



## **PICUM Analysis**

How will the new Schengen  
Borders Code affect  
undocumented migrants?

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## Introduction

In spring 2024, the European institutions adopted [Regulation \(EU\) 2024/1717 of the European Parliament and of the Council of 13 June 2024](#) amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (**Schengen Borders Code**).

The amendments to the Schengen Borders Code (hereafter SBC) are likely to have a detrimental impact on undocumented people. In particular, as repeatedly warned by civil society organisations during the negotiations, **the amended SBC is likely to encroach the right to freedom of movement within the EU; lead to increased racial profiling; and violate the principle of non-discrimination.**

This briefing focuses on provisions which will impact the lives of undocumented people in the EU and at its borders.<sup>1</sup>

Since the SBC is a regulation, it is directly applicable in EU member states. It entered into force 20 days after its publication in the Official Journal of the European Union on 13 June 2024.

However, for the internal transfer procedure (see section 2) to be applicable, member states will have to explicitly agree to make use of this procedure in a bilateral cooperation framework.

In addition, the Commission can adopt delegated acts on additional measures on surveillance, including common minimum standards on border surveillance looking at different type of borders (land, sea or air) (art. 13(5)).

## Broader checks within the territory, leading to more racial profiling

The amended SBC reinforces the concept of "alternative measures" that can be taken by member states instead of reintroducing internal border controls (art. 26(1)(a)(ii)). These measures include, in particular, checks within the territory, as regulated by article 23. While internal checks were already admitted under the 2016 SBC, as long as they are devised in a manner which is clearly distinct from systematic checks on persons and do not have border control as an objective, the amended text introduces the possibility that these checks, which are based on general police information and the experience of competent authorities, have the **purpose of reducing irregular migration** (art. 23(a)(ii)).

As repeatedly [highlighted](#) by civil society organisations, the discretionary nature of these border checks is very likely to disproportionately target racialised communities, and de facto legitimise and even incentivise ethnic and racial profiling, exposing people to institutional and police abuse. Ample research shows that, already now, racial profiling is widely used by the police to identify people who are suspected of being undocumented. [Research from the EU Fundamental Rights Agency](#) has shown that people of colour and African descent are subject to discriminatory and arbitrary checks, regardless of citizenship or residence status. In fact, over half of people of African descent surveyed felt that their most recent police stop was a result of racial profiling. This practice is [in clear violation of European and international anti-discrimination law](#) and a breach to migrants' fundamental rights.

<sup>1</sup> The new SBC also introduces new rules applicable in the event of a large-scale public health emergency, and clarifies the existing framework for the reintroduction and prolongation of internal border controls. However, these aspects will not be addressed in this briefing.

While recital 52 of the amended SBC states that all actions should be carried out in full respect of the principle of non-discrimination, there is no indication of how this will be implemented in practice, or how member states will be sanctioned if they violate this principle. Therefore, it can

be assumed that police and border forces will continue identifying people based on their physical appearance, which violates the [prohibition of discrimination under European and international law](#), as well as national and international jurisprudence<sup>2</sup>.

## The legalisation of internal pushbacks

The amended SBC introduces a new procedure for "internal transfers": if a third country national without a residence permit is apprehended in "border areas" (even up to 30 km from the border), they can be directly sent back to the neighbouring EU country from which it is assumed that they just came, without any individual assessment (art. 23a).

The procedure can only apply if the person is apprehended in the context of checks which involve the authorities of both member states in the framework of a bilateral cooperation agreement which explicitly refers to this procedure (e.g. joint police patrols). While the transfer decision can be subject to appeal, this does not have a suspensive effect.

This provision is very broad and can potentially include people apprehended at train or bus stations, or even in cities close to the internal borders.

States have up to 24 hours to execute the transfer, which implies that people submitted to this procedure can be detained during this time. The transfers and possible detention would also apply to children, as explicitly clarified by a new paragraph included during the negotiations, which states that in these cases, "both Member States shall ensure that all measures are taken in the best interests of the child and in accordance with their respective national laws." The application of similar practices to children has already been [deemed illegal by courts](#).

To understand whether a person has just crossed the border, the authorities can use statements by the person concerned or any documents found

through searches on that person or on [migration or other databases](#) (as regulated by national or EU law). Documents can include receipts or invoices from another country (rec. 28).

The provision does not apply to people with long-term residence permits, family members of EU nationals, holders of long-stay visas and their family members and holders of short-stay visa, or people entitled to vis-free travel if they have not exceeded 90 days (rec. 27). Beneficiaries and applicants of international protection are also excluded (art. 23).

Paradoxically, while introducing this new provision, the amended SBC recommends member states to "as a rule, avoid the use of the procedure referred to in this Article" (art. 23a(5), rec. 30). In particular, the internal transfer procedure should be avoided in situations in which internal border controls have been temporarily reintroduced.

In practice, this provision would legalise the [extremely violent practice](#) of "internal pushbacks" which have been broadly [criticised](#) by civil society organisations across the EU and [condemned](#) by higher courts. In addition, the lack of suspensive effect of the appeal procedure violates the key elements of the right to effective remedy, putting people at risk of fundamental rights violations before they can have their case heard.

<sup>2</sup> In 2023, a [Dutch appeals court](#) prohibited police in the Netherlands from using racial profiling as a basis for selecting people for identity checks at borders. In the [Rosalind Williams Lecraft v. Spain](#) case, the UN Human Rights Committee found that police identity checks motivated by race or ethnicity run violate the international human right to non-discrimination.

## Opening up the possibility for member states to enact violent measures in cases of major arrivals

During the negotiations, the Council introduced in the text a new provision which would allow member states to take any necessary measure to preserve "security, law and order" if a large number of migrants is attempting to enter the country irregularly "en masse and using force" (art. 5(3)).

This provision, which intentionally misinterprets the already very [controversial](#) European Court on Human Rights on the case of [N.D. and N.T. v. Spain](#), by applying it way beyond its original scope, could give Member States carte blanche to enact violent border control measures – similar to what has already been seen in [Spain](#) to [Poland](#), which has resulted in pushbacks and migrants' deaths.

## An expanded definition of border surveillance, and increased use of technologies

The amended SBC expands the definition of "border surveillance" (art. 2 (12); art. 13). Under the new article, border surveillance should contribute not only "to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally" but also to raising situational awareness. In addition, the article details the use of electronic means that can be used, including equipment, surveillance systems and, where appropriate, all types of stationary and mobile infrastructure. Recital 16 clarifies that modern technologies can be used to prevent irregular migration, including "drones and motion sensors, as well as mobile units, and, where appropriate, all types of stationary and mobile infrastructure".

Artificial intelligence (AI) and other automated decision-making systems, including profiling, are increasingly used in border control and management for generalised and indiscriminate surveillance. There is serious concern that such systems can facilitate measures preventing access to the territory, violence at border crossings, and further limit access to asylum and other forms of protection. Furthermore, these technologies [disproportionately target racialised people](#), thus further exacerbating the risks of increased racial and ethnic profiling.

## Migration portrayed as a threat

The amended SBC expands the list of "serious threat(s) to public policy or internal security" which justify the temporary reintroduction or prolongation of internal border controls, introducing notably a new ground based on "an exceptional situation characterised by sudden large-scale unauthorised movements of third-country nationals between the Member States, putting a substantial strain on the overall resources and capacities of well-prepared competent authorities and which is likely to put at risk the overall functioning of the area without internal border control, as evidenced by information analysis and all available data, including from

relevant Union agencies" (art. 25(1)(c)).

The expansion of what constitutes a "threat", to include movements of undocumented people, is likely to increase the number of situations in which member states will reintroduce internal border control and reinforces the stigmatising portrayal of migration as a threat, which is increasingly used as a justification by member states to adopt increasingly [violent](#) measures to prevent arrivals.

## Temporary closure of border crossing points in situations of so-called "instrumentalisation"

Article 5(4), introduced in the amended SBC, allows Member States to temporarily close, or limit, the opening hours of specific border crossing points, in particular in situations of instrumentalisation, as defined by the recently adopted [Crisis Regulation](#).

The concept of "instrumentalisation" was first used in 2021 to justify the introduction of serious limitations to the right of asylum and other fundamental rights in response to the increase in people arriving from

Belarus. Recently, it has been codified into law in the context of the [much-criticised](#) EU Pact on Migration and Asylum, where it has been used to [reduce access to the territory and access to asylum](#).

This new provision would allow member states to further limit access to the territory (already nearly impossible in [many situations](#)) and undermines the internationally-recognised right to apply for asylum.



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