European Union (art. 87) as a measure necessary to maintain and develop an Area of Freedom, Security and Justice (ASFJ).⁶ Cross-border police cooperation is so far regulated in art. 73 TFEU,⁷ the Schengen Convention (CISA)⁸ and other EU secondary acts.⁹ The Schengen Borders Code also encourages cross-border police cooperation mainly in the form of strengthening police cooperation between Member States after the abolition of internal borders, to respond to increased threats to public policy or internal security such as cross-border crimes.¹⁰ Recent challenges related to migration have highlighted the need to improve cross-border police cooperation and use it as a tool to also curb unauthorised movements linked to irregular migration. Art. 23 of the Schengen Border Code foresees that the absence of border control at internal borders should not affect "the exercise of police powers" and it sets the conditions and the rules to ensure that such policing measures do not amount to border controls.¹¹ The amendment proposed in this provision through the Schengen reform is the explicit reference to the objectives of the exercise of such public powers, among which the aim of "combatting irregular residence or stay, linked to irregular migration", without though providing any additional details.

In practice, what is happening to date to combat unauthorised movements¹² at the EU's internal borders, is either the border-area controls regulated at national levels or the conclusion of bilateral readmission agreements between the Member States for the transfer of irregular migrants identified in the framework of cross-border police cooperation.¹³ This latter option is also foreseen in art. 6(3) of the Return Directive, which indicates that Member States may refrain from issuing a return decision to a third-country

⁶ Consolidated version of the Treaty on the Functioning of the European Union [2007] Title V.

⁷ Art. 73 TFEU cit.: "It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security".

⁸ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] Title III – Police and Security ch. 1: Police Cooperation art. 39.

⁹ Police cooperation package of 8 December 2021 comprised of a proposal for a Council Recommendation on operational police cooperation, a proposal for a Directive on information exchange between law enforcement authorities of Member States and for a Regulation on automated data exchange for police cooperation (Prüm II).

¹⁰ Arts 23 and 28 Communication COM(2021) 891 final cit.

¹¹ M Weissensteiner, 'Cross-Border Police Cooperation and "Secondary Movements". On Reconfiguration in Enforcing Differential Mobility Rights within the Spatial-Legal Schengen Space' (2021) *Utrecht Law Review* 73.

¹² The language that the Commission used in the new Pact was "unauthorised movements" that replaced the language that was used in the 2015 reform that was "secondary movements".

¹³ D Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' (2003) *European Journal of Migration and Law* 5.

national staying illegally on their territory if the person concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of the Directive.¹⁴

At the EU level, the response to the onward unauthorised movements across the internal borders has been the key priority in the European Agenda on Migration since 2015.¹⁵ The EU thus, reinforced the Dublin system and the fingerprinting databases, such as Eurodac, to ensure the prevention of *asylum shopping* and counter the secondary movements of asylum-seekers and beneficiaries of international protection.¹⁶ Regarding unauthorised crossings, the EU Recommendation on proportionate police checks and police cooperation in the Schengen area that aimed to provide a common response to cross-border threats affecting the internal borders without introducing border controls, was embraced at the EU level.¹⁷ Furthermore, the Commission has many times highlighted, in the proposed Schengen reforms, that police checks can be used as an effective tool to deal with unauthorised movements without resorting to internal controls. This is now confirmed in the 2021 proposal to amend the Schengen Code, where it is mentioned that: "while irregular migratory flows should not, *per se*, be considered to be a threat to public policy or internal security, they may require additional measures to ensure the functioning of the Schengen area [...]" and that measures need to be taken to address unauthorised movements of illegally staying third-country nationals.¹⁸

Thus, it seems that while the response to secondary movements was initially left in the discretion of the States, since 2015, the Commission has several times stretched the potential of cross-border police cooperation as a promising alternative to border controls. This is also evident from the proposed reform of art. 23 of the Schengen Code, through which the EU Commission aims to increase the exercise of public powers to combat irregular migration. Also, it introduces a new transfer procedure in art. 23a of the SBC proposal for those apprehended in the context of the exercise of the above-mentioned public powers. Specifically, this transfer procedure will apply to third-country nationals apprehended in the vicinity of the internal borders when the following conditions are fulfilled: first, the third-country national should not have the right to enter or stay at the territory of the Member States;¹⁹ secondly, the person should be apprehended during

¹⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 6(3).

¹⁵ Communication COM(2015) 240 final from the Commission of 13 May 2015 on a European Agenda on Migration.

¹⁶ See Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

¹⁷ Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police cooperation in the Schengen Area.

¹⁸ Recital 19 Communication COM(2021) 891 final cit.

¹⁹ Art. 23a(1) Communication COM(2021) 891 final cit.

joint police patrols and thirdly, there should be clear indications that the person has arrived from another Member State (i.e. statements or available documents). The authorities, based on existing evidence either by documents or by searching in the Union databases, could decide the transfer of the apprehended person to the State he came from.

It is apparent thus, that the response to the secondary movements at the EU internal borders is turning from, unilateral to bilateral cooperation, and currently to EU action.²⁰ What seems to be contradictory though is that, while the EU Commission aims to regulate the response to unauthorised secondary movements at the EU level by amending art. 23 and introducing art. 23a in the revised Schengen Code proposal, the proposed reform of art. 6(3) of the Return Directive that can be found in the Part B of Annex XII of the same proposal still leaves the discretion to States to regulate return on a bilateral basis: "Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State in accordance with the procedure provided for in art. 23a of the Regulation (EU) 2016/399 of the European Parliament and of the Council or under bilateral agreements or arrangements".

The proposed amendment of the Return Directive, when read in conjunction with arts 23 and 23a of the SBC proposal, pave the way for the applicability of different regimes at the internal borders: on the one hand EU law may be applicable when States transfer third-country nationals to a neighbouring country on the basis of arts 23 and 23a of the SBC proposal, and on the other hand, EU Law may not apply in cases the police checks are regulated by bilateral agreements and even some times by unilateral actions that are governed by national legal frameworks.

Overall, this section proves that the curbing of secondary movements of migrants at the internal borders has been initially regulated at a unilateral basis through police checks and introduction of border controls, then through bilateral readmission agreements, and recently the EU has decided to reinforce cross-border police cooperation at the EU level to reduce internal border controls.²¹ The fact that multiple legal frameworks may interact at internal borders may have important repercussions on the way the rights of third-country nationals are protected. The reason is that the EU Charter of Fundamental Rights (EU Charter) applies only in situations governed by EU Law.²² Could this mean that as the application of bilateral agreements is regulated under national law, the EU Charter does not apply in these cases?²³ The answer is negative, as even in cases where the transfer of irregular migrants is regulated through bilateral agreements, this option is still foreseen in the Return Directive (art. 6 (3)), which is an EU act. This means that this

²⁰ M Weissenstener, 'Cross-Border Police Cooperation and "Secondary Movements"'. On Reconfiguration in Enforcing Differential Mobility Rights within the Spatial-Legal Schengen Space' cit.

²¹ Communication COM(2021) 891 final cit.

²² Charter of Fundamental Rights of the European Union [2012].

²³ Case C-617/10 *Akerberg Fransson* ECLI:EU:C:2013:105.

situation remains governed by the Directive and that the Member State which decides to transfer a third-country national to another Member State pursuant to this provision needs to act within the framework of the common standards and procedures established by EU law.²⁴ In any case, even if States decide to implement national law at internal borders to counter unauthorised movements with the justification to maintain law and safeguard internal security pursuant to the derogation clause envisaged in art. 72 TFEU,²⁵ they still need to comply with EU Law.²⁶

III. THE 'ENDTIMES' OF PROCEDURAL SAFEGUARDS

As it is analysed above, Member States cannot circumvent EU Law and human rights safeguards at the internal borders even when they take unilateral actions or implement bilateral readmission agreements. While 'alternatives' to border controls are regulated at the EU level, and thus can be seen as positive measures to ensure the proper functioning of the Schengen area without imposing border controls, these measures, when not accompanied by adequate procedural guarantees may seriously impact the rights of third-country nationals. An example is the introduction of the transfer procedure in art. 23a of the SBC proposal. On the one hand, this procedure may entail more safeguards than those envisaged in the bilateral readmission agreements that are governed by national law. On the other hand, still this fast-track transfer procedure has limited procedural safeguards that may seriously undermine the rights of third-country nationals apprehended at the internal borders²⁷ especially of those seeking international protection, as it will be analysed below.

The transfer procedure envisaged in art. 23a takes place as described in the Annex XII of the Code proposal.²⁸ The authorities, based on the finding that the person does not have a right to stay in the territory, shall issue a decision by means of a 'standard form' and give a copy of the form to the third country national. The person should sign this form to acknowledge its receipt and in case s/he refuses to sign it, the refusal will be declared in the 'comments' section. Also, the copies of the necessary identity and other relevant documents will be attached. Third-country nationals refused the right to stay will have a right to appeal in accordance with national law, but the appeal will not have a suspensive effect.²⁹ A written indication of contact points able to provide information on

²⁴ Case C-47/15 *Selina Affum v Prefet du Pas-de-Calais* ECLI:EU:C:2016:408 para. 86.

²⁵ Upon which art. 23 SBC is based.

²⁶ Joined cases C-715/17, C-718/17 and C-719/17 *Commission v Hungary and Poland* ECLI:EU:C:2020:257 para. 145, by analogy, case C-461/05 *Commission v Denmark* ECLI:EU:C:2009:783 para. 53, and case C-38/06 *Commission v Portugal* ECLI:EU:C:2010:108 para. 64.

²⁷ M Tazzioli, 'Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe' (2020) *Environment and Planning Politics and Space* 3.

²⁸ See Annex XII Communication COM(2021) 891 final cit.

²⁹ *Ibid.*

representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national in a language that he understands or is reasonably supposed to understand.³⁰

First, it is not clear whether this provision applies to all third-country nationals, including asylum-seekers and beneficiaries of international protection. Art. 23(a) SBC proposal stipulates that police officers at the borders will check whether there are clear indications that the third-country national has arrived directly from another Member State, on the basis of information immediately available to the apprehending authorities, including statements from the person concerned, identity, travel or other documents found on that person or the results of searches carried out in relevant national and Union databases. This means that not all persons will be fingerprinted, and it is in the discretionary power of the competent authorities to carry out research in Union databases, such as Eurodac, to identify whether the third-country nationals apprehended at the borders have applied for asylum in another Member State. On the contrary, an 'indication', such as a statement or a document from another State may be enough to implement the transfer to the other State. This means that States will have the option not to apply the Dublin III Regulation which has specific provisions that regulate the take-back requests for asylum-seekers, and this procedure is accompanied by more procedural safeguards such as the right to an effective remedy and to legal assistance.³¹

Also, in art. 23a there is not any reference to the right to asylum and the prohibition of *refoulement* that are envisaged in arts 18 and 19 of the EU Charter. It seems that this provision is based on the 'mutual trust' between the EU Member States as per the provision of an equivalent level of protection. However, the proposal does not take into account the well-documented deficiencies in Member States' asylum, reception and return systems, and it cannot automatically be assumed that third-country nationals will not be subject to chain *refoulement* to countries outside the EU.³² The European Council on Refugees and Exiles (ECRE) mentions that cases of chain *refoulement* of people through different EU Member States to a country outside the EU have been multiple times documented in the Asylum Information Database (AIDA) and other sources.³³ Also, it is problematic that this decision may concern a "number of persons".³⁴ Does this mean that summary returns,

³⁰ *Ibid.*

³¹ Arts 26 and 27 of Regulation 604/2013 cit.

³² ECtHR *MSS v Greece and Belgium* App n. 30696/69 [12 January 2011]; ECtHR *Tarakhel v Switzerland* App n. 29217/12 [4 November 2014].

³³ European Council on Refugees and Exiles (ECRE), Comments on the Commission proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders COM(2021) 891 ecre.org.

³⁴ See Annex XII of Communication COM(2021) 891 final cit.: "The national authorities issuing a refusal decision shall collect the following data: a) the number of persons refused entry; b) the number of persons refused stay; c) the number of persons sent back; d) the Member State(s) to which persons were sent back;

and collective expulsions will be legalized if they are implemented under this provision? Moreover, it is doubted whether the principle of non-discrimination envisaged in art. 21 of the Charter can be preserved in this kind of 'take-back' procedure. Available evidence proves that it is difficult to enforce this procedure, as well as it happens in ordinary policy controls,³⁵ without racial profiling, and it remains unclear how the proposed measures will be carried out without intensified racial profiling and discrimination.³⁶

As per the procedural safeguards, many deficits can be witnessed in the described procedure. The decision that will be served to the third-country national will be a 'standard form' that will contain some information such as the person's identity and nationality, the grounds of refusal of entry, the date of refusal, the number of persons to whom the refusal applies, and the Member State to which the person will be transferred. This means that this form will not be a formal decision that will explain in writing and in detail the reasons of the transfer as required by the European Court of Human Rights.³⁷ The right to information before the implementation of a transfer is very crucial in order for the transferee to substantiate the reasons of the appeal, as the article clearly indicates that the third-country national will have the right to appeal. Although a right to appeal the transfer decision is foreseen, the fact that this does not have an automatic suspensive effect, in conjunction with the circumstance that the transfer should take place immediately and at the latest within 24 hours from the apprehension, seriously undermines the right to an effective remedy.³⁸ In practice, this means that the third-country national will be allowed to appeal the transfer decision from the Member State that he will be transferred which raises serious questions as per the effectiveness of the appeal as the immediate transfer may lead to irreversible damage.³⁹

Furthermore, although a written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law will be given, this does not guarantee the access to legal assistance, especially given the fact that the transfer is immediate, and the person will be most probably kept in detention in order to enforce the transfer. Also, access to interpretation and linguistic assistance is not foreseen.

e) where this information is available, the nationality of the third country nationals apprehended; f) the grounds for refusal of entry and stay".

³⁵ Statewatch, *Italy: Police instructed to target Nigerians* statewatch.org; Civil Rights Defenders, *Randomly Selected: Racial/Ethnic Profiling in Sweden* crd.org; European Union Agency for Fundamental Rights, *Your Rights Matter: Police Stops* fra.europa.eu.

³⁶ See also European Union Agency for Fundamental Rights, *Preventing Unlawful Profiling Today and in the Future: A Guide* fra.europa.eu.

³⁷ ECtHR *Hirsi Jamaa and Others v Italy* App n. 27765/09 [23 February 2012].

³⁸ ECtHR *M.K. and Others v Poland* App n. 40503/17, 42902/17, 43643/17 [23 July 2020].

³⁹ ECtHR *I.M. v France* App n. 9152/09 [23 December 2008] paras 136-160; ECtHR *Čonka v Belgium* App n. 51564/99 [5 February 2002] paras 81-83.

Finally, it is noteworthy that there is no exception foreseen for vulnerable persons and children including unaccompanied minors. Will these persons be subject to transfer without their special needs taken into account? It needs to be mentioned that the UN Convention on the Rights of the Child⁴⁰ to which all EU Member States are signatory parties, and which is applicable at the EU internal borders, requires, in all cases, that the best interests of the child should be a primary consideration before deciding on transferring a minor to another State.⁴¹

Overall, even if it is a positive step that the EU Commission decides to regulate an 'alternative' measure to replace unilateral border controls at the EU level, it needs to ensure that this measure is accompanied by the necessary safeguards. Specifically, it needs to warrant that this procedure will not be implemented for asylum-seekers as the Dublin Regulation precedes. Also, the competent authorities should carry out the transfer only if they are satisfied that a transfer decision will not result in direct or indirect *refoulement* or summary returns in violation of international and Union obligations of the Member States. Finally, this procedure needs to provide for a right to an effective remedy, access to interpretation and legal assistance, and ensure that the special needs of vulnerable persons, including unaccompanied minors, are taken into account.

IV. CONCLUSION

The new Schengen Code proposal reiterated that 'alternatives' to internal border controls, such as cross-border police cooperation, should be promoted at the EU level to effectively deal with secondary movements. Arts 23 and 23a in the SBC proposal are encouraged to be used as measures to avoid the reimposing and maintenance of internal border controls that are so far widely used from the Member States as a way to curb unauthorized secondary movements. At the same time, the proposal allows the police operations to be regulated in bilateral readmission agreements (art. 6(3) Return Directive). However, the plurality of legal orders that may interact at internal borders may diminish legal clarity, and cause ambiguity as per the applicability of EU Law in these cases, and this may seriously impact the rights of third-country nationals including those seeking international protection. Thus, the proposed amendment of the Return Directive should not allow for the conclusion of new bilateral agreements, as the transfer of those apprehended at the internal borders through joint police patrols is now regulated in art. 23a of the SBC Proposal.

However, even if the new transfer procedure introduced in art. 23a of the SBC proposal is regulated at the EU level, it does not contain the necessary safeguards to ensure that the rights of those seeking asylum are protected. Although the promotion of 'alternative'

⁴⁰ United Nations, Convention on the Rights of the Child [1989] 3.

⁴¹ UN CRC Committee, *D.D. v Spain* Communication n. 4/2016 CRC/C/80/D/4/2016, views adopted on 1 February 2019.

measures to replace border controls may have a positive impact to the reduction of unilateral border controls and conclusion of additional bilateral agreements, which is essential to sustain a border-free area, it needs to be assured that when these measures concern those seeking international protection, the safeguards envisaged in the asylum *acquis* and the Charter will be preserved in every case.