

8. NORMALISING 'THE HOTSPOT APPROACH?'

AN ANALYSIS OF THE COMMISSION'S MOST RECENT PROPOSALS

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In the 2015 European Agenda on Migration, the 'hotspot approach' was referred to as one of the main immediate actions to support Greece and Italy to 'swiftly identify, register and fingerprint incoming migrants' (European Commission 2015). According to the description provided by Commission's documents, the hotspot approach is ultimately a measure of operational support activated in order to help frontline member countries facing disproportionate migratory pressure in providing to the registration, identification, fingerprinting and debriefing of asylum seekers, as well as return operations. To that end personnel of the European Asylum Support Office (EASO), EU Border Agency (Frontex) EU Police Cooperation Agency (Europol) and EU Judicial Cooperation Agency (Eurojust) are deployed on the ground and work with the authorities of member countries concerned to help to fulfil their obligations under EU law.

The approach has been object of intense criticism, especially for the alleged violations of human rights of migrants and asylum

seekers perpetrated inside so-called hotspot facilities (Amnesty International 2016; European Council for Refugees and Exiles 2017; EU Fundamental Rights Agency 2019). Reports have in particular highlighted horrific reception conditions at disembarkation points, excessive use of force in collecting fingerprints, lack of effective access to asylum procedures and independent monitoring. A report commissioned by the EU Parliament has highlighted, in particular, the risk that pressure to swiftly processing incoming migrants may lead to unlawful returns to unsafe places without proper consideration of individual claims (Neville et al. 2016: 30).

The hotspot approach has also been criticized for its weak legal basis. Many commentators (Casolari 2016; Thym 2016; Neville et al 2016) have emphasized the absence of a specific legal framework regulating the implementation of the approach and the extreme uncertainty regarding the role of different actors involved, especially as regards EU agencies in relation to national authorities. Criticisms have also emphasized the inconsistency between the mandate and competence of EU agencies and their *de facto* roles on the ground (Hoori 2018; Saranti, Papachristopoulou and Vakouli 2018).

The intense scholarly debate generated by the implementation of the hotspot approach has also revealed the existence of some confusion about its exact nature, and this should be considered as another consequence of its weak legal basis. So much so, that some have even described hotspots as chimeric entities (Benvenuti 2018), and others have underlined the multiple dimensions that characterize the approach (Pascucci and Patchett 2018). Hotspots can indeed be regarded either as a procedure, a mechanism called to make migrants' processing after disembarkation more effective and producing a swift division between those eligible for protection and those who must be returned back; or as specific geographical sites, spaces of confinement and detention created near main disembarkation points in order to prevent potential secondary movements of asylum seekers.

This duplicity is clearly reflected in Commission's policy papers and in the very few legal provisions enacted on the hotspots approach into EU law, where the emphasis is apparently placed more on the procedures to be carried out in those places identified as hotspots and less on their spatial configuration. The fact that the first legal provisions on the hotspot approach have been included in the regulation on the European Border and Coast Guard (EBCG) is for instance indicative of a tendency to frame the approach mainly in procedural terms. The regulation establishes the 'Migration Management Support Teams' (MMST) and defines the activities that are to be carried out in 'hotspot areas' but gives very few hints on how the places where the approach is to be implemented are to be organized and managed, just defining hotspot areas as 'an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterized by a significant increase in the number of migrants arriving at the external borders'¹.

In spite of being framed essentially in procedural terms, the hotspot approach also entails a specific re-configuration of space. The use of a term such as 'hotspot' is not neutral in geopolitical terms, quite the contrary it is indicative of a specific spatial thinking (Neocleous and Kastrinou 2016). A hotspot it is always a zone, a space of disorder where a focused intervention is needed. Clearly Hotspot procedures must not be carried out anywhere, but at EU's border sections facing 'disproportionate migratory pressure', but they also entailed a specific physical re-articulation of the border infrastructure, in particular at main disembarkation points. Commission's policy papers (European Commission 2015) suggested providing hotspot areas with 'reception facilities', and made explicit reference to the rules covering the 'reception' of asylum-seekers kept at the border under accelerated and border procedures according to Articles 31(8) and 43 of the Directive 2013/32/EU, and to the rules laid down by Article 18 of the Direc-

1 Article 2(10), Regulation No. 2016/1624.

tive 2008/115/EU for situations in which member countries find themselves having to manage the repatriation of a great number of irregular migrants. In both cases, reference was made to rules allowing for derogation to the ordinary standards on the detention of asylum-seekers and irregular migrants, permitting an easing of procedural guarantees and a significant lowering of the standards relating to reception and detention conditions.

While there was a clear indication that Commission's preferred solution was to create closed and secured facilities in order to prevent secondary movements, thus envisaging a situation protracted confinement at the borders of asylum seekers, the reference made to two directives left member countries concerned with some room for discretion in the implementation of the approach. And indeed, the approach has been implemented differently by Greece and Italy, which have essentially embedded it in the existing national system for first reception.

Whereas in Greece, in particular after the controversial EU-Turkey Statement of March 2016, the implementation of the hotspot approach has entailed a de-facto detention of migrants and asylum seekers in the 5 facilities (Lesvos, Samos, Chios, Leros and Kos) identified as hotspot facilities (European Council for Refugees and Exiles 2017; Papotousi et al. 2018), in Italy migrants remained an average of 5 days in 2017 and 3,5 days in 2018 in the 5 hotspot facilities (Lampedusa, Trapani, Ragusa Pozzallo, Taranto and Messina), under a regime that has been not clearly defined by law, but decided by the police at the local level depending on the circumstances (Garante Nazionale 2017). As a matter of fact, Italy has not conceived hotspots as places of mass detention but has instead used them as a more flexible tool for controlling asylum seekers' mobility (Tazzioli 2017).

The Commission had the opportunity to clarify the legal framework regulating the implementation of the hotspot approach, in particular as regards reception conditions in so-called 'hotspot areas', when published its proposals on the recast of the reception directive (European Commission 2016a) and on the new regula-

tion on asylum procedures (European Commission 2016b). However, while the hotspot approach is never explicitly mentioned, Commission's proposals greatly expand the possibility of keeping asylum seekers in detention near main disembarkation points. In the case of the so-called 'border procedures', the proposed regulation on asylum establishes that the asylum seeker is 'kept in border or transit zones' up to 4 weeks², albeit without specifying under what kind of 'reception' regime. However, it is likely that in Commission's design the facilities installed near main disembarkation points should be detention centres, given that in the proposal on the recast reception directive border procedures are listed among the grounds legitimizing asylum detention³. Moreover, in introducing the proposal on the new regulation on asylum procedures the Commission stated explicitly that border procedures 'normally imply the use of detention throughout the procedure' (European Commission 2016b), thus confirming the impression that hotspot areas must be set up and managed essentially as sites of border confinement for asylum seekers.

According to the proposed regulation, border procedures may also be applied at locations in proximity to border areas⁴, in particular when a disproportionate number of applicants lodge their applications at the border or in a transit zone. This in fact would permit a spatial introversion of borders which is functional to deal with the logistic complications that are likely to arise when thousands of asylum seekers must be kept in a situation of protracted confinement. The scenario of mass detention at the border is therefore explicitly envisaged by the Commission, and hardly the provision included in the Recital No. 42 of the proposed regulation will be a brake on member countries' temptation to abuse of special procedures in order to forcibly keep at the border all migrants arriving by sea⁵.

2 Article 41(3) in European Commission 2016b.

3 Article 8(3)(d), in European Commission 2016a.

4 Recital No. 40 and Article 41(4) in European Commission 2016b.

5 The Recital No. 42 says that 'As long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an auto-

The reference to the need of custodial measures is even more explicit in the policy papers and proposals published by the Commission starting from 2018, where the overall objectives of the hotspot approach are also apparently redefined. Whereas in 2015 the approach was presented as a tool for helping the authorities of member countries facing a disproportionate inflow of migrants in fulfilling their obligations under EU law, in 2018 Commission's main preoccupation is to offer a solution for the diplomatic row over search and rescue and disembarkation. This is evident, for example, in the controversial 2018 non-paper on 'controlled centers' (European Commission 2018a), where the Commission, while not explicitly mentioning the hotspot approach, in many respects takes stock of past experience of operational support in so-called hotspot areas to propose a revised version of the approach.

The aim of the measures envisaged by the Commission in response of the European Council conclusion of 28-29 June 2018 was to improve the process of distinguishing between individuals in need of international protection, and irregular migrants with no right to remain in the EU, while speeding up returns. As with the hotspot approach, this would be realized by mobilizing staff from EU agencies in support of member countries with the aim of speeding up the processing of asylum claims, in particular by 'applying rapid procedures available under EU law followed by a quick return procedure in case of negative decisions' (European Commission 2018a). Interestingly, the areas where operational support should be provided were now more explicitly redefined as sites of confinement, and the added value of controlled centres was clearly seen in their capacity of preventing asylum seekers' secondary movements (European Commission 2018a). Needless to say, the legal footing for the establishment of controlled centres was seen in the rules on the detention of asylum seekers processed according to the so-called border procedures.

matic recourse to an accelerated examination procedure or a border procedure' (Recital No. 42 in European Commission 2016b)

The non-paper on controlled centers, however, contained another important innovation that the Commission would have further developed in a more articulated manner. In this document first emerged the idea of the 'border return procedure' that the Commission officially advanced with the publication of the proposal on the recast return directive (European Commission 2018b). The proposed rapid return procedure provides specific, simplified rules applicable to asylum seekers whose application was rejected following a border procedure. As a rule, they will not be granted a period for voluntary return and will have a shorter time-limit to lodge an appeal. In addition, the Commission proposes to ensure the continued detention of failed asylum seekers who were already kept in detention as a part of asylum border procedures⁶.

The assumption is that failed asylum seekers will remain in detention for a further 4 months in the same facilities located near main disembarkation points. Although there is not much clarity on the issue, these should be the very same facilities that were defined as 'controlled centers' by the non-paper of July 2018, which must function, at the same time, as hotspot areas for the implementation of the hotspot procedures envisaged by the EBCG regulation, as detention facilities where asylum seekers subject to border procedures are kept in custody and, lastly, as pre-removal facilities for failed asylum seekers being deported under the new border return procedure.

The multifunctional nature of 'controlled centers' was finally made explicit with the proposal on the new regulation on the EBCG (European Commission 2018c), in which these facilities were defined as centres 'established at the request of the Member State, where relevant Union agencies in support of the host Member State and with participating Member States, distinguish between third-country nationals in need of international protection and those who are not in need of such protection, as well as carry out security checks and where they apply rapid procedures

6 Article 22(7), in European Commission 2018b.

for international protection and/or return⁷.

Interestingly, Commission's proposal apparently maintained a distinction between 'controlled centers' and 'hotspot areas'⁸, providing that MMSTs shall perform their functions in both places⁹, with the only exception that functions performed in 'hotspot areas' should be exclusively related with the 'provid(ing) (of) assistance in screening, debriefing, identification and fingerprinting' in cases of 'existing or potential disproportionate migratory challenge'.

Beyond the confusion created by the multiplication of the sites of migration enforcement, I believe that Commission's policy design is to 'normalize' the hotspot approach. This is why the deployment of MMSTs has been envisaged as no longer circumscribed to cases of disproportionate migratory pressure and limited to assist member countries in screening, debriefing and fingerprinting, but also extended to offer support in the implementation of the rapid asylum and return procedures even outside 'crisis' situations. This in the framework of an approach which relies heavily and explicitly on the protracted detention of migrants and asylum seekers in border areas.

While every reference to controlled centers has been finally removed from the new regulation on the EBCG approved in November 2019¹⁰, the overall policy design is that of encouraging frontline member countries to manage disembarkation procedures by confining migrants at the border, while attributing to EU agencies an ever-greater role in the management of the accelerated procedures relating to identification, asylum processing and return. It is no coincidence that over the last two years, during which the talk on the need to set up 'controlled centers' at the border has been persistent, both Greece and Italy have finally developed plans to strengthen their regulatory framework on asylum detention (Ferri and Massimi 2018; Mouzourakis and Refugee Support Agean 2019).

7 Article 2(24) in European Commission 2018c.

8 See Article 2(23), in European Commission 2018c.

9 Articles 2(19), 10(1)(12),37(2)(d), and 41 in European Commission 2018c.

10 Regulation No. 2019/1896.

In conclusion, many of the concerns that scholars and activists have been raising over the implementation of the hotspot approach are still extremely relevant. The Hotspot approach is indeed increasingly institutionalized as an asylum and return sub-system where migrants' rights will be protected by sub-standard legal and procedural guarantees, which will be operated, with the increasing involvement of EU agencies, in remote areas where civil society and independent oversight is extremely difficult. Moreover, beside accessing a sub-standard procedure, asylum seekers will be systematically detained.

While clearly in breach of human rights standards, requiring individualized assessment on the necessity and proportionality of every deprivation of liberty, systematic mass detention at the border may be considered as entailing a de-facto criminalization of asylum seekers and, as a consequence, to be contrary to the Refugee Convention prohibiting States to penalize refugees for their irregular entry or status, and to the 1999 Tampere Programme's reaffirmation of the absolute respect of the right to seek asylum, now enshrined in Article 18 of the EU Charter of Fundamental Rights. Finally, one has to wonder what the price of coercion is. Detaining migrants and asylum seekers for months after their arrival, besides being legally questionable, risks to stimulate practices of resistance and disorders within detention facilities, especially given the well-documented poor detention conditions. Encouraging frontline member countries to resort to mass detention at the border will put border police and other security forces under a strong pressure that will greatly increase the risk of an excessive and uncontrolled use of force inside detention facilities.

In light of this, the attempt made by the Commission at normalizing an approach which was originally conceived as an exceptional response to a 'disproportionate migratory pressure', and has been already explicitly denounced as creating 'fundamental rights challenges that appear almost unsurmountable' (EU Agency for Fundamental Rights 2019: 7), it is in many ways extremely questionable.

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