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The 2020 proposals for pre-entry screening and amended border procedures: a system of revolving doors to enter (and leave) Europe?

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Abstract

The new Pact on Migration is a consolidation of externalization policies. Actually, to some extent, it is a step forward, in the sense that it fosters externalization practices already in (and from) the European territory. Two measures are instrumental to this purpose: the pre-entry screening and the amended border procedures. The blogpost argues that their main effect is to downgrade the European territory to a lower density legal territory, by creating a system of revolving doors reinforcing European borders and limiting access to rights.

Externalization policies in 2020: where is the European territory?

In spite of a Commission's rhetoric stressing the novel elements of the Pact on Migration and Asylum (hereinafter: the Pact), there are good reasons to argue that the Pact develops and consolidates, among others, the existing trends on externalization policies of migration control.[1] Furthermore, it tries to create new avenues for a 'smarter' system of management of immigration, by additionally controlling access to the European territory of third country nationals (TCNs), and by creating different categories of migrants, which are then subject to different legal regimes which find application in the European territory.

The consolidation of existing trends concerns the externalization of migration management practices, resort to technologies in developing migration control systems (further development of Eurodac, completion of the path toward full interoperability between IT systems), and also the strengthening of the role of the European executive level, via increased joint management involving European agencies: these are all policies that find in the Pact a strengthening.

This brief will focus on externalization (practices), a concept which is finding a new declination in the Pact: indeed, the Pact and several of the measures proposed, read together, are aiming at 'disentangling' the territory of the EU, from a set of rights which are related with the presence of the migrant or of the asylum seeker on the territory of a state of the EU, and from the relation between territory and access to a jurisdiction, which is necessary to enforce rights which otherwise remain on paper.

Interestingly, this process of separation between territory, on one side, and a system of law which guarantees rights and access to a jurisdiction, functional to enforce those rights, takes place not outside, but within the EU: this is the new declination of externalization which one can find in the measures proposed in the Pact, namely with the proposal for a Screening Regulation and the amended proposal for a Procedure Regulation. It is no accident that other commentators have interpreted it as a consolidation of 'fortress Europe'. In other words, this externalization process takes place within the EU and aims at making the external borders more effective also for the TNCs who are already in the territory of the EU.

The proposal for a pre-entry screening regulation: strengthening the Europe of borders and confinement?

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[1] M. Cremona, J. Monar, S. Poli, *The External Dimension of the Area of Freedom, Security and Justice*, Bruxelles, 2011; E. Guild, S. Carrera, T. Balzacq, *The Changing Dynamics of Security in an Enlarged European Union*, CEPS Challenge Programme, Research Paper n° 12, 2008.

A first instrument which is having a pivotal role in the consolidation of the externalization trend is the proposed Regulation for a screening of third country nationals (hereinafter: Proposal Screening Regulation), which will be applicable to migrants crossing the external borders without authorization. The aim of the screening is to 'accelerate the process of determining the status of a person and what type of procedure should apply'.[2] More precisely, the screening 'should help ensure that the third country nationals concerned are referred to the appropriate procedures at the earliest stage possible' and also to avoid absconding after entrance in the territory in order to reach a different state than the one of arrival.[3] The screening should contribute as well to curb secondary movements, which is a policy target highly relevant for many northern and central European states.

In the new design, the screening procedure becomes the 'standard' for all TNCs who crossed the border in irregular manner, also for persons who are disembarked following a SAR operation, and for those who apply for international protection at the external border crossing points or in transit zones; with the screening Regulation, all these categories of persons shall not be allowed to enter the territory of the state during the screening.[4]

Consequently, different categories of migrants, including asylum seekers which are by definition vulnerable persons, are to be kept in locations situated at or in proximity to the external borders, for a time (up to 5 days, which can become 10 at maximum), defined in the Regulation, but which must be respected by national administrations. There is here an implicit equation between all these categories, and the common denominator of this operation is that all these persons have crossed the border in an unauthorized manner.

It is yet unclear how the situation of migrants during the screening is to be organized in practical terms, transit zones, hotspot or others, and if this can qualify as detention, in legal terms. The Court of Justice has ruled recently on Hungarian transit zones, by deciding that Röszke transit zone qualified as 'detention', and it can be argued that the parameters clarified in that decision could find application also to the case of migrants during the screening phase. If the situation of TCNs during the screening can be considered detention, which is then the legal basis? The Reception Conditions Directive or the Return Directive? If the national administrations will struggle to meet the tight deadlines provided for the screening system, these questions will become more urgent, next to the very practical issue of the actual accommodation for this procedure, which in general does not allow for access to the territory.

On the one side, Article 14(7) provides a guarantee, indicating that the screening should end also if the checks are not completed within the deadlines; on the other side, the remaining question is: to which procedure is the applicant sent and how is then the next phase determined? The relevant procedure following the screening here seems to be determined in

[2] EUROPEAN COMMISSION, The New Pact, COM (2020) 609, p. 4.
[3] Proposal Screening Regulation, COM (2020) 612 final, recital 8, p. 17.
[4] Proposal Screening Regulation, COM (2020) 612 final, Art. 3 and 4.

a very approximate way, and this begs the question on the extent to which rights can be protected in this context. Furthermore, the right to have access to a lawyer is not provided for in the screening phase. Given the relevance of this screening phase, also fundamental rights should be monitored, and the mechanism put in place at Article 7, leaves much to the discretion of the Member States, and the involvement of the Fundamental Rights Agency, with guidance and support upon request of the Member State, can be too little to ensure fundamental rights are not jeopardized by national administrations.

This screening phase, which has the purpose to make sure, among others, that states 'do their job' as to collecting information and consequently feeding the EU information systems, might therefore have important effects on the merits of the individual case, since border procedures are to be seen as fast-track, time is limited and procedural guarantees are also sacrificed in this context. In the case the screening ends with a refusal of entry, there is a substantive effect of the screening, which is conducted without legal assistance and without access to a legal remedy. And if this is not a decision in itself, but it ends up in a de-briefing form, this form might give substance to the next stage of the procedure, which, in the case of asylum, should be an individualized and accurate assessment of one's individual circumstances.

Overall, it should be stressed that the screening itself does not end up in a formal decision, it nevertheless represents an important phase since it defines what comes after, i.e., the type of procedure following the screening. It must be observed therefore, that the respect of some procedural rights is of paramount importance; the same applies for communication: it is important that communication in a language TCNs can understand is effective, since the screening might end in a de-briefing form, where one or more nationalities are indicated. Considering that one of the options is the refusal of entry (Art. 14(1) screening proposal; confirmed by the recital 40 of the Proposal Procedure Regulation, as amended in 2020), and the others are either access to asylum or expulsion, one should require that the screening provides for procedural guarantees.

Furthermore, the screening should point to any element which might be relevant to refer the TCNs into the accelerated examination procedure or the border procedure. In other words, the screening must indicate in the de-briefing form the options that protect asylum applicants less than others.[5] It does not operate in the other way: a TCN who has applied for asylum and comes from a country with a high recognition rate is not excluded from the screening.[6]

The legislation creates therefore avenues for disentangling, splitting the relation between physical presence of an asylum applicant on a territory implies a set of laws and fundamental rights associated to it, namely a protective legal order, access to rights and to a

[5] Proposal Screening Regulation, COM (2020) 612 final, Art. 14(3).

[6] See L. JAKULEVIČIENĖ, 'Re-decoration of existing practices? Proposed screening procedures at the EU external borders', blogpost, 27.10.2020.

jurisdiction enforcing those rights. It creates a sort of 'lighter' legal order, a lower density system, which facilitates the exit of the applicant from the territory of the EU, creating a shift from a Europe of rights to the Europe of borders, confinement and expulsions.

The proposal for new border procedures: a system of revolving doors to enter (and leave) the EU?

Another crucial piece in this process of establishing a stronger border fence and streamline procedures at the border, creating a 'seamless link between asylum and return', in the words of the Commission, is constituted by the reform of the border procedures, with an amendment of the 2016 proposal for the Regulation procedure (hereinafter: Amended Proposal Procedure Regulation).

Though border procedures are already present in the current Regulation of 2013, they are now developed into a "border procedure for asylum and return", and a more developed accelerated procedure, which, next to the normal asylum procedure, comes after the screening phase.

The new border procedure becomes obligatory (according to Art. 41(3) of the Amended Proposal Procedure Regulation) for applicants who arrive irregularly at the external border or after disembarkation and another of these grounds apply:

- they represent a risk to national security or public order;
- the applicant has provided false information or documents or by withholding relevant information or document;
- the applicant comes from a TC for which the share of positive decision in the total number of asylum decisions is below 20 percent.

This last criterion is especially problematic, since it transcends the criterion of the safe third country and it undermines the principle that every asylum application requires a complex and individualized assessment of the particular personal circumstances of the applicant, by introducing presumptive elements in a procedure which gives less guarantees.

During the border procedure, the TCN is not granted access to the EU. The expansion of the new border procedures poses also the problem of the organization of the facilities necessary for the new procedures, which must be a location at or close to the external borders: in other words, where migrants are apprehended or disembarked.

Tellingly enough, the Commission describes as guarantees in the asylum border procedure all the situations in which the border procedure shall not be applied,[7] for example, because

[7] Amended Proposal Procedure Regulation, COM (2020) 611, p. 14-15.

the necessary support cannot be provided or for medical reasons, or where the 'conditions for detention (…) cannot be met and the border procedure cannot be applied without detention'.[8]

Also here the question remains on how to qualify their stay during the procedure, because the Commission aims at limiting resort to detention. The situation could be considered de facto a detention, and its compatibility with the criteria laid down by the Court of Justice in the Hungarian transit zones case is questionable.

Another aspect which must be analyzed is the system of guarantees after the decision in a border procedure. If an application is rejected in an asylum border procedure, the "return procedure" applies immediately. Member States must limit to one instance the right to effective remedy against the decision, as posited in Article 53(9). The right to an effective remedy is therefore limited, according to Art. 53 of the Proposed Regulation, and the right to remain, a 'light' right to remain one could say, is also narrowly constructed, in the case of border procedures, to the first remedy against the negative decision (Art. 54(3) read together with Art. 54(4) and 54(5)). Furthermore, EU law allows Member States to limit the right to remain in case of subsequent applications and provides that there is no right to remain in the case of subsequent appeals (Art. 54(6) and (7)). More in general, this proposal extends the circumstances where the applicant does not have an automatic right to remain and this represents an aspect which affects significantly and in a factual manner the capacity to challenge a negative decision in a border procedure.

Overall, it can be argued that the asylum border procedure is a procedure where guarantees are limited, because the *access* to the jurisdiction is taking place in fast-track procedures, and access to legal remedies is also reduced to the very minimum. Access to the territory of the Member State is therefore deprived of its typical meaning, in the sense that it does not imply access to a system which is protecting rights with procedures which offer guarantees and are, therefore, also time-consuming. Here, efficiency should govern a process where the access to a jurisdiction is lighter, is 'less dense' than otherwise. To conclude, this externalization of migration control policies takes place 'inside' the European territory, and it aims at prolonging the effects of containment policies because they make access to the EU territory less meaningful, in legal terms: the presence of the person in the territory of the EU does not entail full access to the rights related to the presence on the territory.

Conclusions: a 'lower density' European territory?

This brief reflection has highlighted a trend which is taking shape in the Pact and in some of the measures proposed by the Commission in its 2020 package of reforms. It has been shown that the proposals for a pre-entry screening and the 2020 amended proposal for enhanced

[8] Amended Proposal Procedure Regulation, COM (2020) 611, p. 15.

border procedures are creating something we could label as a 'lower density' European territory, because the new procedures and arrangements have the purpose of restricting and limiting access to rights and to jurisdiction. This would happen on the territory of a Member State, but in a place at or close to the external borders, with a view to confining migration and third country nationals to an area where the territory of a state, and therefore, the European territory, is less … 'territorial' than it should be: legally speaking, it is a 'lower density' territory.

The "seamless link between asylum and return" the Commission aims to create with the new border procedures can be described as a system of revolving doors through which the third country national can enter or leave immediately the EU, depending on how the established fast-track system qualifies her situation.

However, as Cassarino has shown in his post on this blog (Cassarino 2020), readmission agreements or even arrangements might turn out not being the solution, since third countries have also their own self-interests and their domestic politics. The return sponsorship is certainly an effort in taking non-frontline Member States out of their privileged position, according to the Dublin criteria; however, it is not clear that the system will work, nor in the direction of effectively carrying out returns, nor in the direction of enforcing relocations. Considering that the relocation system designed with 2015 Decisions was not successful, one can really hope that this time relocations will put solidarity in practice (cf Marin 2020).

SUGGESTED READINGS

Doctrine :

J.-P. CASSARINO, 'Readmission, visa policy and the "return sponsorship" puzzle in the new Pact on migration and asylum', ADIM Blog, Analyses & Opinions, November 2020

L. MARIN, 'La Corte di Giustizia riporta le 'zone di transito' ungheresi dentro il perimetro del diritto (europeo) e dei diritti (fondamentali)', ADiM Blog, May 2020

D. THYM, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum', 28.9.2020

Other materials :

EUROPEAN COMMISSION, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity', Press Release, 23.9.2020;

EUROPEAN COMMISSION, Communication from the Commission to the European Parliament,

the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM (2020) 609 final, 23.9.2020;

EUROPEAN COMMISSION, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (hereinafter: Proposal Screening Regulation), COM (2020) 612 final, 23.9.2020.

EUROPEAN COMMISSION, Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereinafter: Amended Proposal Procedure Regulation), COM (2020) 611 final, 23.9.2020.

CJEU (Grand Chamber), Judgment of 14 May 2020, *F.M.S. et al. c.*, C-924/19 PPU & C-925/19 PPU, ECLI:EU:C:2020:367

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