



RSA Comments on the Commission proposal amending the Schengen Borders Code

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Introduction

The European Commission presented a legislative proposal amending the Schengen Borders Code (SBC) on 14 December 2021, two months after 12 Member States, including Greece, Cyprus, Hungary, Poland, Lithuania and Latvia, requested an “adaptation of EU law to new realities” and the European Council called on the Commission to take related legislative measures.¹

Refugee Support Aegean (RSA) opposes the proposed amendment of the SBC in principle and in its entirety. The text essentially **attempts to ‘legalise’ violations of the existing SBC committed by Member States over the past six years, to the detriment of persons at risk. The Commission has not only refrained from denouncing such violations as the competent institution for EU law enforcement but attempts to normalise them through the legislative dismantling of the – already deficient vis-à-vis refugee protection – common asylum system.**

Furthermore, the proposal reflects a regrettable continuation of the poor law-making trend² on the part of the Commission, as **the impact assessment does not cover the issue of so-called “instrumentalisation of migrants”** which forms the basis for a large number of amendment provisions.³

For these reasons, RSA urges co-legislators to reject the proposal in its entirety.

Analysis of key provisions

1. “Instrumentalisation” of migrants

The new **Article 2(27) SBC** introduces a novel, vague concept into a legislative instrument: “Instrumentalisation of migrants” is defined as “a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.”

The formulation of this concept raises serious questions and concerns. First, contrary to the notions of “**migratory pressure**” in the Asylum and Migration Management

¹ European Commission, *Proposal amending the SBC*, COM(2021) 891, 14 December 2021, Explanatory Memorandum, 3. See also RSA et al., *The right to asylum in the context of “instrumentalisation” – Lessons from Greece*, November 2021, available at: <https://bit.ly/321IUvJ>.

² See RSA, *Comments on the amended Commission proposal for an Asylum Procedures Regulation*, October 2020, 3, available at: <https://bit.ly/3A7R4za>.

³ European Commission, *Proposal amending the SBC – Impact Assessment*, SWD(2021) 463, 14 December 2021, 1.

Regulation proposal⁴ and “**crisis**” in the Crisis Regulation proposal,⁵ **a situation of so-called “instrumentalisation of migrants” is not connected to objective elements and facts such as the number of irregular arrivals at borders or on the territory** of a Member State, but only to a unilateral normative judgment. The only required element to substantiate the existence of “instrumentalisation” is “instigation” of flows by “actively encouraging or facilitating the movement” of new arrivals; it is unclear how this is met. Therefore, according to the definition, **a situation of “instrumentalisation” may be met without a demonstrable difficulty or inability on the part of the Member State of arrival to respond to arrivals and to channel people into applicable asylum and/or return procedures.** It only requires that the actions of a third country be indicative of its intention to destabilise the EU or a Member State and that they be liable by nature to undermine basic state functions. The Commission equally refrains from legally defining these notions.

Second, the ability of “to put at risk essential State functions” is an unclear standard of proof for “instrumentalisation”. The Commission does not further define the term, i.e. the categories of actions which by nature may affect basic state functions – which are non-exhaustively listed in **Article 2(27) SBC** – beyond a reference in **Recital 12** of the proposal to taking into account “whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants”.⁶ Accordingly, the proposal raises **reasonable concerns that a situation may be characterised as “instrumentalisation of migrants” based on Member States’ political assessment and not on clear and sufficiently defined norms.**

More importantly, the measures put forward by the Commission in invoking “instrumentalisation” contravene the EU *acquis* on the protection of human rights and the rule of law, as they introduce unacceptable discretion and derogations from provisions of absolute character such as the prohibition on *refoulement* and/or inhuman or degrading treatment or punishment in international instruments e.g. International Covenant on Civil and Political Rights, Charter of Fundamental Rights, European Convention on Human Rights and Convention against Torture. The proposal also adopts an unprecedented logic of dehumanisation which views human beings as ‘instruments’, i.e. ‘objects’ to be used for specific purposes and no longer as legal subjects and rights-bearers. The consequences of the above definition on the EU asylum *acquis* are discussed in detail in the RSA Comments on the proposal for a Regulation on “instrumentalisation” in the area of migration and asylum.⁷

Finally, RSA recalls that **Recital 26 SBC** and **Recital 19** of the proposal provide that “irregular migration flows should not, per se be considered to be a threat to public policy or international security”, although according to the latter “they may require additional measures to ensure the functioning of the Schengen area”.

⁴ European Commission, *Proposal for a Regulation on asylum and migration management*, COM(2020) 610, 23 September 2020.

⁵ European Commission, *Proposal for a [Crisis Regulation]*, COM(2020) 613, 23 September 2020.

⁶ Visislby inspired from: European Council, *Conclusions 21-22 October 2021*, EUCO 17/21, paras 19-20.

⁷ European Commission, *Proposal for a Regulation on instrumentalisation in the area of migration and asylum*, COM(2021) 890, 14 December 2021.

2. Border surveillance

The proposed amendment of the definition of “border surveillance” in **Article 2(12) SBC** incorporates the notion of “**preventative measures** to detect and prevent unauthorised border crossings”. However, neither the operative part nor the preamble of the proposal specifies what forms such “preventive measures” can take as part of border surveillance.

The purpose of “surveillance” according to the proposed amendment of **Article 13(4) SBC** is “to prevent unauthorised border crossings or apprehend individuals crossing the border illegally”.⁸

In addition, the proposed new **Article 13(5) SBC** provides that, in cases of “instrumentalisation of migrants”, the Member State concerned “shall intensify border surveillance” as necessary with a view to addressing “the increased threat” by reinforcing *inter alia* resources and technical means for prevention of unauthorised border crossings. Such technical means may consist of modern technologies and mobile units to prevent such arrivals. On the one hand, the wording of the provision is particularly unclear, given that the proposed **Article 13(5)** does not sufficiently specify the exact measures that a Member State may adopt to prevent irregular entries. **Recital 12** refers to limiting “border traffic to the minimum” and **Recital 15** to “additional measures preventing illegal crossings” without, however, further defining what form such measures could take.

On the other hand, the Commission confers undue discretion on Member States to define the aforementioned “preventative measures”, since none of the relevant provisions enumerate permissible measures in an exhaustive manner:

- The notion of border surveillance in **Article 2(12)** may include “preventative measures for detecting and preventing unauthorised border crossings”;
- “Technical means” of surveillance under **Article 13(4)** may include “electronic means, equipment and surveillance systems”;
- In the context of “instrumentalisation of migrants” under **Article 13(5)**, “technical means” may include “mobile units” and “modern technologies”, which in turn may include drones and motion sensors.

Through the above provisions, the Commission uses a directly applicable Regulation to establish an extremely opaque framework allowing Member States to designate at their discretion any activity at the borders as “border surveillance”, even where such activity by definition exceeds *stricto sensu* surveillance. The proposal thereby encourages the **conflation of “surveillance” with state measures which amount to an exercise of control and sovereignty over new arrivals regardless of territoriality, and**

⁸ Note that the provision reiterates the objective of preventing unauthorised border crossings, as already stated in Article 13(1).

are therefore carried out within the state's jurisdiction⁹ and engage fundamental rights and the EU *acquis*.¹⁰

The practice followed by Greek authorities in the Eastern Aegean according to systematic push back allegations is illustrative. The measures implemented by the Hellenic Coast Guard 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."¹¹ Such practices, whether conducted within or outside the Greek territory, are undoubtedly conducted under the jurisdiction of the Greek authorities and engage fundamental rights as well as the EU asylum *acquis*.¹²

3. Controls and apprehension at internal borders

Internal border controls

The amended **Article 23 SBC** is titled "Exercise of public powers". **Point (a)** provides that the exercise of police "or other public powers" on the territory of Member States and at internal borders does not have an effect equivalent to border controls where *inter alia*:

- (1) It does not have border control as an objective;
- (2) It is based on general information and experience regarding potential threats to public security or public policy and aims in particular at combatting irregular residence or stay, linked to irregular migration;
- (3) It is devised and executed in a manner clearly distinct from systematic checks on persons at external borders, even it is conducted directly on passenger services;
- (4) It is carried out based on monitoring and surveillance technologies generally used on the territory of the country.

⁹ ECtHR, *N.D. and N.T. v. Spain* [Grand Chamber], App Nos 8675/15 and 8697/15, 13 February 2020, paras 104-111; *Hirsi Jamaa v. Italy* [Grand Chamber], App No 27765/09, 23 February 2012, paras 76-82.

¹⁰ See also Recital 10 Proposal for an Instrumentalisation Regulation, making an opaque reference to the possibility for a Member State to "take the necessary measures in accordance with their national law to preserve security, law and order, and ensure the effective application of this Regulation", in the event of a violent and mass attempt of entry of third-country nationals.

¹¹ RSA, 'Alarm over increase of reported push-backs at sea and risks for the lives of those seeking protection', 20 May 2020, available at: <https://bit.ly/3FE7pWH>.

¹² Article 3(b) SBC; Article 3 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ("Asylum Procedures Directive") [2013] OJ L180/60.

The proposal also establishes a separate transfer procedure for persons apprehended at internal Schengen borders for irregular entry or stay in **Article 23a SBC** for the “immediate transfer” of those persons to the Member State from which they entered, without meeting the necessary safeguards for their protection.

Beyond raising interpretative issues and leaving wide discretion to Member States, this provision creates a serious contradiction. On the one hand, deeming irregular migration tantamount to a threat to public order and security, as reiterated in the amended **Article 25(1)(c) SBC**, contravenes the guidance offered by **Recital 26 SBC**, per which **irregular migration and even the entry of a large number of irregular migrants does not per se amount to a threat to public order and internal security** of a Member State. On the other hand, the provision claims that combatting irregular migration is *not* equivalent to border control, in **flagrant contradiction to the content and spirit of the SBC**. Accordingly, the Commission allows Member States to institute covert border controls at internal Schengen borders to prevent irregular migration without abiding by the legal safeguards set by EU legislation.

Finally, the exercise of such powers is no longer subject to the condition of spot checks pursuant to **Article 23(4)(a)**. As a result, Member States are permitted to lay down generalised border controls within the Schengen area.

Amendment of the Return Directive

Article 2 of the proposal amends **Article 6(3) of the Return Directive**¹³ to allow Member States to refrain from issuing a return decision in the case of irregularly staying persons taken charge of by another country pursuant to the Article 23a transfer procedure at internal Schengen borders or under bilateral agreements or arrangements.

The proposal also deletes the current reference in Article 6(3) of the Directive to permissible derogations from the Return Directive only in respect of implementation of bilateral agreements and arrangements which predate the entry into force of the Directive. Whereas it had maintained the provision in its 12 September 2018 proposal to recast the Directive,¹⁴ the Commission justifies its repeal in the present proposal with reference to the need for discretion to Member States to introduce “more effective bilateral readmission agreements and arrangements, able to address the challenges related to unauthorised movements.”¹⁵ **The provision has no evidence base. The Commission not only insists on not evaluating the implementation of the Return Directive** in direct violation of its obligations under **Article 19 of the Directive** and despite calls from the European Parliament,¹⁶ but also **fails to explain why return**

¹³ 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 [2008] OJ L348/98.

¹⁴ European Commission, *Proposal for a [recast Return Directive]*, COM(2018) 634, 12 September 2018, Article 8(3).

¹⁵ Proposal amending SBC, Explanatory Memorandum, 8-9.

¹⁶ European Parliament, *Letter to the Commissioner for Migration, Home Affairs and Citizenship*, IPOL-COM-LIBED(2018)42213, 3 December 2018; *Civil Liberties, Justice and Home Affairs Committee*, 23 January 2019.

procedures within the framework of the Directive are less efficient than interstate agreements or arrangements.

Consequently, the proposal **circumvents the legal framework set out by the Return Directive for common standards and procedures for removal from Member States**,¹⁷ by leaving the **broadest possible discretion to Member States to derogate from the Directive by setting up new bilateral agreements or arrangements**. The Commission thus uses an EU legislative initiative to order yet another unacceptable retreat of the EU *acquis* in favour of intergovernmental agreements¹⁸ which do not comply with EU law safeguards for the rights of persons under return. In this respect, RSA recalls that the 2018 "Greece-Germany Administrative Arrangement",¹⁹ a prime example of intergovernmental readmission measures, **has been ruled to be "manifestly unlawful" by German courts** insofar as it circumvents the guarantees of the EU asylum *acquis*, namely the Dublin Regulation.²⁰

It should also be highlighted that any derogations from the Return Directive should be narrowly interpreted according to CJEU case law.²¹

¹⁷ CJEU, C-61/11 PPU *El Dridi*, 28 April 2011, para 32.

¹⁸ See RSA, *Comments on the proposal for a Screening Regulation*, October 2020, 4-5, available at: <https://bit.ly/33m6iVz>.

¹⁹ RSA, 'The Administrative Arrangement between Greece and Germany', 1 November 2018, available at: <https://bit.ly/3sdlPkB>.

²⁰ PRO ASYL, 'Deal between Greece and Germany „clearly unlawful“', 7 May 2021, available at: <https://bit.ly/3EZLQHo>; Administrative Court of Munich, M 22 E 21.30294, 4 May 2021.

²¹ CJEU, C-444/17 *Préfet des Pyrénées-Orientales v Arib*, 19 March 2019, para 60.



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