

Revision of the Schengen Borders Code

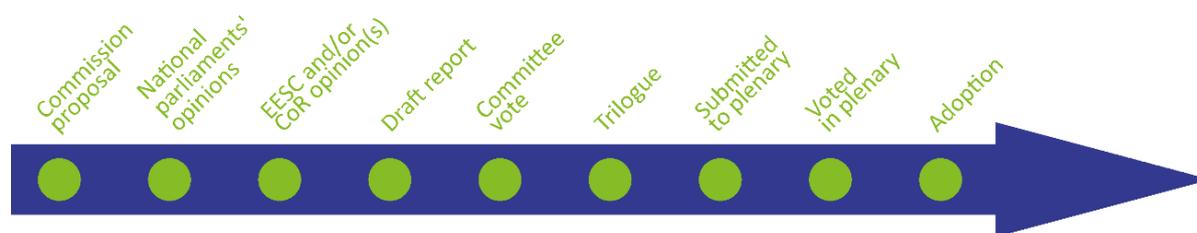
OVERVIEW

In December 2021, the European Commission presented a proposal to amend the Schengen Borders Code, which lays down the rules governing controls at the EU internal and external borders. While debates on the reform of Schengen have been going on for a while, recent challenges – relating to the coronavirus pandemic on the one hand, and attempts to instrumentalise migrants as a way to put pressure on the EU's external borders, on the other – have brought new momentum for reform.

The Commission's proposal is designed to improve the Schengen system's resilience to serious threats and adapt it to new challenges. It introduces a new coordination mechanism to deal with health threats at the external borders and a new Schengen safeguard mechanism to provide a common response at the internal borders in situations of threats affecting Member States, including the possibility to transfer irregular migrants apprehended at the internal borders directly back to the competent authorities in the EU country from which it is assumed they just came, without undergoing an individual assessment.

The co-legislators reached a provisional agreement on the proposal in February 2024. The agreed text was adopted by the European Parliament in April and by the Council in May. Published in the Official Journal on 20 June, the new regulation enters into force in July 2024.

Proposal for a regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders		
<i>Committee responsible:</i>	Committee on Civil Liberties, Justice and Home Affairs (LIBE)	COM(2021)891 14.12.2021
<i>Rapporteur:</i>	Sylvie Guillaume (S&D, France)	2021/0428(COD)
<i>Shadow rapporteurs:</i>	Sara Skyttedal (EPP, Sweden) Malik Azmani (Renew, Netherlands) Erik Marquardt (Greens/EFA, Germany) Anders Vistisen (ID, Denmark) Charlie Weimers (ECR, Sweden) Anne-Sophie Pelletier (GUE/NGL, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Procedure completed.</i>	Regulation (EU) 2024/1717 OJ L, 2024/1717, 20.6.2024	



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Introduction

The massive reintroduction of border controls by the EU Member States due to the coronavirus pandemic, coupled with persistent migration challenges, such as attempts by foreign governments to instrumentalise migrants, have triggered calls to revise the [Schengen Borders Code](#) (SBC).

Adopted in 2006, the SBC lays down the rules governing the movement of persons across borders within the EU, including the rules on border control at the EU external borders and the conditions under which Member States can temporarily reintroduce checks at EU internal borders. The SBC has been **amended several times** in the past decade. In 2013, new provisions made it possible to impose temporary checks at internal border controls in case of persistent deficiencies at the external borders. Another set of [provisions](#) from 2017 obliged Member States to carry out systematic checks on all persons crossing the EU external borders. A 2017 European Commission [proposal](#) to revise the rules on the reintroduction of checks at internal borders was not adopted into law, as the co-legislators failed to reach agreement on it.

In June 2021, the Commission adopted a **Schengen package** consisting of a new [Schengen strategy](#) and a [proposal](#) to revise the Schengen evaluation and monitoring mechanism (which was [adopted](#) into law in 2022). In December 2021, the Schengen package was complemented by a [proposal](#) amending the SBC to enable it to address new challenges relating to threats from irregular migration, public health emergencies, and the instrumentalisation of migrants.

Existing situation

Recent challenges have brought to the fore several shortcomings related to the SBC provisions and their application. First, the outbreak of the coronavirus pandemic in 2020 prompted many Schengen states to **reintroduce checks at the internal borders** (see Figure 1). 'Temporary' border checks had already been in place in Austria, Denmark, Germany, Sweden and Norway since 2015, due to concerns related to the situation at the EU's external borders and/or security threats. In line with the SBC rules, the Council later recommended the exceptional introduction and prolongation of temporary border checks in these countries for the period [May 2016](#) to [November 2017](#). In addition, France has maintained temporary checks at its borders since December 2015, due to persistent terrorist threats.

Figure 1 – Number of Schengen states with controls at internal EU borders



Data source: [European Commission](#), 2024.

While the SBC allows Member States to **temporarily** reintroduce checks at internal borders as a **last resort, for a limited period of time**, and in response to a **serious threat to internal security** or public policy (Articles 25–28 SBC), the prolonged use of these provisions has come under [criticism](#). Moreover, the appropriateness and legality of the massive border control measures applied in the context of the coronavirus pandemic have been called into [question](#). In his [opinion](#) on two ongoing

cases before the Court of Justice of the European Union (CJEU), Advocate General Saugmandsgaard argued that Member States should be able to extend temporary checks at internal borders to ensure national security and public order, but maintained that any prolongation of such measures requires stricter proportionality tests. The Commission has [recommended](#) that Member States use **alternative measures** to border control in border areas (Article 23 SBC), including proportionate police checks, joint patrolling, and the application of bilateral readmission agreements. Such agreements often contain a 'fast-track' or [simplified readmission](#) procedure, and allow Member States to swiftly return third-country nationals (who are not registered in [Eurodac](#) and are thus not eligible for Dublin transfer, as provided by EU asylum law) without issuing a return decision (Article 6(3) of the [Return Directive](#)).

As regards **measures at the external borders**, in March 2020 the Heads of States or Government of the EU agreed to implement the Commission's [recommendation](#) to temporarily restrict non-essential travel from third countries into the EU. However, despite agreeing on a (non-binding) Council [recommendation](#) establishing a list of countries for which the restriction on non-essential travel could be lifted, Member States have [not applied](#) the agreed rules in similar ways. According to the SBC, checks at the external borders must include an assessment of whether EU citizens and third-country nationals constitute a threat to public policy, internal security, public health, or the international relations of any of the Member States (Article 8 SBC). However, the SBC [does not specify](#) what sort of public health checks may be carried out at the external borders.

Another challenge at the external borders concerns the attempt by third countries to **instrumentalise irregular migration** as a way to destabilise EU borders or blackmail the EU. This was illustrated in 2021 by the Belarusian regime's attempt to orchestrate a [hybrid attack](#) against the EU by sponsoring and encouraging irregular migrants to cross over into the EU through its eastern borders. Whereas the SBC contains general rules on border crossing points (Article 5 SBC) and border surveillance (Article 13 SBC), the case involving the instrumentalisation of migrants may require a reinforcement of these rules alongside the adoption of measures in other areas.

Parliament's starting position

The European Parliament has repeatedly [condemned](#) the introduction and continuation of checks at internal borders and stressed the need to assess the **necessity and proportionality** of border controls before introducing and prolonging them. In its 2019 legislative [resolution](#) on the Commission's proposal to amend the SBC, Parliament opposed extending the time limits for temporary checks at internal borders and questioned the effectiveness of the proposed risk assessment conducted solely by the concerned Member States.

In the context of the coronavirus pandemic, in its [resolution](#) of 19 June 2020, Parliament criticised the 'little justification' and the 'lack [of] sufficient detail' provided by the Member States in their notifications, and called on the Commission 'to exercise appropriate scrutiny over the application of the Schengen *acquis*', and 'to enhance its reporting to the Parliament'. It also called for establishing '**truly European governance of the Schengen area**', inviting the Commission to propose reforms in this regard. In its 2021 [resolution](#) on Schengen, Parliament acknowledged that 'the Schengen Borders Code, in particular as regards rules on internal border controls, is no longer fit for purpose and requires urgent and meaningful reform'. It noted the need to adopt 'clearer rules on public health emergencies' and suggested that each prolongation of border controls should trigger additional safeguards and oversight measures. Parliament also called for 'a structured and transparent consultation mechanism in the event of crisis situations' to determine mitigating or alternative measures to checks at the internal borders and uniform rules that are binding and applicable at the external borders.

Council and European Council starting position

In June 2019, in its [new strategic agenda 2019–2024](#), the European Council made the commitment to 'take the necessary steps to ensure [the] proper functioning of Schengen'. In relation to the coronavirus pandemic, the European Council and the Commission laid out a [joint European roadmap](#) towards lifting COVID-19 containment measures in view of restoring the normal functioning of the Schengen area.

Following the hybrid attack launched by the Belarusian regime, in October 2021 the European Council [condemned](#) any attempt to instrumentalise migrants for political purposes. It furthermore invited the Commission to propose any necessary changes to the EU's relevant legal framework and concrete measures underpinned by adequate financial support in order to ensure an immediate and appropriate response in line with EU law and international obligations, including as regards fundamental rights.

Preparation of the proposal

As announced in Commission President Ursula von der Leyen's 2020 State of the Union [address](#), in June 2021 the Commission presented a **Schengen package** consisting of a [strategy](#) towards a fully functioning and resilient Schengen area, and a [proposal](#) to revise the Schengen evaluation and monitoring mechanism (SEMM). The Schengen strategy focuses on three main aspects: ensuring effective and modern management of the EU's external borders; reinforcing the Schengen area internally; and improving governance to foster trust between Member States and to ensure better crisis-preparedness. The proposal to revise the SEMM aims to improve Schengen's governance by increasing efficiency, flexibility, and political visibility of evaluations.

In preparation for the reform proposals, the Commission launched a **Schengen forum**, as announced in its communication on a new [pact on migration and asylum](#). The [first forum](#) was held on 30 November 2020, bringing together various stakeholders, including Members of the European Parliament. The Commission carried out a [public consultation](#) on temporary checks at internal borders between 19 January and 16 March 2021. According to the consultation report, most respondents indicated they had encountered problems due to delays or to other setbacks caused by reintroduced border controls. In January 2021, the Commission also organised two expert meetings on measures allowing for a more effective cooperation within the Schengen area.

The proposal was accompanied by an **impact assessment report** that analysed the key policy options,¹ including: (i) a baseline scenario; (ii) soft law measures; (iii) a targeted revision of the SBC combined with soft law measures (the preferred option); and (iv) a more fundamental revision of the SBC enabling EU-level decisions on reintroducing checks at internal borders.

The changes the proposal would bring

The aim of the revisions is to boost Schengen's resilience to serious threats and to adapt the Schengen rules to evolving challenges. The key elements of the proposal are:

- **a new coordination mechanism to deal with health threats at the external borders** – allowing the Council to adopt binding rules setting out temporary travel restrictions at the external borders in case of a threat to public health;
- **a definition of situations of instrumentalisation of migrants at the external borders** – together with clarifications on measures available at the external borders (complemented by measures in the field on asylum and return provided in a separate [proposal](#));
- **a new Schengen safeguard mechanism to provide a common response at the internal borders in situations of threats affecting a majority of Member States** – allowing the Council to authorise the reintroduction of internal border checks in case of a shared threat;

- **updated procedural safeguards for any reintroduction of internal border controls** – requiring Member States to assess the appropriateness of measures and the likely impact on the free movement of persons, including mandatory risk assessments for Member States (when controls exceed six months), and to obtain a mandatory Commission opinion on proportionality and necessity (when controls are prolonged beyond 18 months). The maximum duration of controls is two years, with the possibility of extension without a specific time limit in certain circumstances;
- **measures to limit the impact of internal border checks on border regions** – facilitating the commuting of cross-border workers and establishing green lanes;
- **the use of alternative measures to border checks, including cross-border police cooperation to address unauthorised movements** – introducing the possibility to directly transfer irregular migrants apprehended at the internal borders back to the competent authorities in the EU country from which it is assumed they just came, without undergoing an individual assessment.

Advisory committees

In its [opinion](#) on the security union package and the Schengen package, issued in May 2022, the **European Economic and Social Committee** (EESC) welcomed the Commission's attempt to introduce new procedural safeguards in the event of unilateral reintroductions of internal border controls, but urged it to further clarify the procedural safeguards introduced, in particular by defining a clear time limit for potential prolongations. The EESC expressed concerns about the new procedure for transfers of persons apprehended at the internal borders, as they risk 'legalising forms of internal pushbacks' and may lead to 'uncontrollable racial profiling'. It also stressed 'that checks conducted within internal as well as at external border areas using monitoring and surveillance technologies should be reviewed regarding their proportionality'.

In its [opinion](#) on the revised Schengen area governance, issued in December 2022, the **European Committee of the Regions** (CoR) proposed several amendments to the Commission's proposal aiming to specify the definition of instrumentalisation of migration and the border measures in order to limit the potential negative impact on fundamental rights. The CoR rejected the new procedure for direct transfers of people apprehended at internal borders as 'not in line with international and European legal standards regarding the movement of persons in the Schengen area'. It also rejected including situations characterised by large-scale unauthorised movements of third-country nationals as constituting a serious threat to public policy or internal security justifying the reintroduction or prolongation of border control at internal borders.

National parliaments

The [deadline](#) for the submission of reasoned opinions on the grounds of subsidiarity was 14 April 2022. None of the national parliaments issued a reasoned opinion on the proposal.

Stakeholder views²

The [Meijers Committee](#), an independent group of legal scholars and practitioners, welcomed the Commission's proposal as an opportunity to address existing gaps in the legal framework. However, it called for clarification of the term 'border surveillance' and its territorial scope, and suggested (i) inserting an obligation for the Member States to notify all arrangements on border control with third countries to the Commission; and (ii) making an explicit reference to Member States' obligation, in the context of border control, to provide persons claiming international protection with access to the asylum procedure.

The European Council of Refugees and Exiles (ECRE) [expressed](#) concerns about the definition of instrumentalisation and about the proposed strategy, which is likely to 'make access to asylum in Europe more difficult'. The procedure for transferring persons apprehended at the internal borders

is also regarded as 'an attempt to regularise and encourage the practice of summary readmission'. The Platform for International Cooperation on Undocumented Migrants (PICUM) also [criticised](#) the new procedure, which would legalise 'internal pushbacks' and lead to 'systematic border controls which target people only based on their racial, ethnic, national, or religious characteristics'. According to [Professor Anna Lübke](#) from the University of Applied Sciences in Fulda (Germany), the proposed procedure 'lacks the minimum legal guarantees for compulsory transfers from one state to another' and is at odds with the case law of the CJEU and the European Court of Human Rights (ECHR).³

In March 2024, before the vote on the text provisionally agreed on by the co-legislators in the Committee on Civil Liberties, Justice and Home Affairs (LIBE), 85 civil society organisations signed a [joint statement](#) calling on MEPs to reject the proposed changes. According to the statement, the new legislation will increase racial profiling, enable 'internal pushbacks' between Schengen states, allow Member States to curtail migrants' rights by invoking the questionable concept of 'instrumentalisation of migration', and lead to a problematic increase in the use of surveillance technologies.

Legislative process

The Commission adopted its legislative proposal ([COM\(2021\) 891](#)) on 14 December 2021. It falls under the ordinary legislative procedure (2021/0428(COD)).

Discussions in the Council

As [proposed](#) by the French Presidency of the Council in March 2022, the Member States agreed to discuss ongoing reforms in a 'Schengen Council', to be convened as part of every Justice and Home Affairs (JHA) Council meeting.

In June 2022, the Council adopted its [general approach](#) on the proposal. The text sought to clarify the concept of **instrumentalisation of migrants** by simplifying the definition and describing the actions Member States may take in such situations. The Council added **more flexibility** regarding the travel and health-related restrictions applicable at the external borders, while respecting national competences on health. It also proposed changes to the procedure for the **transfer of irregular migrants** between Member States by specifying the police cooperation criterion in more detail and clarifying that the procedure should be voluntary and applicable only in the framework of bilateral cooperation.

Work in the European Parliament

In Parliament, the proposal was assigned to the LIBE committee, which appointed Sylvie Guillaume (S&D, France) as rapporteur. In her [draft report](#) on the proposal, the LIBE rapporteur rejected the provisions on the instrumentalisation of migrants, and on establishing a new procedure for internal Schengen returns (as incompatible with the Schengen area). She proposed stricter time limits on the reintroduction of checks at internal borders (**maximum of two years in exceptional cases**), and additional measures to ensure that such checks are used only as a last resort (e.g. use of alternative measures).

The [final LIBE report](#) maintained the rejection of the provisions on the **instrumentalisation of migrants**. However, it reintroduced the provisions on the transfer of migrants apprehended during joint patrols **in the vicinity of internal borders**. The new procedure should not apply to people seeking international protection, or to minors or members of their family arriving together from another Member State.

Provisional agreement

In February 2024, Parliament and the Council reached a [provisional agreement](#) on the proposal. The [agreed text](#) maintains provisions on the **instrumentalisation of migrants**. This term is defined in the

[proposed](#) crisis and force majeure regulation and excludes the actions of hostile non-state actors and humanitarian assistance operations.

The agreed text on the revised SBC regulation specifies conditions for the reintroduction and prolongation of checks at internal borders. Member States will be able to extend internal border controls based on security risks or migratory flows for a **maximum period of two years**. After six months, they will have to provide a risk assessment justifying their measures. After one year, the Commission will have to issue an opinion on whether the measures are proportionate and necessary.

The new procedure for the transfer of a third-country national apprehended **in border areas** could be used voluntarily in the context of bilateral cooperation. This procedure should not apply to persons who apply for international protection, but it could **apply to (presumed) minors** – in which case the Member States concerned should ensure that all measures in the best interests of the child are taken in accordance with their respective national laws.

Adoption

The negotiators from Parliament and the Council reached a provisional agreement on the proposal in February 2024. The agreed text was adopted by the Parliament in plenary on 24 April and by the Council on 24 May. Published in the Official Journal on 20 June 2024, the new regulation entered into force in July 2024.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Dumbrava C., [EU migration and borders: Key facts and figures](#), EPRS, European Parliament, March 2024.

Dumbrava C., Orav A. and Radjenovic A., [EU pact on migration and asylum: State of play](#), EPRS, European Parliament, February 2024.

Dumbrava C. and Radjenovic A., [Towards a common EU system for returns](#), EPRS, European Parliament, January 2024.

Dumbrava C., [The EU's external borders: Key trends and developments](#), EPRS, European Parliament, March 2023.

Eisele K., [The revision of the Schengen Borders Code](#), initial appraisal of a European Commission impact assessment, EPRS, European Parliament, 2022.

Dumbrava C., [Towards a common EU approach to lifting coronavirus-related restrictions on freedom of movement](#), EPRS, European Parliament, 2021.

Madatali H., [Schengen Borders Code](#), implementation appraisal, EPRS, European Parliament, 2021.

Wagner M. et al., [The state of play of Schengen Governance](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2020.

Carrera S. and Luk N., [In the name of COVID-19: An assessment of the Schengen internal border controls and travel restrictions in the EU](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2020.

OTHER SOURCES

European Parliament, [Revision of the Schengen Borders Code](#), Legislative Observatory (OEIL).

ENDNOTES

- ¹ See also the EPRS initial appraisal of the Commission's impact assessment, K. Eisele, [The revision of the Schengen Borders Code](#), 2022.
- ² This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.
- ³ A. Lübbe, [Pushbacks? Never mind, we're doing it: The EU Commission's proposal to curb onward migration in the Schengen area](#), Verfassungsblog, January 2022.

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