

SCHENGEN REFORM AND THE INSTRUMENTALISATION OF ASYLUM-SEEKERS

NEW COMMISSION PROPOSALS LEGITIMATE STATES' EXISTING
PRACTICES

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- The European Union lacks a consistent asylum and migration policy, which makes it vulnerable to the instrumentalisation of asylum-seekers, most recently visible in the Belarusian actions at its borders with EU countries.
- In December 2021, the European Commission published proposals on tackling the instrumentalisation of migrants and reforming Schengen rules, but they appear to miss their targets.
- Instead of addressing the hostile third country, the instrumentalisation proposal weakens the rights of asylum-seekers at the border.
- Schengen reform proposes the possibility of an indeterminate period of reintroduced internal border controls, legitimating the years-long border controls in six Schengen countries (France, Germany, Denmark, Austria, Sweden and Norway).
- Asylum and migration policy is also progressing, as the 18-month-old proposal for the New Pact on Migration and Asylum is expected to move forward, contributing to the badly needed harmonisation of policies.



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INTRODUCTION

The trauma of the so-called refugee crisis is still visible in European border policy, as European leaders keep insisting that 2015 should never happen again. This fear of uncontrolled entry seems to have been exploited by neighbouring countries of the European Union, including Turkey in February 2020, Morocco in May 2021 and Belarus since summer 2021. One of the visible marks of the crisis includes the internal border controls in the Schengen area upheld since the 2015 crisis, with disregard for the limits set in the Schengen Borders Code. In addition to this, entry, registration and asylum practices at the external borders vary and the member states lack a uniform approach towards the instrumentalisation of migrants.

In December 2021, the European Commission proposed Schengen reforms, focusing on the rules on re-introduced internal border controls and tackling the instrumentalisation of migrants. The Commission's previous proposal on internal border controls presented in 2017 was blocked in the Council. However, more flexibility is provided this time, as there is no absolute time limit for reintroduced border control. The phenomenon concerning the instrumentalisation of migrants, in turn, became an acute problem requiring specific measures only after the Belarusian regime started transporting people to European Union borders in summer 2021.

This Briefing Paper focuses on the proposed measures and how they would change European border and asylum policies. The following section outlines the measures to tackle the instrumentalisation of migrants, and the subsequent section looks at the situation with the internal border controls. After that, the necessity for the proposed measures is assessed, before conclusions on the expected progress in European border and asylum policies in 2022.

TACKLING THE INSTRUMENTALISATION OF MIGRANTS

The instrumentalisation of migrants is taken into account in the Commission's recent proposals with regard to borders and migration. Both the reform of the Schengen Borders Code (SBC, COM(2021) 891 final)¹ and the specific regulation proposal on the instrumentalisation of migrants (COM(2021) 890 final)² take the topic into consideration.

Article 2(27) of the proposed SBC defines the instrumentalisation of migrants as "a situation where a third country instigates irregular migratory flows to the Union by actively encouraging or facilitating the arrival of third country nationals to the external borders of the Member States, where such actions indicate an intention to destabilise the Union as a whole or a Member State and 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 definition is highly detailed and could lead to an incident not being considered instrumentalisation, in the event that a member state would not wish to define a certain situation as instrumentalisation, or the other member states would not want to characterise a situation as instrumentalisation.

Even before the present regulation proposal on any instrumentalisation situations in the future, a proposal specifically tailored for the Polish, Latvian and Lithuanian situation was suggested (COM(2021) 752 final). The measures were not strict enough for Poland, whose pushbacks at the Belarusian border have also been criticised by the Council of Europe Commissioner for Human Rights.³ Interestingly, while simultaneously conducting pushbacks in a situation concerning a few thousand asylum-seekers, the Polish Deputy Interior Minister informed the media that the country was

- 1 Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. Strasbourg, 14.12.2021 COM(2021) 891 final.
- 2 European Commission (2021) Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum. Strasbourg, 14.12.2021 COM(2021) 890 final.
- 3 Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights *R. A. and others v. Poland* (no. 42120/21). Strasbourg, 27 January 2022.



The border between Germany and Denmark was closed due to Covid-19. Border checks between Germany and Denmark may continue if the proposal on the Schengen Borders Code is adopted.
Source: Shutterstock

preparing to receive up to a million “real refugees” fleeing war in Ukraine.⁴

Instrumentalisation proposal provides room for manoeuvre

The Commission’s general proposal on the instrumentalisation of migrants provides for derogations from “normal” asylum rules. Instead of measures targeted at the country instrumentalising asylum-seekers, the proposal suggests that the rights of the asylum-seekers should be undermined in an instrumentalisation situation. One would have expected that tackling a hybrid attack by a third state should include measures towards the state instead of the individuals the third state is trying to exploit. For example, EU countries have imposed massive sanctions against Belarus, which seems like the right target. Instead, the Polish practice of legalising and performing immediate deportations of people using unofficial border crossings and prohibiting media access to the area only seems to prolong the situation as people are stuck in limbo in the border area. Rather than considering the hostile third country, the proposal provides

room for manoeuvre for the member state that is the target of the instrumentalisation, allowing the state to derogate from normal asylum procedures.

Indeed, according to the Commission’s proposal for future situations, the Polish practice would be mainstreamed: member states would have the possibility to only accept asylum applications at specific registration points and to limit the number of border-crossing points open. It remains unclear, however, what this means for the right to seek asylum. A member state could only keep one border-crossing point open, but it would still have to allow any person that intends to lodge an asylum application to enter under international law. In addition, under the Refugee Convention, a member state could not return asylum-seekers to territories where their life or freedom would be threatened. Closing border-crossing points or putting in place fences or walls at the border could make it more difficult for asylum-seekers to reach the territory of the member states, and facilitate control over who crosses the border, but it remains unclear whether such measures would have any impact on the state instrumentalising the asylum-seekers.

⁴ Politico (2022) “Poland braces for ‘up to a million people’ fleeing war in Ukraine”. 8.2.2022.

Other measures include the possibility to extend the registration deadline for up to four weeks and the possibility to apply an accelerated border procedure to all applicants for international protection. The border procedure in question was proposed by the Commission in September 2020 in the New Pact on Asylum and Migration and should normally only apply to specific cases, such as people coming from countries from which less than 20% of asylum applications have been accepted. The Commission justifies this extension of the scope of the border procedure on the grounds that it “will limit the possibility that the hostile third country targets for instrumentalisation specific third-country nationals and stateless persons to whom the border procedure cannot be applied”.⁵ However, this undermines the purpose of the border procedure, if it can actually be applied in all cases.

Although the border procedure is intended to apply to people with a lower likelihood of being granted protection, the aspect could be sidestepped if the asylum-seekers are victims of instrumentalisation. This means that the rights of the asylum-seekers could be curbed in the procedure. For example, lodging an appeal in a border procedure would not have a suspensive effect, but the applicant could already be returned during an appeal procedure.

Poorer reception conditions as the main tool

The proposal includes several features that undermine the reception conditions of asylum-seekers, such as providing only material reception conditions and returning asylum-seekers more easily than in a normal situation. Worsening the conditions of asylum-seekers, however, may even incentivise instrumentalisation efforts, creating media images of the EU treating asylum-seekers poorly. Making it legal under EU law to undermine the rights of asylum-seekers reinforces this image: asylum-seekers that are victims of instrumentalisation seem to be considered worthy of fewer rights than other asylum-seekers. Then again, it can be considered better that such derogations from normal practices are stipulated in law rather than member states unilaterally derogating from them as they see fit.

In addition to reception conditions, the proposal addresses solidarity measures from other member states. They would have four alternatives: a) capacity-building measures, b) operational measures, c) measures aimed

at responding to the instrumentalisation situation, and d) any other measure addressing the instrumentalisation and supporting the member state concerned. In practice, other member states could support the requesting country with, for example, material support, border guards and asylum officers, diplomatic practices vis-à-vis the hostile third country or the country where the asylum-seekers originate from, or other support deemed appropriate by the supporting member state.

It is important to note that the proposal would not explicitly obligate the member states to provide support, and nor would it obligate the member state concerned to request support. It appears that even the solidarity measure duly misses its target: it does not guarantee that there will be a uniform response to instrumentalisation, but a member state may be left alone with the situation, either at its own behest or because other member states refuse supporting measures.

The proposal seems to legitimate practices that have also been adopted in response to the Belarusian measures, that is, making it more difficult to reach border-crossing points and request asylum, as well as worsening the reception conditions. In contrast, the proposal includes no specific actions targeted at the hostile third country. It is likely that in an actual situation, sanctions would be imposed, but no predetermined legislation is required for that.

The main problem with this and many other reactionary types of EU legislation is that they only address a part of the picture. The instrumentalisation of asylum-seekers is a multifaceted phenomenon, whereby a hostile third country exploits the fact that firstly, there are people willing to enter the Union but who do not have the means to do so, and secondly, politicians across the Union are afraid of the large-scale entry of third-country nationals. In the European Union, in turn, the reactions to large-scale entry have so far been to provide incentives for the bordering country not to let people enter, and/or to have recourse to illegal practices at the border, such as pushbacks. These reactions are obviously only temporary solutions and do not resolve the issue.

Ultimately, if the EU wants to prevent hostile third countries from having the possibility to instrumentalise asylum-seekers to influence the Union, legal pathways will be needed in order for people not to fall victim to instrumentalisation, and the Union should receive people under clear rules and joint responsibility, instead of taking unilateral actions violating international law.

⁵ European Commission (2021) Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum. Strasbourg, 14.12.2021 COM(2021) 890 final, p. 5.

NEW SCHENGEN REFORM LEGITIMATES YEARS-LONG INTERNAL BORDER CONTROL

The reform of the Schengen Borders Code (SBC), in turn, mainly addresses the reintroduction of internal border control within the Schengen area, as the current SBC has been violated by several countries. Since the so-called refugee crisis more than six years ago, six Schengen countries (Germany, France, Austria, Sweden, Norway and Denmark) have maintained internal border control, exceeding the maximum limits of the currently valid SBC by several years.⁶ Furthermore, as a result of the Covid-19 crisis, most Schengen countries reintroduced internal border control even though the SBC does not define pandemics as a criterion for their reinstatement.

The proposed SBC makes these existing practices legal as it further defines what is intended by a “threat to public policy or internal security”. In addition to terrorism, organised crime and major high-profile events, it is interpreted to include major public health emergencies and “large scale unauthorised movements of third-country nationals [...] putting at risk the overall functioning of the area without internal border control”. In this manner, it can be argued that the grounds for internal border control were already valid before, but the new provision just explicitly mentions that they do fall under threats to public policy or internal security.

While the current SBC only allows having internal border control in place upon a member state’s own notification or for six months, the proposal extends this limit to two years. Furthermore, instead of the possibility under the current rules to authorise two years of border control with a Council implementing decision, the proposal also exceeds this limit “as long as the threat persists”. This measure would thus legitimate the controls that seem to have become permanent at certain borders.

What can be considered positive from the perspective of the integrity of the Schengen area is that the proposal includes more coordination measures. For example, it proposes an annex to the SBC that defines essential functions or needs that justify travel when external borders are closed. Furthermore, the proposal requires member states to report the impact of the controls for cross-border regions and to provide a risk assessment in relation to foreseeable threats.

In addition to regulating the reintroduction of internal border controls, the proposal also includes the ability of a member state to refuse entry or to return irregularly staying third-country nationals to the member state from where they came. Although asylum is not explicitly discussed in the proposal, international law provides that seeking asylum constitutes legal grounds to enter. However, for irregularly staying third-country nationals, the proposal may make it more difficult to move between the Schengen countries when there are controls in place. Or rather, it leaves the responsibility for such irregularly staying individuals in the hands of the country where they are residing, without the need for the country which they are trying to enter to return them to their country of origin.

The main focus of the proposal is, however, on internal border control. Apart from adding some coordination mechanisms and reporting obligations, the proposal mainly legitimates internal border control as it is currently upheld in the Schengen area. It can of course be questioned whether the movement of third-country nationals in the six countries is still “large scale” after the outbreak of the Covid-19 pandemic. Yet, upon the possible adoption of the regulation, the situation may be restored to pre-pandemic levels and thus justify such controls.

Both the instrumentalisation regulation and the SBC reform seem to cater for the status quo. As the previous regulation proposal on internal border control issued in 2017 was not successful, the Commission appears to have considered that in order to pass, the proposal needs to legitimate the present situation at the internal borders. Although this may be necessary in practice, it is not optimal that member states can unilaterally ignore time limits stipulated in EU law, with the result that the limits are removed from the law.

THE NECESSITY FOR THE PROPOSALS IN LIGHT OF EXISTING TOOLS

While both reforms seem relevant in addressing current and future situations, some other alternatives could have been available. For example, the currently valid recast Asylum Procedures Directive (APD)⁷ already includes a border procedure, which functions in a manner similar to the new proposal. However, the main difference is that the APD provides the possibility

6 See e.g. Ceccorulli, Michela (2019), “Back to Schengen: the collective securitisation of the EU free-border area”. *West European Politics* 42 (2), 302–322; Evrard, Estelle, Nienaber, Birte & Sommaribas, Adolfo (2018), “The Temporary Reintroduction of Border Controls Inside the Schengen Area: Towards a Spatial Perspective”. *Journal of Borderlands Studies* 35 (3), 369–383.

7 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). Official Journal of the European Union L 180/60, 29.6.2013.

for each member state to nationally establish the procedure, while the current instrument is a regulation that is immediately valid in the EU (except in Ireland and Denmark with an opt-out). It does not mean that all countries would have recourse to the derogations allowed in the regulation proposal, but it does provide a legal measure for all member states without having to transpose the border procedure allowed in the APD into national legislation.

The border procedure is defined in Article 43 of the APD, which allows the member states to decide on the admissibility and substance of an application even at the border or transit zones. If the decision is not made within four weeks, the applicant should be granted entry into the member state. However, if it is impossible to process all applications at the border or transit zone, and within the four weeks, it is also possible to apply the border procedure “where and for as long as these third-country nationals or stateless persons are accommodated normally”. It suggests that after four weeks, the asylum-seekers should in any case be transferred to these locations.

The current instrumentalisation proposal would grant more leeway, as it would extend the registration deadline to four weeks and the duration of the border procedure, including possible appeal, to sixteen weeks. This means that while currently asylum seekers may be held in detention at the border or transit zones for less than a month, the instrumentalisation proposal would enable the detention of asylum-seekers for almost five months. It is perhaps considered that the possibility of a twenty-week period in detention at the border would make people less willing to enter the border. However, it remains unclear how such periods would incentivise the hostile third country not to encourage asylum-seekers to enter. As argued before, such prolonged detentions could further support the third country’s point about double standards employed by EU countries with regard to asylum-seekers: political refugees from neighbouring countries are allowed to enter, while asylum-seekers from elsewhere may be held in detention for months. It should be noted, however, that the standards of a country instrumentalising asylum-seekers are not very high either.

When it comes to the reintroduction of internal border controls, the question of necessity is complicated by the fact that the legality of the permanent border controls is a question of interpretation. For example, while there is no judgement of the Court of Justice of the European Union (CJEU) on the matter, at least an advocate general of the CJEU considered that member

states’ powers and responsibilities “cannot be framed by absolute periods”.⁸ Since this is not straightforward even for the CJEU, there is probably no other way of explicitly legitimating such years-long controls than by preparing new legislation, which makes the de facto practice also de jure.

In addition, coordination of the border control in the future is a step in the right direction. However, if there was another pandemic with the legislation in place, the rules do not guarantee that the situation would change from what it was in 2020. Furthermore, irregularly staying individuals probably do not try their luck where internal border control is in place, which means that the ability to refuse their entry or to return them mainly relates to member states avoiding responsibility for the return of such individuals.

Regardless of whether the contents of the new proposals can be considered successful, new legislation should aim at improving the status quo. The current proposals may be approached positively by the member states, which are victims of instrumentalisation, have internal border control in place or receive irregularly staying individuals from other Schengen countries, but the proposals are more problematic from the perspective of border-crossers. While the instrumentalisation proposal undermines the rights of asylum-seekers, the SBC proposal legitimises blocking or at least complicating all movement in what is supposed to constitute the borderless Schengen area.

CONCLUSION: WHAT CAN BE EXPECTED IN BORDER AND ASYLUM POLICIES IN 2022?

It will be interesting to see how the proposals discussed in this Briefing Paper move forward during the French Council Presidency, as France has usually been very active in promoting regulation on Schengen and migration. President Macron already proposed having an emergency response mechanism for Schengen in December 2021,⁹ to which the instrumentalisation proposal can be considered to correspond. Furthermore, in February 2022, he suggested that a Schengen Council should be established,¹⁰ and the first such Council is supposed to convene in connection with the Justice and Home Affairs

8 Court of Justice of the European Union (2021) Advocate General’s Opinion in Cases C-368/20 and C-369/20 Landespolizeidirektion Steiermark. Press Release No 177/21, 6.10.2021.

9 Reuters (2021) “Macron calls for EU emergency response system to control borders”, 9.12.2021.

10 Présidence française du Conseil de l’Union européenne (2022). Discours du Président de la République devant les ministres chargés des affaires intérieures. 4.2.2022.

(JHA) Council meeting on 3 March 2022. The SBC reforms will be on the agenda, and the instrumentalisation proposal is also likely to be discussed.

In addition to the above-mentioned proposals, the French Presidency has suggested a gradual approach to the proposed New Pact on Asylum and Migration, as explained by the French Minister of the Interior.¹¹ The phased approach received a positive response from the other member states, and an initial agreement is expected. An agreement should be reached to begin with on screening asylum-seekers at the external border, as well as on support from other member states, either through relocation or significant financial support. Although the outcome may not reflect the proposal by the Commission, as relocations may be rejected along with money, it can be considered positive that some progress is being made after 18 months.

Expectations are therefore high ahead of the March JHA Council, where a picture of the different member states' asylum legislation should also be presented. Currently, the recognition rates may range for the same nationals from one per cent (Afghans in Bulgaria in 2020) to one hundred per cent (Afghans in

Poland in 2020).¹² Although even the Commission's comprehensive proposals are unlikely to harmonise the recognition rates, more uniform measures and solidarity are needed in the field of asylum.

The state of play with the various proposals for border and migration policies reflects the overall picture in these policy fields. The Commission tries to adapt to the unilateral actions of the member states by legitimating existing practices and proposing loose compromises. Instead of common rules, technology and interoperability have gained considerable emphasis, and uniform external border systems should finally be deployed in autumn 2022, after years of preparation. Simply put, the "smart borders" system with the Entry/Exit System (EES) and the European Travel Information and Authorisation System (ETIAS) means that there will be no stamps for third-country nationals' passports at the border, but border-crossers will be checked in advance. Although progress in the technological harmonisation of border procedures is welcome, there is a risk that it will make up for the lack of a Union migration and asylum policy, while member states simultaneously continue to adopt unilateral border, asylum and migration practices. /

11 European Commission Audiovisual Services (2022) Informal Meeting of Ministers for Justice and Home Affairs, Lille: joint press conference by Gérald Darmanin and Ylva Johansson. 3.2.2022.

12 European Council on Refugees and Exiles (2021), Asylum adjourned – the situation of applicants for international protection in 2020, <https://ecre.org/wp-content/uploads/2021/07/Asylum-in-2020.pdf>.