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FOCUS
***Best interests of the child* e tutela dei diritti dei minori nell'Unione europea**
Il Focus contiene la versione, rivista e integrata, di alcune delle relazioni tenute nel corso del Seminario intitolato "Povertà e diritti dei minori" promosso dai Gruppi di interesse "Diritto internazionale ed europeo dei diritti umani" e "Diritti fondamentali e cittadinanza nello spazio europeo di libertà, sicurezza e giustizia" in occasione del Convegno SIDI 2024 di Palermo

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THE PAST AND THE FUTURE OF READMISSIONS IN THE EU: FROM THE *AFFUM, ARIB* AND *ADDE* CASE LAW TO THE REFORM OF THE SCHENGEN BORDERS CODE

Stefano Montaldo, Verus Kelch, Connor Mailand, Simone Poncini*

SUMMARY: 1. Introduction. – 2. The articulated legal regime governing the interception of illegal migrants in the Schengen area. – 3. The Court to the rescue: From *Affum* to *Arib*. – 4. The Court's final word on migrants' guarantees in internal border areas: *ADDE*. – 5. The reform of the Schengen Borders Code: In search of ways out of the rush to reintroduce border controls. – 6. Readmissions between Member States: From ADDE to the implications of the reform of the Schengen Borders Code. – 7. Conclusion.

1. Introduction

Irregular migration in the European context is a fraught subject, revealing normative tensions between the European Union's supranational management thereof vis-à-vis Member States' political priorities and pressures on the ground. The management and the legal regime of the borders of the Schengen area are illustrative examples of these tensions. On the one hand, Schengen was established on the premiss that "*frontières n'ont d'intteret qu'en vertu de leur desparution*"[1]. On the other hand, over the last decade, the divide between the principled borderless space and the day-to-day reality has been striking.

Double-blind peer reviewed article.
* Stefano Montaldo is Associate Professor of European Union Law at the University of Turin. E-mail: stefano.montaldo@unito.it. Verus Kelch, Connor Maitland and Simone Poncini are second year master's students of European Legal Studies at the Law Department of the University of Turin: www.europeanlegalstudies.unito.it.
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[1] C. BLUMANN, *Les frontières de l'Union européenne. Rapport introductif général*, in C. BLUMANN (ed.), *Les frontières de l'Union européenne*, Bruxelles, 2013, p. 12.

Before 2015, Member States had been reintroducing (sporadically) internal border controls for specific events of short temporal duration, such as high profile sporting or political events[2]. With the outbreak of the Syrian crisis, the practice started to be linked to long-term threats such as terrorism and high-volume migration influxes, which led to a sharp increase of border control reintroductions and prolongations pursuant to Articles 26-29 of the Schengen Borders Code (SBC)[3]. The 2020 pandemic and terrorist threats generated new challenges and contributed to a deep reconsideration of the essence of the (theoretically) borderless Schengen space. The national governments' approach is particularly telling. Between 2006 and 2015, reintroduction clauses had been resorted to only 37 times. Since then, departures from the abolition of internal border control have increased more than tenfold: at the moment of drafting this analysis, the Commission's repository counts no fewer than 404 notifications of new reintroductions or prorogations of existing ones[4].

In this respect, one of the core concerns is that the reinstatement of border controls clearly distinguishes the responsibilities of Member States from the role of EU institutions. The SBC stipulates the absence of internal border controls but allows Member States to reintroduce them at their discretion.[5] While it makes the use of reintroduction clauses dependent upon the requirements of necessity and proportionality, over the last years several Member States have openly refused to take the relevant Schengen *acquis* seriously.

The French case is a textbook example of this trend. For more than eight years now, the French government has repeatedly and uninterruptedly reinstalled controls at various portions of the internal border, well beyond the temporal limits established by the SBC and very often based on copy-pasted grounds.

Aside from inevitably fuelling the crisis of the original spirit of the Schengen area, this situation has unveiled critical spillovers with respect to the legal regime applied to third-country nationals (TCNs) apprehended in the proximity of the French border. Several professional and civil society organisations have reported the extensive use of untransparent refusals of entry and of informal readmissions procedures, leading in an

[2] This practice is still in place. For example, Italy had reintroduced border controls for the two weeks in which it held the G7 meeting. Source: https://www.open.online/2024/05/31/italia-controlli-frontiere-giugno-g7-puglia-schengen/ (last accessed 10 August 2024).

[3] Regulation (EU) 2016/399 of the European Parliament and of the Council *on a Union Code on the rules governing the movement of persons across borders*, of 9 March 2016, in OJEU L 77 of 23 March 2016, pp. 1-52. *Ex multis*, A. Di Pascale, *Respingimento dello straniero e controlli delle frontiere interne ed esterne dell'UE*, in *Diritto, immigrazione e cittadinanza*, 2020, n. 2, pp. 1-48; M. De Somer, *Schengen: Quo Vadis?*, in *European Journal of Migration and Law*, 2020, n. 2, pp. 178-197.

[4] The Commission keeps track of the list of notifications, that can be accessed at https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en#:~:text=The%20reintroduction%20of%20border%20control%20is%20a%20prerogative%20of%20the,decision%20to%20reintroduce%20border%20control (last accessed 9 September 2024).

[5] See Arts. 22 ff. SBC.

undermined number of cases to readmission chains at the expense of the rights of the migrants concerned[6].

Notably, these controversial regimes stemmed from the complex interplay of different normative layers: domestic law, bilateral international agreements signed between France and other EU Member States, and important pillars of EU migration and border law, namely the SBC and the 2008/115/EC Directive (Return Directive)[7]. This articulated normative framework provided incentives to curtail the scope of application of the procedures and safeguards enshrined in the Return Directive, with a view to dispose of TCNs irregularly crossing the French border more swiftly and easily[8].

The French government's approach to TCNs intercepted in the proximity of the internal border gave rise to extensive litigation, which in the end offered the Court of Justice three opportunities to clarify the interpretation of important provisions of the SBC and of the Return Directive. More specifically, the preliminary rulings in the *Affum* and *Arib* cases have been recently complemented by *ADDE*,[9] the third and latest case in which the CJEU has been asked to examine the compatibility of the French Code on the Entry and Residence of Foreign Nationals and the Right of Asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile; the Ceseda)[10] with the SBC and the Directive 2008/115/EC.

This analysis precisely takes the *ADDE* judgment as an opportunity to frame the case law of the Court within the wider context of the past, the present and the future of the complex interplay of legal sources governing the Schengen internal borders. This opportunity is particularly appealing, since *ADDE* and its precedents need to be read in the light of the recent SBC reform, adopted by the Council and the European Parliament

[6] See *ex multis* Défenseur des droits de la Republique française, *Respecter les droits des personnes migrantes à la frontère intérieure franco-italienne*, 25 April 2024, available at https://www.defenseurdesdroits.fr/respect-des-droits-des-personnes-migrantes-la-frontiere-interieure-franco-italienne-le-defenseur.

[7] Directive 2008/115/EC of the European Parliament and of the Council *on common standards and procedures in Member States for returning illegally staying third-country nationals*, of 16 December 2008, in OJEU L 348 of 24 December 2008, pp. 98–107.

[8] See the agreement between Italy and France on the readmission of irregular migrants, done in Chambery on 3 October 1997, in force as from 1 December 1999. For an account of this complex legal interplay, C. MOLINARI, *The EU Readmission Policy to the Test of Subsidiarity and Institutional Balance: Framing the Exercise of a Peculiar Shared Competence*, in *European Papers*, 2022, n. 1, pp. 151-170; E. FRASCA, E. ROMAN, *The Informalisation of EU Readmission Policy: Eclipsing Human Rights Protection Under the Shadow of Informality and Conditionality*, in *European Papers*, 2023, n. 2, pp. 931-957.

[9] Court of Justice, Grand Chamber, judgment of 7 June 2016, *Sélina Affum v. Préfet du Pas-de-Calais e Procureur général de la Cour d'appel de Douai*, case C-47/15; Court of Justice, Grand Chamber, judgment of 19 March 2019, *Préfet des Pyrénées-Orientales v. Abdelaziz Arib and Others*, case C-444/17; Court of Justice, judgment of 21 Setpember 2023, *Association Avocats pour la défense des droits des étrangers (ADDE) and Others v. Ministre de l'Intérieur*, case C-143/22.

[10] The updated version of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* is available at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070158/.

as an extensively debated and exhaustively negotiated last-minute achievement of the 2019-2024 legislature[11].

In this context, the analysis first briefly sets out the legal frameworks that govern the return of TCNs to Schengen States Parties, with particular attention paid to relevant EU law and to agreements signed between two or more Schengen States Parties (Section 2). Thereafter, the annotation addresses the Luxembourg case-law, tracing the evolution of the Court's reasoning from the *Affum* to the *Arib* cases (Section 3) before culminating in an exploration of the *ADDE* judgment (Section 4). Afterwards, Section 5 discusses the recently approved amendments to the SBC and Section 6 endeavours to set out the ways in which they will impact this normative scenario.

2. The articulated legal regime governing the interception of illegal migrants in the Schengen area

The regime applicable to illegal migrants intercepted or apprehended within the Schengen area is a textbook example of the complex articulation of sources stemming from the interplay of EU policies and national sovereignty. Without any ambition for a comprehensive description, a brief overview is a needed preparatory step towards the next phases of the analysis. Three main sources need to be considered: the SBC, the Return Directive and the readmission and border cooperation international agreements concluded by Member States.

The Schengen Borders Code has a twofold dimension: on the one hand it "provides for the absence of border control of persons crossing the internal borders between the Member States of the Union", while on the other hand, it "govern[s] border control[s] of persons crossing the external borders of the Member States of the Union"[12]. The SBC differentiates between rules applied at external borders and those enforced at the internal borders of the Union. While in principle Article 22 SBC provides for the abolition of control at internal borders, the external ones perform a filter function requiring any person being subject to checks regulated in detail in Title II SBC and, in case, being refused entry under Article 14. As a rule, Member States may not treat internal borders as external, except for the specified circumstances that allow for the reintroduction of border controls at internal borders pursuant to Articles 25-29 SBC. Pursuant to Article 32, in such situations "the relevant provisions of Title II shall apply *mutatis mutandis*". At first sight, the open-ended wording of this provision may justify replacing the rules governing the internal borders with those applicable to external ones, including provisions on identity checks and refusal of entry in the event of an interception at the border. Another reading

[11] Regulation (EU) 2024/1717 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*, of 13 June 2024, in OJEU L 2024/1717 of 20 June 2024, pp. 1-24.
[12] Art. 1 SBC.

would be in favour of a selective application of the external border regime, in light of the inherent differences between the inner and the outer facets of the Schengen area.

The correct interpretation of Article 32 SBC is essential to clarify the interplay between the SBC itself and Directive 2008/115 (Return Directive). In fact, Article 2(2), laying down the list of exceptions from the scope of application of the Directive, makes a direct reference to the SBC. Pursuant to letter a), in particular, if a TCN is found to be illegally entering or attempting to cross the (external) border and is apprehended under border surveillance operations, he/she could be subject to a decision refusing entry pursuant to Article 14 SBC, rather than to the more developed guarantees provided for in the Return Directive[13]. In such situation, therefore, the application of the Directive's procedures is made conditional upon the Member State's discretion and willingness to respect the procedural safeguards contained in the instrument[14].

Another key provision is Article 6, which codifies the obligation to issue a return decision against illegally staying TCNs and provides for the exceptions to this general rule. For our purposes, Article 6(3) deserves specific attention. According to this text, Member States may avoid complying with the obligation to issue a return decision if the TCN is taken back by another EU Member State pursuant to a bilateral readmission agreement.

Article 6 therefore bridges the Return Directive and the SBC to a third normative layer, namely the wide array of international treaties signed *inter se* by Member States or by Member States and Third Countries around matters of readmission procedures[15]. Readmissions are generally fast-tracks deprived of significant formalities and are tied to internal border management. As a matter of fact, readmission treaties are often linked to bilateral police cooperation agreements that regulate how national border authorities support each other when managing internal border areas[16]. In the framework analysed here, they fall under the coverage of Article 23, l. a, SBC, which allows for the conduct of ordinary police activities within the territory of a Member State, provided they do not elude the ban on checks at internal borders. One of the tools that these agreements provide is logistic support for conducting readmissions, thus giving national enforcement authorities the power to decide whether to apply the Return Directive or resort to a fast-track procedure[17].

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[13] Art. 2(2)(a) of the Return Directive. See M. MORARU, *EU Return Directive. A cause for shame or an unexpectedly protective framework?*, in E. TSOURDI, P. DE BRUYCKER (eds.), *Research Handbook on EU Migration and Asylum Law*, Cheltenham, 2022, pp. 435-454.

[14] This first cross-reference between these two instruments could create uncertainty as to the overlap of EU provisions: are EU Member States' free to avoid the Directive's procedure when they are enforcing this SBC article? We will see how the CJEU faced this interpretative issue.

[15] In principle, the only external power conferred to the EU explicitly in the area of migration concerns the conclusion of readmission agreements: see Art. 79(3) TFEU.

[16] An inventory of bilateral agreements linked to readmissions is available at https://www.jeanpierrecassarino.com/datasets/ra/. See in this regard T. MOLNAR, *EU readmission policy: A (shapeshifter) technical toolkit or challenge to rights compliance?*, in E. TSOURDI, P. DE BRUYCKER (eds.), *Research Handbook*, cit., pp. 486-504.

[17] M. WEISSENSTEINER, *Cross-Border Police Cooperation and 'Secondary Movements'*, in *Utrecht Law Review*, 2021, n. 4, pp. 73-88.

3. The Court to the rescue: from *Affum* to *Arib*

The interconnections among the legal sources in question soon elicited interpretative clarifications from the Court of Justice. These were mainly triggered by national restrictive approaches to the guarantees which EU law grants to migrants. As outlined in the introduction, the French legal order was the main battlefield.

In 2016, the Court was called upon to determine the compatibility of the French Ceseda with the Return Directive in the *Affum* case. Mrs. Affum was a Ghanaian national who irregularly crossed an internal border of the EU while attempting to cross the Channel Tunnel. French authorities intercepted her while she travelled by bus from Brussels. At the time, the version of Ceseda in force foresaw the possibility of a prison sentence of up to one year if the TCN did not satisfy the conditions to enter French territory. The Court had already held that the imprisonment of a TCN on the sole ground that the TCN is staying illegally on the territory of a Member State is incompatible with EU law[18]. Consequently, the French legislature repealed the offence of staying illegally but retained the offence of 'illegal entry'.

According to the French authorities, a detention measure for illegal entry under French law did not violate EU law because the Return Directive was not applicable in the case at issue. This interpretation was based on the existence of a bilateral readmission agreement that would bring the readmission procedure outside the scope of application of the Return Directive, pursuant to the exception laid down in Article 6(3). In other words, according to this approach, the latter provision established an exception to the scope of the Directive itself, thereby leaving the TCN concerned subject to the readmission agreement alone.

The Court fully rejected the French authorities' interpretation of the Return Directive, on two main grounds.

First, it outlined the close link between the concepts of 'illegal stay' and 'illegal entry'. Illegal entry is one factual circumstance that may result in an illegal stay in the Member State's territory. Therefore, illegal entry into the territory of a Member State would bring a TCN within the scope of application of the Return Directive and subject him or her to the return procedure outlined therein[19]. The illegal entry alone did not permit Member States to dispose of TCNs before national authorities had completed the return procedure set out in the Return Directive. Otherwise, the effectiveness of the Directive would be hampered by hindering and delaying the return procedure[20].

Second, the Court posited that Member States cannot interpret the existence of a bilateral agreement as a limit to the scope of application of the Return Directive itself. By virtue of a literal and contextual interpretation of Arts 2(2) and 6(3), the only provision

[18] Court of Justice, Grand Chamber, judgment of 6 December 2011, *Alexandre Achughbabian v. Préfet du Val-de-Marne*, case C-329/11.
[19] Court of Justice, Grand Chamber, *Affum*, cit., paras. 59-62.
[20] *Ibidem*, para. 63.

which outlines the limits to the reach of this act is Article 2(2). Instead, the exception laid down in Article 6(3) "concerns solely the obligation of the Member State on whose territory the national in question is present to issue a return decision to him and thus to attend to his removal, that obligation then falling, as the second sentence of Article 6(3) makes clear, to the Member State who has taken him back". Therefore, the existence of a readmission agreement does not amount to a ground for disposing of the procedures and guarantees governing formal returns, but rather leads to determine the Member State tasked with the obligations stemming from the Return Directive[21]. In conclusion, the Court employed the argument of *effet utile* to avoid undue limitations to the scope of application of the Return Directive and thereby to its procedural safeguards[22].

This approach was developed further in the subsequent *Arib* judgment. Once again, the Court was tasked with determining if the Ceseda was compatible with the Return Directive. However, on this occasion, border controls were reintroduced between France and Spain pursuant to Article 25 SBC. Mr. Arib, a Moroccan national, was intercepted in the vicinity of that border and held in police custody based upon the suspicion that he illegally entered French territory[23]. Therefore, the Court was asked to determine whether a TCN apprehended in the immediate vicinity of an internal border where internal border controls have been reintroduced was to be subject to the Return Directive or not. More specifically, since according to Article 32 SBC the reintroduction of internal border controls requires the relevant portion of the internal border to be considered as an external one, the referring judge needed to know if Mr. Arib's situation was to be governed by Art. 2(2) let. a) of the Return Directive, which excludes the applicability of this act to TCNs "who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State".

The Court stated that this was not the case. First, it relied on the wording of Art. 2(2) let. a) of the Return Directive, which clearly refers to "external borders" and contains no indication that the reintroduction of internal border controls equates to border controls at the external border.[24] Second, it pointed out that no provisions of the SBC allow to differentiate the situation of an irregularly staying TCN apprehended in the immediate vicinity of an internal border depending on whether or not border controls have been reintroduced. This can also be derived from the purpose of Article 2(2) let. a), which is to take advantage of the vicinity of the external borders of the EU to use national procedures to swiftly return the TCN.[25] Third, this interpretation was further supported by a systematic reading of the SBC that uses the concepts of 'internal' and 'external'

[21] *Ibidem*, paras. 84-85.
[22] It has been contended that the Court showed pragmatism, as it could have gone so far as to quash Art. 6(3) of the Return Directive, "which is an exception to the general approach on the relationship between EU law and agreements concluded before its entry into force". See G. ZACCARONI, *The Pragmatism of the Court of Justice on the Detention of Irregular Migrants: Comment on Affum*, in *European Papers*, 2017, n. 2, p. 454.
[23] Court of Justice, Grand Chamber, *Arib*, cit., para. 22.
[24] *Ibidem*, paras. 38-43.
[25] *Ibidem*, paras. 52-59.

borders mutually exclusively[26].

Therefore, the Court concluded that Art. 2(2) let. a) of the Return Directive applies only at the Union's external borders. Instead, a TCN who is apprehended in the immediate vicinity of the internal borders of a Member State must be subjected to the standards and procedures laid down in the Return Directive, otherwise the effectiveness and coherence of the return system established by this act would be undermined[27].

4. The Court's final word on migrants' guarantees in internal border areas: *ADDE*

The *ADDE* case stems from a request for a preliminary ruling, made by the Conseil d'État (France) in proceedings between the Association Avocats pour la défense des droits des étrangers (ADDE) and others and the French Government. In a domestic action for annulment, the applicants challenged the validity of Order 2020-1733[28], which permits French authorities to refuse entry of third-country nationals at internal borders where checks have been temporarily reintroduced, without subjecting the TCN to the procedural requirements and safeguards established in the Return Directive.

In this context, the Conseil d'État stayed proceedings and submitted a preliminary reference to the Court, questioning whether Article 14 SBC permitted Member States to bypass Directive 2008/115 procedures and to immediately refuse entry and turn back an unauthorised TCN who had been intercepted or apprehended at an internal border crossing, where a Member State has temporarily re-imposed internal border checks.

The *ADDE* judgment builds on the Court's reasoning in the *Affum* and *Arib* cases. Accordingly, first, the Court reiterates its findings that the exceptions defined in Article 2(2) Return Directive relate exclusively to external borders of Member States and do not apply to internal borders, independently from the fact that border controls have been reintroduced.

In a second step, the Court further extends this approach to the situation in which a TCN presents himself/herself at an authorised border crossing point coming directly from a State party to the Schengen Area. Even in this case, Member States are not allowed to derogate from the common standards and procedure of the Return Directive[29].

The *ADDE* judgment confirms that, as a matter of principle, national authorities cannot elude the system of checks and guarantees granted by EU law. Even if Article 32 SBC provides for the application of Title II SBC when border controls are reinstated, it

[26] *Ibidem*, paras. 62-64.

[27] S. Bartolini, *Return Directive or Criminal Law? The next episode of the series is called Arib*, in *EU Immigration and Asylum Law Policy Blog*, 2019, available at https://eumigrationlawblog.eu/internal-border-control-and-the-return-directive-the-cjeus-ruling-in-arib-sets-the-record-straight-on-an-ambiguous-relationship/.

[28] Ordonnance n. 2020-1733 du 16 décembre 2020 portant partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile, available at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042754770.

[29] Court of Justice, *ADDE*, cit., paras. 36-37. See also Court of Justice, Grand Chamber, judgment of 22 November 2022, *X v. Staatssecretaris van Justitie en Veiligheid*, case C-69/21.

does not mean that the Member State can treat the internal border as if it were an external one. It follows that, for the purposes of the legal regime applicable to TCNs intercepted while crossing the internal border or in its proximity, Member States cannot invoke Article 2(2) of the Return Directive, because this provision refers solely to external borders. It follows that the limits to the scope of application of Directive 2008/115 enshrined in Article 2(2) do not permit any erosion of standards and procedures of the return practices within the Schengen area[30]. It follows that resorting to readmission treaties should not amount to preventing in any case the issuing of a return decision. Instead, it is a 'managerial tool', whereby the receiving State – with the critical loophole of the Member States' lax approach of readmission chains – should take responsibility for conducting the return procedure[31].

This brief analysis shows that the Schengen internal *coté* has important implications well beyond border issues and impacts both the systemic and the fundamental rights dimensions of EU and national policies vis-à-vis illegal migration. From this viewpoint, the *Affum*, *Arib* and *ADDE* line of cases needs to be framed into the evolving context of the recent legislative reforms of the New Pact on Migration and Asylum. The key question is if and to what extent the SBC reform will bring substantial change to the scenario in which these judgments were issued.

5. The reform of the Schengen Borders Code: In search of ways out of the rush to reintroduce border controls

Over the last decade, in line with the assumption that the Schengen area now confronts challenges that differ significantly from those at its inception, the Commission has brought forward various proposals to reform the SBC. The latest of these proposals was published in December 2021 and, following long and heated negotiations, has been eventually adopted by the Parliament and the Council[33]. Providing a detailed explanation of the content of the proposal exceeds the scope of the current analysis by far[34]. Three

[30] M. MORARU, *Op-Ed: "The interplay between the Schengen Borders Code and the Return Directive – another episode in the reintroduction of internal border controls saga – C-143/22, ADDE and others"*, available at: https://eulawlive.com/op-ed-the-interplay-between-the-schengen-borders-code-and-the-return-directive-another-episode-in-the-reintroduction-of-internal-border-controls-saga-c-143-22-adde-and-o/.

[31] The French Conseil d'Etat followed up to the Court of Justice's preliminary ruling in the *ADDE* case with decision n. 450285 of 2 February 2024, available at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000049102415.

[33] Communication from the Commission *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*, of 14 December 2021, COM(2021) 891 final; Regulation (EU) 2024/1717, cit.

[34] For an overview of the reform, from the proposal till the final text, S. MONTALDO, *La riforma della governance delle frontiere interne dello spazio Schengen*, in M. SAVINO, D. VITIELLO (eds.), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici*, Napoli, 2023, pp. 17-33; D. THYM, *Reinvigorating Schengen amid legal changes and secondary movements*, EPC Discussion Paper, 11 July 2024, available at https://www.epc.eu/content/SchengenEMD.pdf.

main normative trajectories deserve consideration, as they could impact the current state of affairs of the legal regime reserved to migrants intercepted in border areas or while crossing internal borders.

First, along the lines of the original proposal from the Commission, the duration of individual reintroductions and prorogations and their overall maximum duration are extended significantly. Ordinary reinstatements pursuant to Article 25 and based on public policy and national security considerations are the most telling example. While they could not originally exceed six months, Member States are now allowed to extend them up to two years. In "major exceptional situations", Article 25a, para 6a, grants further leeway, namely two additional prolongations of a maximum period of six months each. This choice is based not only on the demonstrated ineffectiveness of stricter deadlines – at least at this stage of the integration process – but also on the increasingly flexible and generous way in which national authorities have used the reintroduction clauses.

Second, the reform compensates for the concessions made to Member States with instruments designed to limit the discretionary power of the national authorities. While the decision to reintroduce border controls is in principle left to the Member States, this option is described as a last resort, to be used only when other measures have proven to be unfeasible or inappropriate. According to the new Article 26, para. 1, let. a), such alternatives include the exercise of ordinary police activities within the territory and the use of the instruments of cross-border operational police cooperation. Overall, in the absence of binding blocks against illegitimate reinstatements, the text relies on what could be called an intensive but soft proceduralisation. For instance, whenever domestic authorities seek to reintroduce border control, they are required to demonstrate the absence of alternatives and that the requirements of necessity and proportionality have been met. In addition, they need to draft a detailed risk and an impact assessment[35]. The consultations following the notification of the decision to reinstall border control are also accompanied by measures designed to increase their incisiveness, although their outcome remains confined to the realm of mere political exhortation. At the same time, failure to comply effectively with these requirements does not entail any binding implication for the Member State concerned. In line with the previous version of the SBC, the system will largely depend on the European Commission's actual willingness to make use of the law enforcement instruments at its disposal, ranging from monitoring and evaluating Member States' actions to (threatening) launching infringement procedures. The reform is also a missed opportunity in that it does not provide for any specific instruments designed to enforce, quickly and effectively, the cessation of controls deemed incompatible with the SBC.

[35] Such proceduralisation echoes the recent reform of the Schengen evaluation mechanism, which emphasises the importance of such analyses in the context of the verification of the implementation of the *acquis*. See Council Regulation (EU) 2022/922 *on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013*, of 9 June 2022, in OJEU L 160 of 15 June 2022, pp. 1–27.

Lastly, the new Article 23a SBC introduces a procedure for transferring TCNs apprehended in border areas[36], provided that three requirements are met. First, there must be clear evidence that the person concerned "has arrived directly from the other Member State" and that he/she "has no right to stay on the territory of the Member State in which he or she has arrived". Second, the third-country national must not have filed an application for international protection, as in that case the new Asylum Procedure Regulation applies. Third, apprehension must have occurred "during checks involving the competent authorities of both Member States within the framework of bilateral cooperation", such as in the case of joint police patrols. However, the Member States must have agreed to use this procedure within the said bilateral cooperation framework.

Article 23a, para. 2, allows Member States to derogate from Article 6(1) of the Return Directive and therefore qualifies as a new exception from the duty to start the return procedure. Accordingly, the procedure in question and the related guarantees differ from the more significant safeguards provided by the Return Directive. The transfer decision is issued by means of a standard form and takes effect at once. This means that the TCN concerned is handed over to the authorities of the receiving Member State immediately and within 24 hours at the latest[37]. The transfer cannot take place once this deadline is expired, and as a rule the case should be handled according to Directive 2008/115, unless a readmission agreement is in place between the Member States concerned. In terms of procedural safeguards, transfer decisions shall be amenable to judicial review, pursuant to national law. Although TCNs need to be provided with an effective judicial remedy in accordance with Art. 47 of the Charter, lodging an appeal will not have suspensive effect[38].

6. Readmissions between Member States: From ADDE to the implications of the reform of the Schengen Borders Code

Overall, this brief overview demonstrates that the SBC reform has significant potential for impacting the legal regime of interceptions and readmissions at internal

[36] The notion of border area is based on a cross-reference to Art. 23 SBC, concerning checks within the territory of Member States that are not affected by the abolition of internal border controls. To this effect, based on the factual situations brought to its attention, the Court of Justice has considered that border areas can range between the immediate proximity to a border and a distance of 20-30 kilometres, also depending on additional criteria such as the existence of only one road crossing two Member States in a given portion of their shared border. See inter alia Court of Justice, Grand Chamber, judgment of 22 June 2010, *Aziz Melki and Sélim Abdeli*, joined cases C-188/10 and C-189/10; Court of Justice, judgment of 19 July 2012, *Atiqullah Adil contro Minister voor Immigratie, Integratie en Asiel*, case C-278/12 PPU.

[37] Regulation 2024/1724, cit., Annex XII, para. 6.

[38] It can be questioned whether the reference to Art. 47 of the Charter is in practice meaningful. The absence of suspensive effect entails TCNs being transferred within 24 hours; it follows that any complaint raised before the judicial authorities of the transferring Member State would be handled in the absence of the person concerned. This could be particularly problematic in the event of an asylum seeker, for example in case of a national authorities' failure to register his/her application for asylum before the transfer is completed.

borders.

From a general viewpoint, the main implication of the reform is a functional and structural paradigm shift, whereby the exceptional nature of border control is declared in theory but mitigated in practice by the conditions for their activation and the extension of their duration. While compliance with the new rules will continue to rest primarily on the Member States' political willingness and on the Commission's attitude as a Guardian of the Treaties, the amended provisions will likely result in an expansion of the use of reintroduction clauses, or at least the confirmation of existing critical domestic practices. This will make the Court's settled stance culminated in *ADDE* an ever-important barrier to attempts to elude the application of the Return Directive in the framework of reinstatements of internal border controls.

The same applies to situations where the national authorities will decide to prioritise ordinary police activities nearby border areas, as a less disruptive option than the formal reintroduction of border checks. Faced with various domestic practices and normative frameworks incompatible with the SBC, the Court of Justice has carefully delimited the scope for these initiatives to avoid Member States eschewing the abolition of internal border control[39]. However, as studies on the ground confirm, law enforcement activities in proximity with borders are often characterised by lack of transparency, poor regulatory framework, and may result in profiling practices[40]. Since the reform makes clear that empowering the Member States for preserving public order and national security is a more desirable alternative to the use of the SBC reintroduction clauses, *Affum*, *Arib* and *ADDE* acquire further significance, together with the Luxembourg case law on the limits of the national law enforcement authorities' responsibilities under Art. 23(1), SBC.

In fact, over the last years, conducting readmissions under the EU framework has become a priority for the Commission[41], especially after it realised that the application of the Return Directive was not as successful as imagined[42]. First, in a Recommendation of 2017, it contended that bilateral readmission agreements can better serve the purpose of preventing secondary movements by countering irregular entries and stays, especially when TCNs are apprehended in border areas[43]. To this purpose, it considered enhancing cross-border operational police cooperation. More specifically, it outlined that strengthened police cooperation consists of more effective use of police checks and bilateral readmission agreements between Member States. Member States were encouraged to conduct readmissions using firstly a bilateral agreement falling under Article 6(3) Return Directive; secondly, they should implement all necessary measures to

[39] See above, footnote n. 36.
[40] *Inter alia*, M VAN DER WOUDE, J. VAN DER LEUN, *Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters*, in *European Journal of Criminology*, 2017, pp. 27-45; see also the various national reports and fact-finding visits reports available at www.asylumineurope.org.
[41] See E. FRASCA, E. ROMAN, *The informalisation of EU readmission policy*, cit., pp. 938 ff.
[42] Communication from the Commission *A European Agenda on Migration*, of 13 May 2015, COM(2015)240 final, pp. 9-10.
[43] Commission Recommendation (EU) 2017/820 *on proportionate police checks and police cooperation in the Schengen area*, of 12 May 2017, in OJEU L 122 of 13 May 2017, pp. 79–83.

ensure that procedures under such bilateral agreements guarantee swift transfers; lastly, they should resort to the ordinary procedure enshrined in the Return Directive. Second, in 2021 the Commission issued a set of proposals for a reform of the EU legislative framework on operational police cooperation, with a view to the adoption of a more consistent and up to date 'EU police cooperation code'[44]. Once again, one of the key-drivers of this initiative was improving and boosting shared law enforcement activities on a cross-border level, in particular nearby border areas, through enhancing hot pursuits, coordinated cross-border surveillance, joint operations, and, more generally, the exchange of information and the governance of police cooperation. The success of this project demonstrated the Commission's willingness to expand the reach and the day-to-day use of EU-driven law enforcement activities at the Schengen internal borders, as a more desirable alternative to departures from the abolition of border control[45]. Crucially, the new transfer procedure regulated in Art. 23a SBC is another telling example of this trend. These instruments can be seen as opportunities to strengthen cross-border horizontal cooperation, in parallel to (and in support of) the development of an ever-closer EU judicial space. However, they also confirm the dark side of the Schengen area, namely that the establishment of the borderless space runs in parallel to security-oriented countermeasures. As it has been observed on several occasions, the development of an area of freedom, security and justice has often relied on a prevailing security paradigm, especially with respect to the legal regime of migration and asylum[46]. Accordingly, enhanced and multi-faceted police cooperation may come at the price of diluting the guarantees for irregular TCNs, since each of the instruments in question contributes to one common outcome: boosting readmissions at the expense of less effective ordinary return procedures.[47] This is why careful compliance with the rules governing the interplay

[44] The project for an EU police cooperation code included three main proposals for legislative reforms: Communication from the Commission *Proposal for a Directive of the European Parliament and of the Council on information exchange between law enforcement authorities of Member States, repealing Council Framework Decision 2006/960/*JHA, of 8 December 2021, COM(2021) 782 final; Communication from the Commission *Proposal for a Regulation of the European Parliament and of the Council on automated data exchange for police cooperation ("Prüm II"), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the* Council, of 8 December 2021, COM(2021) 784 final; and Communication from the Commission *Proposal for a Council Recommendation on operational police cooperation*, of 8 December 2021, COM(2021) 780 final.

[45] See Directive (EU) 2023/977 of the European Parliament and of the Council of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA; Regulation (EU) 2024/982 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818 (the Prüm II Regulation); and Council Recommendation (EU) 2022/915 of 9 June 2022 on operational law enforcement cooperation.

[46] *Ex multis*, A. BALDACCINI. E. GUILD, H. TOBER (eds.), *Whose freedom, security and justice? EU immigration and asylum law and policy*, Oxford, 2007.

[47] M. WEISSENSTEINER, *Cross-Border Police Cooperation*, cit., p.80. Also, it has been contended that they contribute to the creation of an "invisible wall", in so far as these practices can de facto reach similar outcomes to border controls, even at the risk of conflicting with the very idea of disposing of borders within the Schengen area. See E. PISTOIA, *Verso la riforma del Codice Frontiere Schengen: le frontiere interne alla prova della nuova centralità delle riammissioni informali*, in *Diritto, immigrazione e cittadinanza*, 2022, n. 1, pp. 53-65.

between the Return Directive (as interpreted by the Court of Justice) and the varied set of sources establishing forms of cooperation on readmissions is a compelling concern.

This is even more the case with respect to the new transfer procedure established by Article 23a SBC. The final text of this provision elicits some further reflections.

First, Article 23a states that, once the migrant is in the receiving State, “all relevant provisions of Directive 2008/115/EC shall apply”. This formula was originally complemented by the proposed reform of Art. 6(3) of the Return Directive. This provision clarifies that “the Member State which has taken back the third-country national concerned shall apply paragraph 1”. In principle, it is meant to oblige the Member State in question to issue a return decision. However, Member States have generally interpreted this reference as encompassing also the derogations from Art. 6(1) listed in the subsequent paragraphs of the same Article, including therefore Art. 6(3). This approach has fuelled the practice of readmission chains, whereby the receiving States invoke a derogation from their duty to issue a return decision and apply informal readmission procedures based on agreements concluded with other Member States. In this context, the Commission’s original proposal included a more precise reference to the fact that the receiving State is under a duty to issue a return decision by virtue of Art. 6(1) of Directive 2008/115. This clarification was precisely intended to avoid interpretative deviations from the spirit of this provision and to prevent readmission chains. However, this part of the reform was not successful. It follows that, for our purposes, the vague reference to the Return Directive enshrined in Art. 23a SBC is insufficient to prevent the receiving Member State from transferring the migrant concerned to another Member State on the basis of an *inter se* agreement, with a risk of a series of subsequent readmissions.

Second, the Commission’s proposal made this provision dependent on the interception of a migrant in the framework of an EU-regulated operational police cooperation activity. On the contrary, the text adopted by the Parliament and the Council more broadly uses the formula “within the framework of bilateral cooperation”. It follows that the scope of Article 23a is in principle wider than originally designed, since the national authorities can extend it to cross-border police cooperation conducted outside the umbrella of EU law, for example in the context of the numerous *inter se* bilateral agreements establishing forms of border cooperation between law enforcement authorities as a flanking measure to readmission practices regulated by parallel readmission agreements. Accordingly, Art. 23a(6), provides that the new fast track does not affect existing bilateral agreements, including therefore those providing for cooperation on readmissions. However, since the use of this transfer procedure depends on the voluntary decision of the authorities involved, the possibility of a theoretical overlap between Art. 23a SBC and *inter se* agreements should not be ruled out[48]. In this case, it will be up to the national authorities concerned to agree on the applicable regime. This provision could have been even more impactful if another amendment had been approved. In fact, the Commission’s proposal included a reform of Art. 6 of the Return

[48] V. APATZIDOU, *Schengen reform: ‘Alternatives’ to border controls to curb ‘secondary movements’*, in *European Papers*, 2022, n. 2, p. 577.

Directive that was abandoned during the negotiation process between the Parliament and the Council. In particular, the Commission aimed at suppressing the suspension clause according to which the derogation to the duty to issue a return decision enshrined in Art. 6(3) applies only to existing bilateral readmission agreements. The underlying purpose was to support the start of a new season of *inter se* readmission agreements, with the Commission ready to propose common models for their main clauses[49]. This could be seen as a failed attempt to curtail the role of *inter se* agreements in readmission practices or at least to 'Eurpeanise' an area which is still by large a reserved domain of the Member States. In this context, admittedly, the final text of Art. 23a SBC provides leeway for keeping on relying on inter se cooperation instruments and seems unfit for a deep reconfiguration of the current state of affair. The national authorities have no specific incentives to the use of the new transfer procedure, whereas *inter se* readmission agreements remain a particularly appealing option, as a way of avoiding the full deployment of the EU constitutional framework of remedies. This is a crucial aspect in connection with the ADDE case law. The EU legislature pushes for less disruptive alternatives to the reintroduction of border controls and points at readmissions as a key option in this regard. It remains to be seen if, as the EU legislature apparently hopes, readmission rates will increase in the next future. In any event, this alternative marginalises the line of case law limiting the national authorities' powers at internal borders and raises the question of how to avoid violations of migrants' rights. The possibility for the Member States to continue to shield readmission practices from EU law by relying on existing readmission agreements exacerbates this criticism.

7. Conclusion

After various failed attempts and following heated negotiations, the much-awaited reform of the SBC has eventually entered into force. The reform has two souls. On the one hand, it puts the reintroduction of internal border control in line with existing practices of long (and prolonged) reinstatements. On the other hand, it tries to refresh the original idea of internal border control as a nuclear option within the Schengen area. To do so, the new text conditions deviations from the general rule enshrined in Art. 22 SBC to several preliminary steps, which the Member States are expected to comply with in a spirit of loyal cooperation with the neighbouring States and with the EU institutions. On the other hand, it promotes the use of less impactful alternatives, such as ordinary police activities in the territory of a Member State and nearby its borders and cross-border police cooperation aimed at fostering readmissions. In this regard, the SBC provides for a new transfer procedure, which the national authorities could consider using in the absence of inter se agreements or as an alternative to them.

The revised legislative framework needs to be read in the light of existing Luxembourg

[49] See the introductory report to the proposal for the reform of the SBC, p. 9.

case law. In particular, the line of cases inaugurated with *Affum* and culminated in *ADDE* teaches two main lessons. First, it will be a crucial reference point in the event of border control reinstatements. In so far as the SBC allows for longer reintroductions, the Court's clear stance on the need to preserve the guarantees provided by the Return Directive will continue to provide valuable interpretative guidance as to the legal regime of internal borders and the limits to the national authorities' coercive powers vis-à-vis migrants. On the other hand, this case law is an instructive precedent with respect to the new challenge ahead. The SBC reform is premised on the importance of cross-border cooperative law enforcement, either under the aegis of EU law, including the new transfer procedure regulated by Art. 23a SBC, or in the framework of bilateral *inter se* agreements. While at first sight less problematic than reintroductions of border control, these law enforcement activities are problematic in light of the interplay between the SBC and the Return Directive. In fact, they allow the national authorities to derogate from the obligation to issue a return decision and provide leeway for departing from more articulated guarantees against rejection at the border. In this context, *ADDE* could be a useful source of inspiration, since the Court made clear that deviations from the obligation to issue a return decision cannot be justified by the fact it could "render ineffective to a large extent any decision to refuse entry to a third-country national arriving at one of its internal borders"[50]. At the same time, admittedly, *ADDE* and its precedents stemmed from different legal premises, namely the use of the border control reintroduction clauses by the French Government. Still, this case law makes clear that the proper operation of the internal dimension of Schengen cannot come at the price of eluding appropriate standards of protection. This is a crucial challenge for the new phase of operation of the borderless Schengen area and will surely elicit further research in the light of the day-to-day practice of the revised rules of the SBC.

ABSTRACT: The interplay between formal return procedures under Directive 2008/115 and readmissions based on bilateral inter se treaties unveils the Member States' recurrent ambition of disposing of irregular migrants quickly and through minimum formalities. Over the last decade, with the line of cases originated with *Affum* and developed further by *Arib* and *ADDE*, the Court of Justice has maintained that the Member States cannot exercise their reserved powers on readmissions to reduce or circumvent the guarantees provided by Directive 2008/115. In this context, the recent reform of the Schengen Borders Code provides further food for thought, as it introduces a new voluntary transfer procedure aimed at replacing traditional readmissions and to place them under the umbrella of EU law. The proposed analysis addresses this normative development in the light of the case law of the Court of Justice. While discussing the continuing topicality of the Court's position, the article

[50] Court of Justice, *ADDE*, cit., para. 40.

briefly highlights the inherent potential of the revised Schengen Borders Code and the legal and operational knots ahead.

KEYWORDS: readmission – return procedure – bilateral agreements – Schengen Borders Code – transfer procedure.