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**CASE LAW COMMENTARY**

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Case C-143/22, *Association Avocats pour la défense des droits des étrangers (ADDE) and Others v Ministre de l'Intérieur*, Judgment of the Court (Fourth Chamber) of 21 September 2023, ECLI:EU:C:2023:689.

***Refusal of Entry or Return?***  
***The CJEU's Ambiguous Conclusions in ADDE and Others***

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***Keywords***

*Returns of Third-Country nationals illegally staying in the territory of the Union – Refusal of entry at the EU's external borders – Reintroduction of border control at internal borders – Secondary Movements – Returns Directive (Directive 2008/115/EC) – Schengen Borders Code (Regulation EU 2016/399)*

***Abstract***

*In ADDE and others, the Court of Justice of the European Union (CJEU) rules that the Returns Directive applies to third-country nationals (TCNs) who do not have a right to stay in a Member State's territory when that Member State reintroduces border control at an internal border and the TCNs come directly from another Member State. Applying the Returns Directive to such cases entails that an option for voluntary departure shall be made available and detention shall comply with the purpose and limits set by Article 15 Returns Directive.*

*However, the CJEU does not clarify the difference (if any) between decisions refusing entry and return decisions to be adopted towards TCNs who arrive, without satisfying the mandatory entry conditions, at an internal border where a Member State has temporarily reinstated border control by placing authorised crossing points within its territory.*

## CASE SUMMARY

### *1. Background of the case and the preliminary question referred to the CJEU*

[ADDE and Others](#) clarifies what EU rules apply to third-country nationals (TCNs) stopped in France while crossing the Italian-French border, where France has reintroduced border control since 2015. The CJEU concludes that France must apply the [Returns Directive](#) (RD) when checks are temporarily reintroduced and TCNs present themselves without fulfilling the entry conditions set out in the [Schengen Borders Code](#) (SBC) at a border crossing point located in the French territory. The obligation to apply the RD to these cases makes pushbacks and detention practices at the French-Italian border incompatible with EU law.

The preliminary question was submitted by the French Council of State (*Conseil d'État*). This had been requested by several associations assisting migrants<sup>1</sup> to adjudicate on the legality of an amendment introduced to the *French Code on Entry and Residences of Foreigners and the Right of Asylum* ([CESEDA](#)). This amendment extended the rules on entry refusal set by Article 14 SBC for the EU's external borders to TCNs who could not be granted entry at an internal border where control was temporarily reintroduced.<sup>2</sup> The appealing associations claimed that such practice was incompatible with EU law.

To adjudicate on this case, the *Conseil d'État* asked the CJEU to clarify whether the refusal of entry to TCNs who arrive, without a right to entry, to an internal border from another Member State is to be regulated by the SBC or by the RD. In its conclusions, the CJEU squares the circle by suggesting that the rules on refusal of entry set in the SBC shall apply together with the gradual system for EU returns established by the RD (see [ADDE and Others](#), § 47).

### *2. The EU legal context*

The question posed to the CJEU required it to clarify the interaction between the rules on entry refusal set in the SBC and RD's rules on returns of TCNs illegally staying in the EU (see [AG's Opinion on ADDE and Others](#), § 26). The SBC governs the crossing of the EU's external borders and establishes that TCNs can enter the EU only if they fulfil the entry conditions set in Article 6 (1) SBC or fall within one of the derogation categories listed exhaustively in Article 6 (5) SBC. In all other cases, Article 14 SBC prescribes that TCNs shall be denied entry.

Article 2 SBC distinguishes between the EU's external and internal borders. Concerning the

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<sup>1</sup> The Legal Associations and research centers that started the domestic proceeding include the following: Association Avocats pour la défense des droits des étrangers (ADDE), Association nationale d'assistance aux frontières pour les étrangers (ANAFE), Association de recherche, de communication et d'action pour l'accès aux traitements (ARCAT), Comité inter-mouvements auprès des évacués (Cimade), Fédération des associations de solidarité avec tous les immigrés (FASTI), Groupe d'information et de soutien des immigrés (GISTI), Ligue des droits de l'homme (LDH), Le paria, Syndicat des avocats de France (SAF), SOS – Hépatites Fédération.

<sup>2</sup> Throughout this commentary, the phrase «checks at internal borders» will be used as a shorthand for the situation examined by the CJEU in *ADDE and Others*. So, it will stand for «checks at an internal border where border control has been temporarily reinstated under Article 25 of the SBC».

latter, Article 22 SBC establishes that everyone, independently of nationality, may cross an internal border at any point without being subject to border checks. However, in exceptional situations, the SBC allows the temporary reintroduction of control at internal borders, for instance, when a Member State faces a serious threat to its public policy or security (Article 25 SBC). France's reintroduction of internal border control since 2015 has been based on these rules.

The SBC also includes a gap-filling provision: Article 32 SBC. This article establishes that the rules relating to external borders shall apply *mutatis mutandis* to situations where control at an internal border is reinstated. In [ADDE and Others](#) (see § 29), the CJEU was asked to clarify the meaning of Article 32 SBC and to specify what should be changed (if anything) when applying the rules on the entry refusal designed for external borders to internal ones.

Refusal of entry at the external borders is regulated by Article 14 SBC, which sets a strict obligation for Member States: border guards shall refuse entry to any TCN who arrives at the EU's external borders without satisfying the mandatory entry conditions. TCNs may appeal the entry refusal. However, based on Article 14 (3) SBC, the appeal cannot have a suspensive effect. The remedy is limited to compensation if their challenge succeeds. The strict obligation set by Article 14 SBC means that border control at the EU's external borders always presupposes a non-entry legal fiction. In other words, the authorisation of entry obtained at external borders, rather than crossing geographical borders, determines the precise moment when a TCN enters the Union's territory. TCNs are always considered as being outside the EU's territory before undergoing border control at the EU's external borders so that they can be prevented from entering if entry conditions are not met.

The amended *CESEDA* required that, when border control is restored, Article 14 SBC will apply to internal borders too (see [ADDE and Others](#) § 19, 25-27). As a consequence, TCNs arriving from Italy without meeting the conditions to enter France legally were to be considered as not yet present in French territory, independently from the fact that they found themselves at an authorised crossing point located in France. Thus, the forcible removal of these TCNs to Italy was framed under the amended *CESEDA* as a refusal of entry in the meaning of the SBC. The appealing associations contested this provision, arguing that the RD must apply to all TCNs illegally staying in the territory of a Member State, as required by Article 1 and Article 3 (2) RD, including those who have just arrived and have not (yet) undergone checks at an internal border.

### ***3. The answer provided by the CJEU***

The Court's conclusion in [ADDE and Others](#) (see § 47) remains ambiguous about the interaction between the SBC and the RD. The CJEU holds that, when control is reintroduced at internal borders, a Member State must comply *mutatis mutandis* with Article 14 SBC and refuse entry to TCNs who do not meet the entry requirements. At the same time, it holds that all rules on returns established by the RD must apply to TCNs illegally staying in the French territory.

Thus, the Court seems to consider that the application of SBC's rules on entry refusal and the application of the RD are not mutually exclusive. To reach this conclusion, the Court's legal reasoning unfolds in three steps.

Firstly, the Court clarifies under what circumstances TCNs may be considered illegally staying in a State that reinstates internal border control even before being checked at the border. This happens when a Member State reintroduces border control by setting up authorised crossing points within its territory. In these situations, TCNs who cross its geographical borders without meeting the entry conditions are already staying illegally on its territory before undergoing checks at the internal border crossing point. Therefore, the RD applies to them. The Court also clarifies how this rule applies when TCNs irregularly enter a Member State that reinstates border control by travelling on an international train from another Member State. In those cases, if the two bordering States do not agree on different rules, TCNs are considered to be staying irregularly (within the RD's scope) as soon as the train enters the first station in the territory of the State that reintroduces border control (see [ADDE and Others](#) § 32-33).

Secondly, the Court argues that the option, which Member States have under Article 2 (2) RD to derogate from the RD's harmonised return procedure and apply national rules to expel TCNs intercepted after an irregular crossing in the proximity of external borders, does not apply at internal borders where checks are reinstated ([ADDE and Others](#) § 33-41). In 2019, the Grand Chamber ruled that the derogation permitted under Article 2 (2) (a) must be interpreted restrictively ([Arib and Others](#) § 60-62, 67). In [ADDE and Others](#) (§ 34-37), the Court confirms these findings and clarifies that the RD must apply not only to TCNs intercepted in the proximity of an internal border but also to TCNs who arrive at an internal border's authorised crossing point (located within the State's territory) without meeting the entry conditions.

Thirdly, the CJEU holds that reintroducing checks at internal borders does not exempt a Member State from complying with the gradual system set by the RD ([ADDE and Others](#) § 42-45). This includes a window period for allowing returnees' voluntary departure as well as rules limiting returnees' detention. The Court acknowledges that it is likely that decisions to refuse entry taken at internal borders will remain ineffective since they cannot prevent actual irregular entry. But it also concludes that this expediency argument cannot be invoked by Member States to escape their obligation to comply with the RD ([ADDE and Others](#) § 40).

In conclusion, [ADDE and Others](#) upholds previous case law where the Court has insisted on a robust difference between the EU's external and internal borders. In addition, it makes more evident that such difference cannot be effaced by a Member State's decision to reintroduce checks at its internal borders.

## A. COMMENT

Two puzzling questions, however, remain after reading the last paragraph of [ADDE and Others](#). Why does the CJEU hold on to the application of SCB's rules on entry refusal despite

it acknowledges their ineffectiveness in cases where the TCNs are already within French territory? And why is the Court silent about the obligation to issue a return decision despite it holds that the RD applies?

The Court's conclusion, which establishes the concurring application of the SBC's rules on entry refusal and of the RD's gradual system to return TCNs irregularly staying in France, introduces the possibility of a Kafkaesque scenario. Namely, TCNs who arrive at an internal border's crossing point in France without a right to cross will find themselves in a contradictory legal position. On the one hand, they must be denied entry into that country under the SBC. On the other hand, they must be returned following the RD's procedure, which will allow them to stay in France to prepare for their voluntary departure.

This case commentary will focus on two elements of this contradictory finding. First, I will examine how the Court could establish that a TCN may be irregularly staying in a Member State's territory even before having undergone checks at an internal border. Secondly, I will discuss what is problematic about the Court's conclusion that a decision refusing entry, rather than a return decision, is to be adopted when the TCNs' entry into the State's territory has already irregularly occurred.

### **1. Since when is a TCN irregularly present?**

In [ADDE and Others](#) (§ 31-33), the CJEU rules that «a person may have entered the territory of a Member State even before crossing a border crossing point». The Court explains that this is the case when a Member State temporarily restores internal border control and places crossing points within its territory. In these cases, TCNs who arrive at the crossing point without meeting the entry conditions must be considered as illegally staying in that country before undergoing border checks.

So, for the CJEU, to determine whether TCNs are staying irregularly in a Member State, what counts is a factual element: the TCN's physical presence in the State's territory, independently of the length of the stay. To support this argument, the Court refers only to a single case: [Signing-on of seamen in the port of Rotterdam](#). The Court's choice to rely on this earlier case is not so obvious. Unlike *ADDE and Others*, [Signing-on of seamen in the port of Rotterdam](#) is not about determining the relevant moment when TCNs can be said to have irregularly entered a Member State's territory via an internal border. It is rather about the relevant moment when TCNs can be said to have effectively departed from the EU's territory by crossing an external border.

More specifically, in the [Signing-on of seamen in the port of Rotterdam](#) (§ 28), the CJEU was asked whether TCNs, who work as seamen in ships departing from the port of Rotterdam, should be considered as exiting the Schengen area when their ships leave the territory of the Union or, before their ships' departure, as soon as the seamen sign in on their assigned ships. The CJEU established that seamen cannot be considered as having left the EU's territory until they have physically crossed the EU's external borders. Even though seamen are subjected to exit

border checks and get an exit stamp when they report to sign in on their assigned ships, border checks and exit stamps are preparatory to their departure and do not prove whether and when the seamen leave the EU. ([Signing-on of seamen in the port of Rotterdam](#) § 53). In the seamen's case, the Court explains that its reasoning aims at avoiding the circumvention of the EU rules imposing limits to the length of TCNs' short stays (*Ibidem* § 56-64). In fact, if the exit control is conducted too far before the TCNs' actual departure from the EU's territory, the date reported in the exit stamp is inaccurate. This might result in covering up irregular overstays.

However, this reasoning about preventing irregular overstays is inappropriate to be applied analogically to *ADDE and others* because the irregular crossing of an internal border does not affect the counting of periods spent by TCNs within the Schengen area. By referring to [Signing-on of seamen in the port of Rotterdam](#), the CJEU implicitly suggests that a parallel can be established between its earlier interpretation of the SBC's rules on exit from the EU and the interpretation it was requested to provide in *ADDE and Others*. However, no effort is made in the ruling to account for this similarity between the two scenarios. So, the parallel remains difficult to grasp.

The Court concludes that, in cases where TCNs cross internal EU borders, the location of the authorised crossing points is a decisive criterion to establish whether a TCN is illegally staying in a country even before undergoing border checks. This conclusion introduces a notable distinction between entry checks conducted at external borders and those at an internal border. Regarding the former, a non-entry legal fiction generally applies to any TCN who does not meet the entry criteria. On the contrary, regarding the latter, if the entry checks are conducted at a crossing point located within the State's territory, no legal fiction applies to TCNs who do not satisfy the entry conditions. As a result, in these circumstances, the TCNs are considered illegally staying in the country conducting the checks ([ADDE and Others](#) § 32).

## **2. What about the obligation to issue a return decision?**

Still, the CJEU determines that, in such cases, a decision refusing entry (like the one required at the EU's external borders under Article 14 SCB) may be adopted concurrently with the application of the RD, which is triggered by the irregular stay of those TCNs who arrive at the crossing point without satisfying the entry conditions. However, we might ask whether, in such cases, the decision to refuse entry taken at an internal border is comparable to decisions to refuse entry at the EU's external borders under Article 14 SBC.

*Prima facie*, decisions taken at an internal border (when the authorised crossing point is within the State's territory) appear inadequate to prevent TCNs' territorial entry. Practically, these decisions can, in fact, only establish retroactively that an entry (which has already taken place) was irregular. Therefore, these decisions appear more similar in their content and effects to return decisions and to decisions that establish the illegal stay of a TCN in the territory of a Member State, as regulated by Article 6 RD. This issue, however, is not discussed in *ADDE and Others*, where the Court never mentions Article 6 RD in its reasoning.

The CJEU does not explicitly address whether a Member State must issue a return decision when it stops at an internal border crossing point located within its territory, a TCN who intends to cross irregularly. However, the obligation to issue a return decision can be logically inferred from the CJEU's conclusion that the RD applies. In *Affum* (§ 79), the CJEU ruled that issuing a return decision represents an inevitable first step when the RD applies. Under Article 6 (1) RD, Member States must issue a return decision to any TCN illegally staying in their territory, except for the exceptions listed from Article 6 (2) to Article 6 (5) RD. Accordingly, it can be argued that Member States are generally obliged under Article 6 RD to issue a return decision also when they stop an irregular staying TCN at an internal border where they temporarily restore checks. In such cases, the only exceptions to issue a return decision should be those listed exhaustively from Article 6(2) RD to Article 6(5) RD.

For instance, Article 6 (2) RD suggests that a Member State may be exempted from issuing a return decision to a TCN with a right (or an authorisation) to reside in another Member State.<sup>3</sup> When interpreting this exception in its earlier case law, the CJEU clarified that the RD does not apply to cover the forcible transfer of TCNs from the Member State where they are irregularly staying to another Member State where they can reside (*M and Others* § 45). In these cases, the CJEU also indicated that the RD's rules on detention do not apply. Therefore, the Member State where a TCN is irregularly staying may still resort to national laws permitting administrative detention to prepare and execute the TCN's transfer to the Member State where he/she can stay (*M and Others* § 46).

*M and Others* seems to suggest that the RD could not apply to TCNs stopped at an internal border who, while lacking the conditions to remain in the Member State conducting the checks, can stay in another Member State. In such cases, the TCNs could potentially be detained to arrange a forcible intra-EU transfer if permitted by domestic legislation.

By not addressing Article 6 RD in *ADDE and Others*, the Court fails to clarify how to apply (or derogate from) the obligation to issue a return decision specifying the country of return (*M and Others* § 46) to TCNs who arrive at an internal border's crossing point without a right to cross. This omission will generate an array of practical questions, such as: where shall TCNs go back to when they are refused entry at a border crossing point on French territory?

The CJEU's indication that SBC's rules on entry refusal must apply *mutatis mutandis* seems to suggest that the TCNs are expected to invert their route and return to Italy. On the other hand, the Court's conclusion that the RD must apply indicates that they should go back (voluntarily or forcibly) to a third country, based on the definition of return provided in Article 3 (3) RD. These reflections suggest that it may not be easy to reconcile in practice the two scenarios that the CJEU joins together in its conclusions, namely, refusing entry to TCNs at an internal border and starting procedures to remove them from the EU.

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<sup>3</sup> A return decision is to be issued also in those exceptional cases where there are reasons of public policy or national security that require the TCN's immediate departure. In such cases, see art 6 (1) and 6 (2) RD.

## B. CONCLUSIONS

In *ADDE and others*, the Court establishes that, when reintroducing checks at its internal borders, a Member State cannot escape its obligation to apply the RD to TCNs who arrive irregularly to its territory coming directly from another Member State. However, there is still a long way to go to clarify the difference (if any) between the obligation to adopt a decision refusing entry at an internal border and the obligation to issue a return decision.

The lack of clarity on this point has significant practical consequences. The CJEU had previously determined that a Member State shall not issue a return decision nor apply the RD if the TCN in question can legally reside in another Member State. The reasoning developed in *ADDE and Others* implicitly assumes that anyone who does not have a right to enter France also lacks the right to remain elsewhere in the EU. Regrettably, the ruling does not address how EU law applies to situations when the TCNs, who attempt to cross the French-Italian border irregularly, have a right to stay in Italy (or in another Member State). In such cases, one may wonder if France could retain the ability to act outside the framework of the RD and resort to national rules on administrative detention to prepare intra-EU forcible transfers (as ruled in *M and Others* § 46) or to verify the TCNs' identity (as ruled in *Achughbabian* § 31).

Besides the missing reference to Article 6 RD and to the obligation to issue a return decision, there is another notable omission in *ADDE and Others*. The judgment does not mention secondary movements, even though the case's background makes it evident that the question referred to the CJEU had been generated from the often-abused practice of reintroducing internal border control adopted by some Member States to contrast secondary movements. In a recent ruling, the CJEU openly condemned the prolonged reintroduction of checks at internal borders, beyond the strict limits set by the SBC, as contrary to EU law *NW v Landespolizeidirektion Steiermark* (§ 57-69).

In *ADDE and Others*, the Court abstains from incidentally assessing the legality of the border checks reintroduced since 2015 at the French-Italian border. Still, the Court's conclusions make clear that reintroducing border control does not render compatible with EU law the practice of informal rejections and forcible removals of TCNs who arrive at an internal border's crossing point without meeting the entry conditions.

An optimist reading of *ADDE and Others* reveals its positive effects in constraining Member States' use of coercive and informal practices used to stop TCNs caught while irregularly crossing internal borders. However, upon closer analysis, one must also consider that the Court relies on the applicability of the RD to invoke the protective scope of EU law and restrict the use of arbitrary detention and informal rejections at the EU's internal borders. Uncertainty remains, however, regarding the RD's ability to ensure proper protection for TCNs, especially for those who move from one Member State to another, as it does not address detention procedures or rules for determining the legality of their stay or forcible transfers within the EU.



## C. REFERENCES

### Relevant Case Law:

ECJ, [Opinion of Advocate General Athanasios Rantos](#) delivered on 30 March 2023, *ADDE and Others*, C-143/22. ECLI:EU:C:2023:271.

ECJ (Grand Chamber), Judgment 6 December 2011, [Achughbabian](#), C-329/11, ECLI:EU:C:2011:807.

ECJ (Grand Chamber), Judgment 7 June 2016, [Affum](#), C-47/15, ECLI:EU:C:2016:408.

ECJ(Grand Chamber), Judgment 19 March 2019, [Arib and Others](#), C-444/17, EU:C:2019:220.

ECJ, Judgment 24 February 2021, [M and Others](#), C-673/19, ECLI:EU:C:2021:127.

ECJ(Grand Chamber), Judgment 26 April 2022, in joined cases [NW v Landespolizeidirektion Steiermark](#), C-368/20 and C-369/20, ECLI:EU:C:2022:298.

ECJ, Judgment 5 February 2020, *Staatssecretaris van Justitie en Veiligheid v J. and Others* ([Signing-on of seamen in the port of Rotterdam](#)), C-341/18, ECLI:EU:C:2020:76.

### Literature:

A. BALDACCINI, *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive*, in *European Journal of Migration and Law*, n. 11 (1), 2009, pp. 1-17.

C. COSTELLO, *Immigration Detention*, in C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford (United Kingdom), Oxford University Press, 2016, pp. 279-314.

M. MORARU, *EU Return Directive: a cause for shame or an unexpectedly protective framework?*, in E. TSOURDI, P. DE BRUYCKER (a cura di), *Research Handbook on EU Migration and Asylum Law*, Cheltenham (United Kingdom) and Northampton (Massachusetts), Edward Elgar Publishing Limited, 2022, pp. 435-454.

S. PEERS, E. GUILD, D. ACOSTA ARCARAZO, K. GROENENDIJK, V. MORENO-LAX, *The Returns Directive*, in S. PEERS, E. GUILD, D. ACOSTA ARCARAZO, K. GROENENDIJK, V. MORENO-LAX (a cura di) *EU Immigration and Asylum Law: Text and Commentary (Second Revised Edition)*, Leiden (The Netherlands), Brill | Nijhoff, 2012, pp. 483-523.

S. PEERS, *Irregular Migration*, in S. PEERS, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law*, 4th ed, Oxford (United Kingdom), Oxford University Press, 2016, pp. 443-540.

D. THYM, *Border Controls*, in D. THYM, *European Migration Law*, Oxford (United Kingdom), Oxford University Press, 2023, pp. 301-336.

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