

17. The EU Pact on Migration and Asylum and the Dangerous Multiplication of 'Anomalous Zones' For Migration Management

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17.1 Introduction

One of the most qualifying aspects of the new EU Pact on Migration and Asylum (European Commission, 2020a) published on 23 September 2020 are the proposals that the Commission has put forward to establish a 'robust and fair management of external borders', which find expression in the proposals for a Regulation on screening at the external borders (European Commission, 2020b) and in the amended proposal for an Asylum Procedure Regulation (European Commission, 2020c)

The Commission's stated aim is to build a system for the 'better management of mixed migration flows', establishing a 'seamless link between all stages of the migration process, from arrival to processing of requests for international protection until, where applicable, return' (European Commission, 2020b: 4). According to the envisaged plan, migrants will be registered and screened at the border to establish identity and health and security risks and then be referred to the appropriate procedure, be it asylum, refusal of entry or return. In particular, screening procedures will help relevant authorities to decide whether an asylum application should be assessed without authorising the applicant's entry into the Member State's territory in an 'asylum border procedure' or in a normal asylum procedure. Where an asylum border procedure is used and determines that the individual is not in need of protection, an accelerated 'return border procedure' should follow.

While it is specified (European Commission, 2020c: 4) that none of the proposals 'abridge the exercise of individual rights' and that asylum and return border procedures will be surrounded by 'adequate procedural safeguards' ensuring access to protection for those in need, the Commission's proposals risk institutionalising an asylum and return subsystem where migrants' rights will be protected by sub-standard legal and procedural guarantees. Overall, the focus seems to be placed more on the control of undesired migration and on the prevention of unauthorized secondary movements within the EU space, than on improving reception conditions and access to effective protection for incoming refugees.

In this contribution, I will assess the Commission's proposals on the new mechanism for the management of external borders in light of the experience and lessons learned from the implementation of the so-called 'hotspot approach' in Greece and Italy (European Union Fundamental Rights Agency, 2016).

17.2 Old wine in a new bottle?

The Commission's proposals are not an absolute novelty. They take up and systematize ideas that had already emerged in 2018 and which actually aimed at normalizing the hotspot approach (Campesi, 2020), transforming it into an ordinary tool for the management of incoming migration by sea. The proposal for a reinforced asylum border procedure was already included in the 2016 proposal for a new regulation of asylum procedures (European Commission, 2016), while the idea of an accelerated border return procedure had surfaced in the controversial 2018 non-paper on 'controlled centres' (European Commission, 2018a) and was then included in the proposal for a recast return directive published the same year (European Commission, 2018b). The Commission now brings together the rules on the asylum and return border procedures in a single legislative instrument, with the stated aim of closing the gap between the two stages of migration management and eliminating the risks of migrants' unauthorised movements within the EU space (European Commission, 2020a).

Unlike the hotspot approach, the new mechanism for the management of external borders is however envisaged as no longer circumscribed to cases of disproportionate migratory pressure and as limited to assisting frontline member countries in screening, debriefing and

fingerprinting incoming migrants by sea, but to effectively implement pre-entry screening and border procedures even outside 'crisis' situations. In particular, it would concern all third country nationals crossing external borders outside of the border crossing points, or disembarked after a search and rescue operation, and all third country nationals presenting themselves at border crossing points without fulfilling the entry conditions who apply there for international protection.

Another important novelty is that the new mechanism for the management of external borders will also apply to all third country nationals apprehended within the territory of Member States, where there are indications that they eluded border checks at the external border on entry. This means that they will be subjected to pre-border screening and the subsequent border procedures as if they had never physically entered EU territory.

One of the most worrying aspects is that the envisaged mechanism for the management of external borders relies heavily and explicitly on the protracted confinement of migrants and asylum seekers in border areas. In particular, the proposals put forward by the Commission seem to encourage member countries to multiply the sites of border enforcement, transforming EU borders into a space in which 'anomalous zones' will proliferate.

Gerald Neuman, who first used this concept in reference to the establishment of the refugee transit centre in Guantanamo, defines 'anomalous zones' as 'a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended' (Neuman, 1996: 1201). Over the years, the practice of strategically manipulating the geographical scope of jurisdiction by creating areas where migrants' access to rights and procedural safeguards were limited has been a hallmark of migration control policies implemented by main destination countries (Mountz, 2011). While the idea of establishing extraterritorial processing centres has been occasionally advanced (Noll, 2003), such an approach has never been officially pursued at the EU level.

The new EU Pact on Migration and Asylum does not represent an explicit move in that direction, since it does not envisage the establishment of processing centres in third countries; yet it often alludes to the extraterritoriality of the areas or facilities where screening and border

procedures will be carried out. In what follows I will outline the potential implications of these references to the extraterritoriality of the new mechanism for the management of external borders.

17.3 The spatiality of the new mechanism for the management of external borders

One point on which the Commission places great emphasis is that during the new screening procedure third-country nationals concerned should not be authorised to enter the territory of Member States (see Article 4(1) of the proposal in European Commission, 2020b). In particular, Member States are explicitly called upon to adopt measures to prevent the persons concerned from leaving the 'locations situated at or in proximity to the external borders' (see Article 6(1) of the proposal in European Commission, 2020b) where the relevant procedures are carried out.

Such measures may 'in individual cases' include detention, but the Commission seems to suggest that this should not be the rule, apparently leaving Member States free to determine the appropriate locations to carry out pre-entry screening procedures 'taking into account geography and existing infrastructures'. It is only suggested that the tasks related to the screening may be carried out in already established hotspot areas (see Recital 12 of the proposal in European Commission, 2020b). This reference to the hotspot approach is however particularly worrying here, as the experience of the past five years has clearly shown that hotspot areas were in fact managed as places of confinement, in which migrants' freedoms were drastically curtailed even in the absence of formally adopted detention measures (European Union Fundamental Rights Agency, 2016).

Commissioner Johansson has argued before the LIBE Committee of the European Parliament that with the new pre-entry screening procedures the Commission is not intending to promote detention¹, yet it is easy to imagine that in order to prevent migrants from escaping the new mechanism for the management of external borders, Member States will be tempted to adopt automatic and generalized detention measures, or at least strongly encouraged to carry out pre-entry screening and border

1 See record of the September 24th, 2020 session available at: https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20200924-0900-COMMITTEE-LIBE-B_vd

procedures in locations where, if not formally detained, migrants will actually be confined to islands or other geographically inaccessible areas.

Similarly, asylum seekers subject to border procedures shall not be authorized to enter Member States' territory and, according to the Commission's plans (European Commission, 2020c), must be accommodated in dedicated 'facilities' set up in proximity to the sections of the external border or border crossing points where Member States expect to receive most asylum applications falling within the scope of the border procedures. The Commission does not explicitly mention detention, but it is clear that the emphasis placed on the need to prevent entry will induce Member States to confine all asylum seekers subjected to border procedures in the same locations where pre-entry screening takes place. This was for instance the approach followed by Greece in the implementation of the hotspot approach, with every migrant reaching a Greek island from Turkey subjected to a geographical restriction and prevented from moving to the mainland pending the definition of his/her position according to the asylum border procedure enacted with Law 4375/2016 (Bousiou, 2020).

Finally, migrants subject to a border return procedure may be held in detention 'in order to prevent unauthorised entry and carry out return' for the duration of the procedure, which would last a maximum of 12 weeks. This should be added to the 12 weeks during which the migrant has been placed under the asylum border procedure, which means that the new mechanism for the management of external borders gives Member States the power to curtail migrants' personal freedoms for a total of six months. The proposal does not specify where migrants subject to border return procedures should be held in detention. Yet the Commission is arguably inspired by the Greek example, where migrants were prevented from reaching the mainland and repatriations under the EU-Turkey statement were carried out directly from hotspot areas (Illias et al., 2019).

Less clear is where screening procedures should take place in cases of third country nationals apprehended within the territory of Member States. Article 6(2) of the Commission's proposal on the screening of third country nationals at the external borders (European Commission, 2020b) simply says that in these cases 'the screening shall be conducted at any appropriate location within the territory of a Member State.' This means that Member States will have room to implement this provision

differently, possibly also using ordinary pre-removal detention facilities to that end. Yet the Italian case may be taken as an example of the implications that this provision can have – in particular when implemented by frontline member countries.

Following the enactment of Decree No. 17/2017, the Italian police have been vested with the power of returning irregular migrants intercepted on Italy's mainland to hotspot areas, thus giving a legal basis to the practice of forcibly dispersing migrants gathering near main border crossing points in an attempt to reach Switzerland, France or Austria (Tazzioli, 2018). In spite of the Commission suggesting that 'submitting the same third-country national to repeated screenings should be avoided to the utmost extent possible' (Recital n. 19 of the proposal in European Commission, 2020b), the idea of submitting third country nationals apprehended within the territory of Member States to pre-entry screening is likely to encourage dispersal practices. The legal fiction of EU borders will be literally haunting migrants within Member States' mainland areas by giving state authorities more room to curtail their personal freedoms and limiting access to ordinary asylum and return procedures.

17.4 The new legal geography of EU borders

The envisaged mechanism for the management of external borders is premised on the idea that 'abusive' asylum requests should be dealt with quickly by keeping migrants at the border and returning them as soon as possible. This idea is highly questionable because border procedures always increase the risk of arbitrariness and discrimination (ECRE, 2019), but it is also deeply flawed as it rests on the assumption that member countries will be able to quickly and effectively enforce returns. According to the Commission's plans, when it is 'from the outset' clear that readmission of rejected asylum seekers would be impossible, Member States 'may decide' not to apply border procedures (European Commission, 2020c). Yet, given that the main objective of the proposed mechanism for the management of external borders is to prevent unauthorized entry, it is likely that the effect produced will be that of immobilizing asylum seekers in proximity of border areas, increasing as a consequence the pressure on the reception infrastructures of frontline member countries.

Similar logic was already at work in the implementation of the hotspot approach. While the Commission never went so far as to classify hotspot areas as extraterritorial sites, the result of the hotspot approach was to encourage frontline countries to confine migrants to border areas, in many cases on islands or in otherwise remote and poorly accessible locations, such as transit zones. In the wake of the current pandemic, Italy has even experimented with the practice of confining incoming migrants into ‘quarantine ships’ (ANSA, 2020), which may be seen as a first experiment with the idea that was advanced in 2016 of establishing floating offshore processing facilities (Nielsen, 2016).

The EU pact seems to go a step further in the legal manipulation of EU border geography, describing the ‘locations’ where the new mechanism for the management of external borders will be implemented as outside EU territory. The legal implications of this attempt at de-territorializing EU borders are obviously highly questionable, given it is doubtful that Member States may escape their obligations on human rights and refugee protection by simply reframing territory as non-territory (Gammeltoft-Hansen, 2014). On the contrary, as it has been suggested (Carrera and Stefan, 2020), the rule of law follows the state wherever it exercises jurisdiction over individuals.

The Commission seems to want to mitigate the fundamental rights challenges raised by the proposed new mechanism for the management of external borders by envisaging the establishment of a monitoring mechanism for pre-entry screening procedures (see Article 7 of the proposal in European Commission, 2020b). However, besides the structural limits already highlighted by Stefan and Cortinovis in their contribution to this book (Chapter 16), one has to ask whether the envisaged monitoring mechanism will be able to effectively address the risk of human rights violations deriving from an approach which is premised on the idea of confining asylum seekers at the border.

As the experience of the implementation of the hotspot approach has demonstrated, Member States have managed hotspot areas as spaces of border enforcement where access to rights was mediated by distance creation. The relative remoteness of hotspot areas has greatly limited asylum seekers’ access to information and support, keeping them in isolation from local communities and resources that are more readily available in the mainland. While, as suggested, it is doubtful that

the insistence on the extraterritoriality of the new envisaged pre-entry screening and border procedures may legitimize any local suspension of the rule of law, the risk is that this may further encourage the multiplication of remote places of confinement where asylum seekers' access to rights will be mediated only by state representatives.

The effective protection of human rights in the framework of the new mechanism for the management of external borders will depend on the degree of independence that the envisaged monitoring bodies will be able to maintain with respect to national governments. It will also rely on the prerogatives with which they will be vested. Experience with the implementation of the hotspot approach suggests that multiplying the anomalous zones of border enforcement where asylum seekers – in addition to being subjected to less guaranteed border procedures, will also be kept isolated from civil society and advocacy groups – greatly increases the risks that their access to rights is limited or their protection needs not properly considered.

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