

The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?

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Abstract

Can a part of the territory of the European Union be turned into a “non-territory” where the fundamental rights of the migrants and asylum seekers to appeal and to remain in their destination country while their applications are examined, and the right for an individual assessment in line with international standards, are as it were contracted, owing to the very attributes of this “non-territory”?

This article argues that the Pact on Migration and Asylum, in particular with the pre-entry screening and the new border procedures, subtly develops and consolidates policies and rules aimed at “deterritorializing” the territory of the EU while reinforcing its practices of externalization. Moreover, this unprecedented deterritorialization-externalization combination, in order to produce tangible policy results, presupposes the cooperation of third countries on expulsion and readmission, as well as more solidarity among the Member States. Having critically examined these two dimensions, the authors conclude that the new measures contained in the Pact might be conducive to the enhanced precarization of the legal positions of migrants and asylum seekers and to potential tensions with strategic third countries.

Keywords

pact on migration and asylum – externalization – pre-entry screening – border procedures – return sponsorships

1 Introduction: What Is Happening on the European Territory?

If borders clearly demarcate the territory where states can exercise their own jurisdiction and adopt public policies, what if, within that same territory, laws and procedural safeguards are not implemented uniformly? In other words, can a “part” of this territory be turned into a “non-territory” where asylum seekers’ fundamental rights to appeal and to remain in their destination country while their applications are examined, and the right for an individual assessment in line with international standards, are as it were contracted, owing to the very attributes of this “non-territory”?

Admittedly, these introductory questions may sound puzzling. However, recent legal and policy developments, at the EU level, have made them more relevant than ever. The Pact on Migration and Asylum of September 2020 (hereinafter: the Pact)¹ is a case in point. In the substantial package of measures, the European Commission proposes, among others, the introduction of pre-entry screening and new border procedures aimed at accelerating status determination of foreign nationals arriving in Europe, by linking screening with asylum and return procedures. Such accelerated border procedures also beg the question of how the readmission of foreign nationals to non-EU countries will be implemented if, at the pre-screening stage, their application for asylum is rejected. The internal and external dimensions are closely interrelated.

This article argues that the Pact, among other things, develops and consolidates existing policy trends on migration and border management, such as the hotspot approach;² in particular, it gives a new meaning to externalisation.³ Actually, externalization of migration management practices, the use of technologies to develop migration control systems (including further development of Eurodac, the completion of the path toward full interoperability between IT systems),⁴ and also the strengthening of the role of the European executive

1 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; and European Commission, ‘A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity’, Press Release, 23.9.2020.

2 For the launch of the hotspot approach, see European Commission, Communication: A European Agenda on Migration, COM (2015) 240 final, 13.5.2015. See also European Parliamentary Research Service, Hotspots at EU External Borders: state of play, Briefing, September 2020.

3 In similar terms, see Thym, D. 2020. European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the ‘New’ Pact on Migration and Asylum, *eumigrationlawblog*.

4 Brom F. and Besters, M. 2010. ‘Greedy’ Information Technology: The Digitalization of the European Migration Policy, *European Journal of Migration and Law*, pp. 455–470; for a more

level⁵ via increased joint management involving European agencies are all reflective of the consolidation of existing trends.

Furthermore, the Pact tries to create new avenues for a ‘smarter’ system of management of immigration, by additionally charging the borders with the function of controlling access to the European territory of third country nationals (TCNs):⁶ the borders of the EU are now meant to filter and sort out, to ‘produce’ different categories of migrants, and to subject them to different legal regimes which find application on the European territory. This is the consolidation of the ‘hotspot approach’, a policy tested since 2015–2016, also with the administrative support of the AFSJ agencies, with EASO, Frontex and Europol playing a pivotal role.⁷

This article will focus on the implications these measures have for the very meaning of territory within the EU’s Area of Freedom, Security and Justice. It will first focus on the EU as an area, a legal space, of freedom, security and justice, which has celebrated 20 years since the foundational momentum of Tampere. This area works as a space of inclusion and exclusion and the external borders have gained relevance and meaning through the evolution of the AFSJ.

It will then focus on externalization (practices),⁸ a concept which is finding a new meaning in the Pact: the core argument this article advances is that the

recent account of the interoperability policy of the E, see the special issue of European Public Law, issue 1–2020, edited by F. Brito Bastos and D. Curtin, on ‘Interoperable Information Sharing and the Five Novel Frontiers of EU Governance: A Special Issue’. European Public Law 26, no. 1 (2020): 59–70. See also Brouwer, E. 2020. Large-Scale Databases and Interoperability in Migration and Border Policies: The Non-Discriminatory Approach of Data Protection, European Public Law 26, no. 1, pp. 71–92.

- 5 Tsourdi, E. 2020. The New Pact and EU Agencies: an ambivalent approach towards administrative integration, eumigrationlawblog; Fernandez Rojo, D. (2021). EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL, Edward Elgar; and E. Tsourdi, ‘Beyond the “Migration Crisis”: The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies’ in Pollak, J. and Slominski, P. (2021). The Role of EU Agencies in the Eurozone and Migration Crisis. Palgrave, City, Country.
- 6 Ryan, B. (2019). The Migration Crisis and the European Union Border Regime, in: EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law. Cremona, M. and Scott, J. (Eds.) OUP, London, England, pp. 197 ff.
- 7 See Thym, D. 2020. European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the ‘New’ Pact on Migration and Asylum. eumigrationlawblog; Tsourdi, E. ‘Beyond the “Migration Crisis”: The Evolving Role of EU Agencies.
- 8 On this, see Lavenex, S. 2006. Shifting up and out: the foreign policy of European immigration control. West European Politics 329–50; Lavenex, S. 2008. The external governance of EU internal security. 31 Journal of European Integration, pp. 83–102; Lavenex, S. 2016. Multileveling EU external governance: the role of international organizations in the diffusion of EU migration policies. Journal of Ethnic and Migration Studies, pp. 554–70; Guild, E.,

Pact and several of the measures proposed, read together, are aiming at “detritorializing” the territory of the EU from (a) the system of laws and 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 (b) the relation between territory and access to a jurisdiction, which is essential to enforcing rights. This will be demonstrated by the analysis of the two core measures proposed in the Pact.

Indeed, the very idea of territory is related to that of legal order constituted upon it, and one of the function of a legal order is to draw a *jus excludendi* and a *jus includendi* in relation of the legal space created.⁹ At the same time, access to a (state) territory also means access to the legal order of that given state, but also to the European one: in both legal orders, institutions are given the function of enforcing laws and rights emanating from them.¹⁰ The internal market, freedom of movement and enjoyment of rights are central constitutional claims of the EU, and one of its very core features has been precisely to ‘emancipate’ individuals from states, since the EU has granted them new rights that persons could invoke against states.¹¹

We argue that this process of separation of ‘territory’ from ‘legal order’ – meaning the binomial law/rights and, furthermore, the access to a jurisdiction – does not take place outside the EU, but *within* the EU. This separation is made possible by the enhanced function performed by borders: this is the new meaning of externalization one can find in the proposal for a Screening Regulation¹² and in the amended proposal for a Procedure Regulation.¹³ In other words, this process of internalization of externalization takes place within the EU

Carrera, S. and Balzacq, T. *The Changing Dynamics of Security in an Enlarged European Union*, CEPS Challenge Programme, Research Paper no. 12, 2008. See also Ryan, B. and Mitsilegas, V. (Eds.). (2010). *Extraterritorial Immigration Control: Legal Challenges*. Martinus Nijhoff Publishers, Leiden, the Netherlands; Maes, M., Foblets, M.-C. and De Bruycker, P. (Eds.) 2011. *External Dimension of European Migration and Asylum Law and Policy/Dimensions externes du droit et de la politique d’immigration et d’asile de l’UE*. Bruylant, Bruxelles, Belgium.

- 9 Lindahl, H. 2005. *Jus Includendi et Excludendi: Europe and the Borders of Freedom, Security and Justice*. The King’s College Law Journal, pp. 234 ff.
- 10 Moreno Lax, V. *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*. 2017. OUP, Oxford, England.
- 11 Cortese, B. 2018 *L’ordinamento dell’Unione europea, tra autocostruzione, collaborazione e autonomia*. Giappichelli, Turin, Italy.
- 12 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. 612 final. 2020.
- 13 European Commission, Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the

and aims at making the external borders more effective for migrants too and – possibly – protection seekers who are already present in the territory of the EU.¹⁴ It is no accident that other commentators have interpreted the Pact as a consolidation of ‘fortress Europe’.¹⁵ At the same time, this combined deterritorialization-externalization process, in order to produce tangible policy results, presupposes the cooperation of Third States on expulsion and readmission, and also between Member States, in the framework of “return sponsorships” that as shown later, may result in a form of relocation. On the one hand, the external dimension is invariably complex, since it is contingent on the cooperation of third states having their own ‘migration agendas’, vested interests and contingencies. On the other hand, the rationale for return sponsorships is premised on the principle of solidarity (Art. 80 TFEU). However, attempts to promote solidarity among the EU Member States in the field of relocation have been disappointing.¹⁶ Pending achievement of these major dimensions, the new forms of externalization policies and enhanced border controls the Pact aims to create within the European territory are certainly contributing to a ‘precarization of the law’ and to potential tensions with third countries, which should be considered with care.

2 Territory and Borders, and Their Meaning for the EU as an Area of Freedom, Security and Justice

The evolution of European integration, which started with the Treaty of Maastricht, has succeeded in reframing the European Union as an Area of Freedom, Security and Justice, as posited in Art. 3 of the TEU. In addition to the internal market, the EU has the aim to offer its citizens an area, i.e., a legal

Union and repealing Directive 2013/32/EU (hereinafter: Amended Proposal Procedure Regulation), COM 611 final, 2020.

14 See Zaiotti, R. and Abdulhamid, N. Offshoring in the Pandemic Age: Europe and the Reconfiguration of Externalized Border Controls. 2020. Paper presented at the conference: “The Borders as Places of Control: Fixing, Shifting and Reinventing State Borders,” Berlin, November 19–20, 2020, on file with the author.

15 Spinelli, F. 2020. Fortress Europe raises the drawbridge, VoxEurope.

16 Marin, L. 2019. Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation. 2019. *Freedom, Security & Justice: European Legal Studies*, 2019, no. 1, pp. 55–74; Savino, M. 2020. On Failed Relocation and Would-be Leviathans: Towards the New Pact on Migration and Asylum, ADiMBlog. See also. Marin, L. and Pistoia, E. 2021. Captured between subsidiarity and solidarity: any European added value for the Pact on Migration and Asylum?. *Freedom, Security & Justice: European Legal Studies*, pp. 167–193.

space, built upon some of its core values: freedom, security and justice.¹⁷ This evolution indicates that this project became concerned with individuals, and more specifically with citizens: indeed, by defining a legal space as a legal and political space of freedom, security and justice, that very space is separated and differentiated from the outer legal space, and, therefore, from the individuals who belong to that outer legal space.¹⁸

Furthermore, alongside the European perspective, which puts the Area of Freedom, Security and Justice in dialogue and interaction with the economic rationale for European integration, this shift is also relevant in its relations with the Member States and their legal orders. The resulting picture is that the EU has become a crucial actor in a triangular – even rectangular – relation concerning the EU itself, its Member States and individuals, individuals being meant here to indicate more than persons *qua* economic actors, but rather persons as European citizens and also as third country nationals.¹⁹

However, these new dimensions of integration have had important consequences for the very nature of the EU: first, this suggests the evolution of the EU as a transformation from a (economic) regulatory polity to one (co-)exercising core state powers, such as those concerning borders, migration, administration of justice and citizenship;²⁰ secondly, and in the perspective of the Member States, this new set of (shared) competences is sensitive because it touches upon core state powers: in modern times, indeed, state sovereignty has been linked with the power to grant foreigners access to a territory and to a legal and political community, and, conversely, to exclude other individuals

17 Walker, N. 2004. *Europe's Area of Freedom, Security and Justice*, OUP, Oxford, England. See also Fichera, M. 2016. *Sketches of a Theory of Europe as an Area of Freedom, Security and Justice*, in: Fletcher, M., Herlin-Karnell, E. and Matera C. (Eds.), *The European Union as an Area of Freedom, Security and Justice*. Routledge, Abingdon-on-Thames, England, pp. 34 ff. who stresses the complex equilibria and paradoxes underlying the interaction between market and security.

18 In positing the constitutional foundations of this evolution, the treaties define how the EU relates with the wider world, in its external relations, at Art. 3 section 5 TEU: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

19 Needless to say, since its very origins, the EU was able to establish relations with individuals going beyond the veil of state sovereignty, since *van Gend en Loos*.

20 Genschel, P. and Jachtenfuchs, M. (eds.). (2014). *Beyond the regulatory polity*. OUP: Oxford, England.

from this benefit.²¹ Controlling borders also means controlling the transformation of the society of a given state, and also access to the welfare system of that state, which still proves to be politically sensitive within the EU.²²

The function of borders and immigration control is precisely instrumental to the exercise of this right to include and exclude persons, and, at EU level, has been substantially affected by the removal of internal border controls, achieved with the creation of the Schengen area. In this perspective, this spill over effect of the internal market has pushed, first, toward a limited integration in the management of external borders,²³ which progressively evolved into the notion of European integrated border management.²⁴ This is a highly dynamic domain, as the pace of reforms concerning the border dedicated agency suggests: the difficulties in building a Common European Asylum System, which means giving shape and substance to the humanitarian dimension of migration control, alongside the complexities underlying cooperation with third states, translate into a political consensus over the strengthening of the 'effective management' of its external borders. In this context, it should however be pointed out that states have agreed upon limitation to their sovereignty but they still are crucial actors in the administration of the procedures and of the machinery related to the administration of migration control powers and in the enforcement of border controls, also considering the progressive development of a European administrative layer with EU agencies.²⁵ The 'refugee crisis' has given impetus to experimenting new policies sketching European integrated border management, with 'hotspots' in Greece and Italy being a case in point: in particular hotspots have 'the merit' of testing the administrative support and coordination exercised by the EU agencies; on the other side, they allow the EU a form of presence and control in border areas most hit by migration.

21 See Lindahl, H. *Jus Includendi et Excludendi: Europe and the Borders, and from the same author: Finding a place for freedom, security and justice: the European Union's claim to territorial unity*. 2004. *European Law Review*, 29(4), pp. 461–484.

22 For more, see Marin, L. *Governing Asylum with (or without) Solidarity?*; Lavenex, S. "Failing Forward" *Towards Which Europe? Organized Hypocrisy in the Common European Asylum System?*. 2018. *Journal of Common Market Studies*, pp. 1195–1212.

23 Pastore, F. (2004). *Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System*, in: *Europe's Area of Freedom, Security and Justice*. N. Walker (ed.). pp. 89–142. OUP, Oxford, England.

24 On this notion, see Art. 3 of the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, in JO L 295 du 14.11.2019, pp. 1–131.

25 Craig, P. 2014. *EU Administrative Law*, OUP, Oxford, England; Curtin, D. 2014. *Executive Power of the European Union*. OUP, Oxford, England.

Therefore, the European AFSJ interacts with and encroaches upon the way states exercise their sovereignty.²⁶ The territories of the Member States do constitute, altogether, the European legal space, with state agencies still being the core actors in the administration and enforcement of the AFSJ as a legal space, where the borders of the Member States are the gateways of this European legal space. The very nature of the European legal space is to be a space defined as a legal order built upon institutions set up to enforce law and guarantee rights. This correlation between law and rights postulates access to justice administration in order to enforce the law and to protect rights, at the same time. These are the constitutive elements of a *thick* legal order.

The legal framework, as amended by the Treaty of Lisbon, has contributed to a process of '*small c* constitutionalization' of the EU as an AFSJ,²⁷ in particular because the Charter of Fundamental Rights has been given legally binding status. This has consolidated the meaning of the AFSJ as a legal space, implying that the access to the territory of the EU is 'loaded' with legal protection, also for third country nationals.²⁸ The reflexive meaning of the nature of the EU as an AFSJ applies also to migrants, and in particular to asylum-seekers, who fall under the jurisdiction of domestic courts while applying EU law.²⁹ The legal order is also such regarding when and how it defines itself in the relations it develops with those individuals who have not accessed that territory in a regular manner, and perhaps have no right to stay in that inner space: however, this entire process should develop itself in a way that respects both domestic provisions, including constitutional ones, but also European and international ones.

The domestic and the international levels do not fall within the scope of this article. By contrast, it should be recalled that the EU has enacted legislation which guarantees some (EU provided) rights of the migrants, who find themselves being subjected to the power of the EU Member States in the context of migration and asylum laws: these are the Procedures Directive, the Reception Conditions Directive and the Return Directive, just to mention the

26 Genschel, P. and Jachtenfuchs, M. (Eds.). Beyond the regulatory polity. In a legal and comparative constitutional perspective, see Penasa, S. and Romeo, G. 2020. Sovereignty-based Arguments and the European Asylum System: Searching for a European Constitutional Moment?, *European Journal of Migration Law*, pp. 11–38.

27 See Walker, N. 2006. Big 'C' or Small 'c'. *European Law Journal*, 201, pp. 12–14.

28 Moreno Lax, V. develops this argument beyond the European borders. Cf. Moreno Lax, V. 2017. *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, OUP, Oxford, England.

29 See Art. 51 of the Charter of FR and the interpretation given by the Court of Justice, in particular in the judgment: CJEU, 26 february 2013, Åklagaren c. Hans Åkerberg Fransson, case C-617/10.

most relevant for our argument.³⁰ At the same time, the Court of Justice has reminded states that their discretion in implementing directives must remain within the boundaries of the respect of some EU standards on core fundamental rights.³¹ By limiting their discretion, and by affirming that fundamental rights act as boundaries, the Court of Justice is contributing to the 'small c constitutionalization' of the AFSJ.

This constitutionalization function has been fulfilled by the Court of Justice in its work of interpretation; recently, this process has crossed the path of the Hungarian rule of law saga,³² which concerns domestic legislation adopted by the openly anti-EU Orbán government in the aftermath of the so-called refugee crisis of 2015–2016. In this cluster of judgments, the Court has stated some important principles that place clear limits and boundaries to domestic legislation and its implementation by administrations. It is argued here that all these boundaries should also guide the European legislator and, consequently, the measures proposed in the Pact.

In particular, the Court of Justice has reinforced the guarantees against the use of migrants' detention, offering a better protection than the European Court of Human Rights in qualifying a migrant's deprivation of liberty as detention, as the *F.M.S.* case has shown. In this hypothesis, the domestic legal order must provide an effective remedy to challenge the detention, which is possible only if the requirements and conditions posited in the Reception

30 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, JO L 180 du 29.6.2013, pp. 60–95; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), JO L 180 du 29.6.2013, pp. 96–116; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, JO L 348 du 24.12.2008, pp. 98–107.

31 Moraru, M., Cornelisse, G. and De Bruycker, P. (Eds.). 2021. Law and judicial dialogue on the return of irregular migrants from the European Union. Hart, Oxford, England; Favilli, C. 2019. Armonizzazione delle legislazioni nazionali e standard di tutela dei diritti fondamentali: il caso del diritto a una tutela giurisdizionale effettiva in materia di asilo, in: Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci. Laterza, Bari, Italia, pp. 688 ff.

32 CJEU, judgment of 29 July 2019, C-556/17, Torubarov, EU:C:2019:626; CJEU, judgment of 19 March 2020, C-564/18, LH, EU:C:2020:218; CJEU, judgment of 19 March 2020, C-406/18, PG, EU:C:2020:216; CJUE, judgment of 14 May 2020, FMS et al., joined cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367; see also CJEU, judgment of 2 April 2020, joint cases C-715/17, C-718/17 and C-719/17, Commission/Hungary, Poland and Czech Republic, ECLI:EU:C:2020:257; CJUE, judgment of 17 December 2020, Commission/Hungary, C-808/18, EU:C:2020:1029.

Conditions or in the Return Directives are met, and must be in compliance with Art. 47 of the Charter: the Court states that, if the national legal order does not provide for such a remedy, the national judge must declare himself or herself competent in assessing a legal challenge. Though the national judge has been disempowered by the national legislator, as in Hungary, yet the Court of Justice has re-empowered it.³³

Other guarantees require that the migrant must have access to an asylum procedure, at the border or within the territory; procedural guarantees must be respected, including appeal against a negative decision, before a court which must have full cognition of the case, and not be bound by deadlines that are too strict (8 days, in the specific case).³⁴ The removal of TCNs is certainly possible, but with prior respect of the procedures and guarantees of the Return Directive, and, last but not least, resort to the public order clause ex. Art. 72 of TFEU finds its external limits in EU law, and it is already considered in the Directives Procedures and Reception. In other words, territory means access to a legal space where institutions, European and domestic, enforce the law and protect rights.

After having explored the relation between territory and legal orders, including access to a system of enforcement of law and rights, the next section will examine the pre-entry screening, as proposed by the Commission.

3 The Proposal for a Pre-entry Screening Regulation: A Step toward the De-legalisation of the Area of Freedom, Security and Justice?

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.³⁵ The aim of the screening is to 'accelerate the process of determining the status of a

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

34 CJEU, judgment of 19 March 2020, C-564/18, LH, EU:C:2020:218.

35 Also with the screening, we observe the codification of screening and debriefing activities that are already existing practice developed with the current rules, for example the Schengen Borders Code. In the same vein, the Frontex Regulation N. 2896/2019, indicates screening and debriefing among the tasks of the management support teams to be deployed in hotspot areas (Art. 40), and of the rapid border interventions at the external areas (Art. 37).

person and what type of procedure should apply'.³⁶ 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.³⁷ The screening should contribute as well to curbing 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 have crossed the border in irregular manner, also for persons who are disembarked following an 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 process.³⁸

Consequently, different categories of migrants, including asylum seekers who 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 the maximum), defined in the Regulation, but which must be enforced and respected by national administrations. Here there is 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, instead of their specific circumstances.

It is yet unclear how the situation of migrants during the screening procedure is to be qualified in legal terms, detention or not, and how it is to be organized in practical terms, transit zones, hotspot or others. In its ruling on Hungarian transit zones,³⁹ the Court of Justice has decided that staying/being held in the Röske transit zone qualified as 'detention': it can be argued that the parameters clarified in that decision could also be applied to the case of migrants during the screening phase. If the situation of TCNs during the screening process can be considered detention, its legal basis should be clearly indicated in EU law, for example in the Reception Conditions Directive or in the Return Directive, depending on the case at hand. In other words, it is here recommended that the qualification of this situation should not be left to national laws, precisely as seems to be the case now, with the proposal of the Commission.

36 European Commission. 2020. The New Pact, COM 609, p. 4.

37 Proposal Screening Regulation, COM (2020) 612 final, recital 8, p. 17.

38 Proposal Screening Regulation, COM (2020) 612 final, Art. 3 and 4.

39 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; Marin, L. La Corte di Giustizia riporta le 'zone di transito' ungheresi dentro il perimetro del diritto (europeo) e dei diritti (fondamentali).

If we look at the matter in the perspective of implementation, it must be observed that enforcement of the screening system is delegated to national administrations, also in organizational terms: this makes it more urgent to answer these questions, as well as solving the very practical issue of the actual accommodation for this procedure, which in general does not allow for access to the territory. The fear is that the new measures stressing the function of borders as preventing migration will create new detention centres or 'camps', new hotspots or Moria; this does not represent a novelty of the Pact, but a dangerous consolidation of a highly problematic *status quo*.⁴⁰

Considering the protective dimension of law, the proposal for a screening Regulation is insufficient in terms of legal guarantees to be applied during the procedure: on the one side, Article 14(7) provides a guarantee, indicating that screening should end even if the checks are not completed within the deadlines; on the other side, this termination leaves the question open as to which procedure is the applicant sent and what the next phase to be determined is. To this purpose, it must be observed that the applicable procedure following screening seems to be determined in a very approximate way, and this begs the question of the (limited) 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.⁴¹

It is therefore obvious that 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: if a person is channeled to border procedures, it is known that time is limited and procedural guarantees are sacrificed in this context. If screening ends with a refusal of entry, there is a substantive effect of screening, which is conducted without legal assistance and without access to a legal remedy. Though the de-briefing form is not a decision in itself, it is self-evident that this form might give substance to the next stage of the procedure, which, in the case of asylum seekers, should be an individualized and accurate assessment of one's individual circumstances.

40 In this perspective, see Papoutsis, A. Painter, J., Papada E. and Vradis, A. 2019. The EC hotspot approach in Greece: creating liminal EU territory, in: *Journal of Ethnic and Migration Studies*, pp. 2200–2212. See also EuroMed Rights, *How the EU Migration Pact disadvantages both Italy and asylum seekers*, Briefing, November 2020.

41 Given the importance of this screening phase, fundamental rights should also 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 MS can be too little to ensure fundamental rights are not jeopardized by national administrations.

Overall, though screening itself does not end in a formal decision, it nevertheless represents an important phase since it defines what comes after, i.e., the type of procedure following screening. Therefore, the respect of some procedural rights is of paramount importance.⁴² Considering that one of the options is the refusal of entry (Art. 14(1) screening proposal; confirmed by 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 screening provides for procedural guarantees, and for the possibility to challenge the de-briefing form, in compliance with Article 47 of the Charter of Fundamental Rights.⁴³

Furthermore, screening should point to any element which it might be important to refer the TCNs in the accelerated examination procedure or the border procedure. In other words, screening must indicate in the de-briefing form the options that protect asylum applicants less than others.⁴⁴ 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 screening.⁴⁵

The proposed legislation therefore creates 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, and access to rights and to a 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 sort of shift from a Europe of rights to a Europe of borders, confinement and expulsions.

4 The Proposal for New Border Procedures: An Attempt to Create a Lower Density Legal Territory?

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

42 At the same time, 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.

43 In similar terms, see Meijers Committee Comments on the Migration Pact – Asylum Screening Regulation, November 2020, hereinafter: CM 2010, pp. 6–7.

44 Proposal Screening Regulation, COM (2020) 612 final, Art. 14(3).

45 Jakulevičienė, L. 2020. Re-decoration of existing practices? Proposed screening procedures at the EU external borders, blogpost, 27.10.2020.

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 an option states can use 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 comes after the screening phase, alongside the normal asylum procedure. With border procedures too, with the Pact we are observing a process of consolidation of the *status quo*: recently frontline states have been pushed by EU institutions and other MS toward introducing them in their domestic systems and applying them more rigorously.⁴⁶ 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 withheld 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.

The first criterion could be interpreted differently by national administrations, and this represents a risk for the unity of EU law; it could be exploited abusively to disapply binding decisions, as done by Poland and Hungary with relocation decisions;⁴⁷ last but not least, it is not self-evident why the state of first entry should bear the burden of irregular migrants that represent a risk for public security, also to the benefit of the other states. The second criterion presupposes that the migrant or asylum seeker has a full understanding of her/his actions and their legal implications, and this might often not be the case. However, the 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 fewer guarantees.

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

⁴⁶ ECRE, Border procedures: Not a Panacea, Policy Note 21/2019.

⁴⁷ CJEU, judgment of 2 April 2020, joint cases C-715/17, C-718/17 and C-719/17, Commission / Hungary, Poland and Czech Republic, ECLI:EU:C:2020:257, paragraphs 134 ff.

Tellingly enough, the Commission describes as guarantees in the asylum border procedure all the situations in which the border procedure shall not be applied,⁴⁸ for example, because 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.”⁴⁹

Here too there remains the question of how to qualify people’s 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. In particular, the reasoned and motivated decision is missing as well as the possibility to activate a judicial remedy against it.

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 is here argued that the asylum border procedure is a procedure where guarantees are limited, because *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 protecting rights with procedures which offer guarantees and therefore also time-consuming. Here, efficiency should govern a process where access to a jurisdiction is lighter, less ‘*thick*’ than otherwise.

This contributes to the process of externalization of migration control policies taking place ‘inside’ the European territory, and it aims at prolonging the effects of containment policies, because they make access to the EU territory

48 Amended Proposal Procedure Regulation, COM (2020) 611, pp. 14–15.

49 Amended Proposal Procedure Regulation, COM (2020) 611, p. 15.

less meaningful, in legal terms: the presence of a person in the territory of the EU does not entail full access to the rights related to presence on the territory.⁵⁰ Importantly, these unprecedented developments do not substitute the reinforced externalization of migration control. Rather, “internalization” of externalized migration control (premised on pre-entry screening and asylum border procedures) invariably remains contingent on third countries’ cooperation, namely on the extent to which they will cooperate on the readmission of irregular migrants and rejected asylum-seekers. Both dimensions are inseparable in the New Pact. A whole set of measures and provisions have been devised to address third countries’ cooperation. These measures are critically examined in the next section.

5 Cooperation with Third Countries: Lessons Learned and Unlearned

Among other things, Chapter 6 of the New Pact on Migration and Asylum proposes to create a conditionality between cooperation on readmission with third countries and issuance of visas to their nationals. This conditionality was legally established in the 2019 revision of the Visa Code Regulation together with a series of provisions. The text of the 2019 revision of the Visa Code states that, given their “politically sensitive nature and their horizontal implications for the Member States and the Union”,⁵¹ such provisions will be triggered once implementing powers are conferred to the Council (following a proposal from the Commission).

What do these measures entail? We know that they can be applied in bulk or separately. Firstly, EU consulates in third countries will not have the usual leeway to waive some documents required to apply for visas (Art. 14(6) Regulation (EC) No 810/2009). Secondly, visa applicants from uncooperative third countries will pay higher visa fees (Art. 16(1) Regulation (EC) No 810/2009). Thirdly, visa fees for diplomatic and service passports will not be waived (Art. 16(5)b Regulation (EC) No 810/2009). Fourthly, the time to take a decision on the visa application will be longer than 15 days (Art. 23(1) Regulation (EC) No 810/2009). Fifthly, the issuance of multi-entry visas (MEVs) from 6 months to 5 years is suspended (Art. 24(2) Regulation (EC) No 810/2009 and Art. 24(2)c Regulation

50 In similar terms, see Papoutsis, A., Painter, J., Papada E. and Vradis, A. 2019. The EC hotspot approach in Greece: creating liminal EU territory, pp. 2200–2212.

51 OJEU, Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), L 188/27.

EU 2019/1155). In other words, these coercive measures are not aimed at suspending visas. They are designed to make the procedure for obtaining a visa lengthier, costlier, and more limited in terms of access to MEVs.

Moreover, it is important to stress that the revision of the Visa Code Regulation mentions that the Union will strike a balance between “migration and security concerns, economic considerations and general external relations.” Consequently, measures (be they restrictive or not) will result from an assessment that goes well beyond the remit of migration management. The assessment will not be based exclusively on the so-called “return rate” that has been presented as a compass used to reward or punish third countries’ cooperation on readmission. Other indicators or criteria, based on data provided by the Member States, will be equally examined by the Commission.⁵² These other indicators pertain to “the overall relations” between the Union and its Member States, on the one hand, and a given third country, on the other. This broad category is not defined in the 2019 revision of the Visa Code, nor do we know what it precisely refers to.

What do we know about this linkage? The idea of linking cooperation on readmission with visa policy is not new. It was first introduced at a bilateral level by some member states. For example, sixteen years ago, cooperation on redocumentation, including swift delivery of laissez-passers by the consular authorities of countries of origin, was at the centre of bilateral talks between France and North African countries. In September 2005, the French Ministry of the Interior proposed to “sanction uncooperative countries [especially Morocco, Tunisia and Algeria] by limiting the number of short-term visas that France delivers to their nationals.”⁵³ Sanctions turned out to be unsuccessful not only because of the diplomatic tensions they generated – they were met with strong criticisms and reaction on the part of North African countries – but also because the ratio between the number of laissez-passers requested by the French authorities and the number of laissez-passers delivered by North African countries’ authorities remained unchanged.

At the EU level, the idea to link readmission with visa policy has been in the pipeline for many years. Let us remember that, in October 2002, in its Community Return Policy, the European Commission reflected on the positive incentives that could be used in order to ensure third countries’ constant cooperation on readmission. The Commission observed in the abovementioned communication that, actually, “there is little that can be offered in return. In

⁵² Op. cit., L 188/37.

⁵³ Excerpt from the discourse of former Minister of the Interior, Nicolas Sarkozy, addressed to French regional governors, dated Friday 9th September 2005.

particular, visa concessions or the lifting of visa requirements can be a realistic option in exceptional cases only; in most cases it is not.”⁵⁴ Therefore, the Commission set out to propose additional incentives (e.g. trade concessions, technical/financial assistance, additional development aid).

In a similar vein, in September 2015, after years of negotiations and failed attempts to cooperate on readmission with southern countries, the Commission remarked that the possibility to use Visa Facilitation Agreements as an incentive to cooperate on readmission is limited in the South “as the EU is unlikely to offer visa facilitation to certain third countries which generate many irregular migrants and thus pose a migratory risk. And even when the EU does offer the parallel negotiation of a visa facilitation agreement, this may not be sufficient if the facilitations offered are not sufficiently attractive.”⁵⁵

More recently, in March 2018, in its Impact Assessment accompanying the proposal for an amendment of the Common Visa Code, the Commission itself recognised that “better cooperation on readmission with reluctant third countries cannot be obtained through visa policy measures alone.”⁵⁶ It also added that “there is no hard evidence on how visa leverage can translate into better cooperation of third countries on readmission.”⁵⁷

Against this backdrop, why has so much emphasis been put on the link between cooperation on readmission and visa policy in the revised Visa Code Regulation and later in the New Pact? The Commission itself recognised that this conditionality might not constitute a sufficient incentive to ensure the cooperation on readmission.

To reply to this question, we need first to reflect the oft-cited reference to third countries’ “reluctance”⁵⁸ to cooperate on readmission in order to understand that, cooperation on readmission is inextricably based on unbalanced

54 European Commission. 2002. On a Community Return Policy on Illegal Residents, COM (2002) 564 final, p. 24.

55 European Commission. 2015. EU Action Plan on Return, COM (2015) 453 final, p. 14.

56 European Commission 2018. Commission Staff working document, Impact Assessment accompanying the proposal for a regulation amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), SWD (2018) 77 final, p. 26.

57 Ibid. p. 31.

58 For a critical approach to the use and abuse of the notion of “reluctance” when explaining non-Western countries’ low degree of cooperation or compliance with bilateral commitments, see A. Acharya. 2004. How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism., International Organization, 58(2), pp. 239–275; Cassarino, J.-P. 2018. Beyond the Criminalisation of Migration: A Non-Western Perspective. International Journal of Migration and Border Studies, 4(4), pp. 397–411; Cebeci, M. 2018. Deconstructing “Ideal Power Europe”: The EU and the Arab Change, Lexington Books, London, England.

reciprocities leading to win-lose outcomes. Moreover, migration, be it regular or irregular, continues to be viewed as a safety valve to relieve pressure on domestic unemployment and poverty in countries of origin. Readmission has asymmetric costs and benefits having economic, social and political implications for countries of origin. Apart from being unpopular in southern non-EU countries, readmission is humiliating, stigmatizing, violent and traumatic for migrants,⁵⁹ making their process of reintegration extremely difficult, if not impossible, especially when the countries of origin have often no interest in promoting reintegration programmes addressed to their nationals expelled from Europe.

Importantly, the conclusion of a bilateral agreement does not automatically lead to its full implementation in the field of readmission, for the latter is contingent on an array of factors that codify the bilateral interactions between two contracting parties. Today, more than 320 bilateral agreements linked to readmission have been stipulated between the 27 EU Member States and third countries at a global level. Using an oxymoron, it is possible to argue that, over the past decades, various EU member states have learned that, if bilateral cooperation on readmission constitutes a central priority in their external relations (this is the official rhetoric), readmission remains peripheral to other strategic issue-areas which are detailed below. Finally, unlike some third countries in the Balkans or Eastern Europe, southern third countries have no prospect of acceding to the EU bloc, let alone having a visa-free regime, at least in the foreseeable future. This basic difference makes any attempt to compare the responsiveness of the Balkan countries to cooperation on readmission with southern non-EU countries' impossible, if not spurious.

Today, patterns of interdependence between the North and the South of the Mediterranean are very much consolidated. Over the last decades, Member States, especially Spain, France, Italy and Greece, have learned that bringing pressure to bear on uncooperative third countries needs to be evaluated cautiously lest other issues of high politics be jeopardized. Readmission cannot be isolated from a broader framework of interactions including other strategic, if not more crucial, issue-areas, such as police cooperation on the fight against international terrorism, border control, energy security and other diplomatic and geopolitical concerns. Nor can bilateral cooperation on readmission be

59 Among many others, see Von Lersner, U. Elbert, Th. and. Neuner, F. 2008. Mental health of refugees following state-sponsored repatriation from Germany. *BMC Psychiatry* 2008 8:88. Schuster, L. and Majidi, N. 2015. Deportation stigma and re-migration. *Journal of Ethnic and Migration Studies*, (4): 635–652. Alpes, J., Blondel, Ch., Preiss, N. and Sayos Monras, M. Post-deportation risks for failed asylum-seekers. *Forced Migration Review*, 54.

viewed as an end in itself, for it has often been grafted onto a broader framework of interactions.

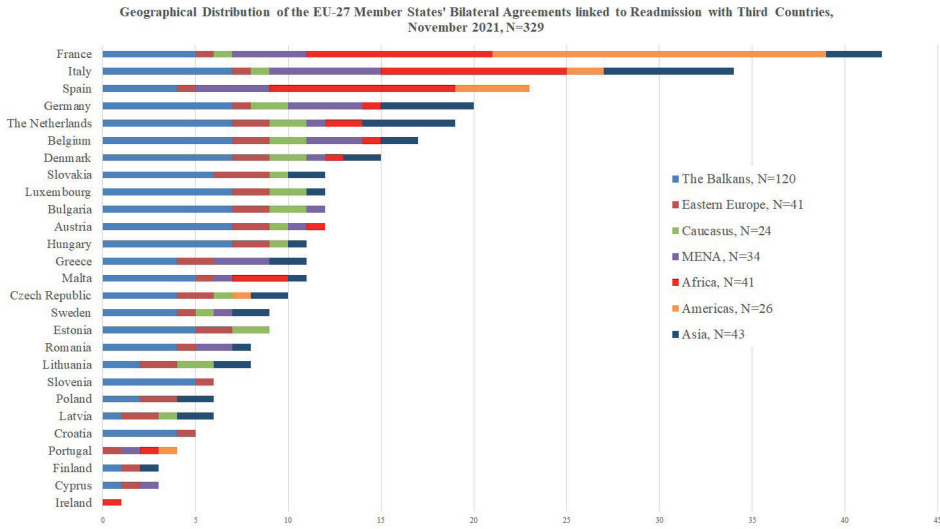
6 The “Return Sponsorship” Puzzle

This point leads to a final remark regarding “return sponsorship” which is detailed in Art. 55 of the proposal for a regulation on asylum and migration management.⁶⁰ In a nutshell, the idea of the European Commission consists in a commitment from a “sponsoring Member State” to assist another Member State (the benefitting Member State) in the readmission of a third-country national. This mechanism foresees that each Member State is expected to indicate the nationalities for which they are willing to provide support in the field of readmission. The sponsoring Member State offers assistance by mobilizing its network of bilateral cooperation on readmission, or by opening a dialogue with the authorities of a given third country where the third-country national will be deported. If, after eight months (or four months in the case of a migratory crisis), attempts are unsuccessful, the third-country national is transferred to the sponsoring Member State. Note that, in application of Council Directive 2001/40 on mutual recognition of expulsion decisions, the sponsoring Member State may or may not recognize the expulsion decision of the benefitting Member State,⁶¹ because Member States continue to interpret the Geneva Convention in different ways and also because they have different grounds for subsidiary protection.

Viewed from a non-EU perspective, namely from the point of view of third countries, this mechanism might raise some questions of competence and relevance. Which consular authorities will undertake the identification process of the third country national with a view to eventually delivering a travel document? Are we talking about the third country’s consular authorities located in the territory of the benefitting Member State or in the sponsoring Member State’s? In a similar vein, why would a bilateral agreement linked to readmission – stipulated with a given ‘sponsoring’ Member State – be

60 European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM (2020) 610 final, 23.9.2020.

61 Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 2.6.2001. The Directive enables but does not require Member States to enforce each other’s expulsion decisions. It is, however, very unlikely that a Member State will not recognise the expulsion decision of another Member State.



applicable to a 'benefitting' Member State (with which no bilateral agreement or arrangement has been signed)? Such territorially bounded contingencies will invariably be problematic, at a certain stage, from the viewpoint of third countries. Additionally, in acting as a sponsoring Member State, one is entitled to wonder why an EU Member State might decide to expose itself to increased tensions with a given third country while putting at risk a broader framework of interactions.

As the graph shows, not all the EU Member States are equally engaged in bilateral cooperation on readmission with third countries. Moreover, a geographical distribution of available data demonstrates that more than 70 per cent of the total number of bilateral agreements linked to readmission (be they formal or informal⁶²) stipulated with African countries are covered by France, Italy and Spain. Over the last few decades, these three Member States have developed their respective networks of cooperation on readmission with a number of countries in Africa and in the Middle East and North Africa (MENA) region.

62 On the informalization of agreements and its implications for access to fundamental rights, see Giuffr , M. 2020. *The Readmission of Asylum Seekers under International Law*. Hart, Oxford, England, pp. 160–170. See also Moreno-Lax, V. 2020. *EU External Migration Policy and the Protection of Human Rights*. European Parliament In-Depth Analysis, DG for External Policies. European Parliament, Brussels, Belgium, pp. 25–28, and also Carrera, S. 2016. *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*. Springer International Publishing, Heidelberg, Germany.

Given the existence of these consolidated networks, the extent to which the “return sponsorship” proposed in the Pact will add value to their current undertakings is objectively questionable. Rather, if the “return sponsorship” mechanism is adopted, these three Member States might be deemed to act as sponsoring Member States when it comes to the expulsion of irregular migrants (located in other EU Member States) to Africa and the MENA region. More concretely, the propensity of, for example, Austria to sponsor Italy in expelling from Italy a foreign national coming from the MENA region or from Africa is predictably low. Austria’s current networks of cooperation on readmission with MENA and African countries would never add value to Italy’s consolidated networks of cooperation on readmission with these third countries. Moreover, it is unlikely that Italy will proactively be “sponsoring” other Member States’ expulsion decisions, without jeopardizing its bilateral relations with other strategic third countries located in the MENA region or in Africa, to use the same example. These considerations concretely demonstrate that the European Commission’s call for “solidarity and fair sharing of responsibility” (Art. 80 TFEU), on which the “return sponsorship” mechanism is premised, is contingent on the existence of a *federative* Union able to act as a unitary supranational body in domestic and foreign affairs.

This federation does not exist in political terms, nor can we imagine that any reinforced federative action will ever be supported by the EU Member States themselves. Not only have the latter been adamant about protecting their own sovereign preserve in the area of Freedom, Security and Justice (FSJ), but also the European Commission has been prone, over the last few years, to accommodate it, especially with reference to cooperation on readmission with third countries. The introduction in 2015 of the New Partnership Framework, including its “compacts” or tailor-made EU-wide atypical arrangements on readmission or readmission-related matters, are a case in point. These recent developments raise a host of challenges and serious concerns. Firstly, they starkly reflect a reconsideration of the EU approach to a ‘common readmission policy’ which has veered from “a normative approach to a flexible one.”⁶³ Moreover, such a reconsideration may “increase the inconsistencies and, arguably, further undermine the credibility of the EU’s readmission policy”⁶⁴ in its claim to build common and harmonized procedures – all the more so when we

63 J.-P. Cassarino, “Informalizing EU Readmission Policy” In A. Ripoll Servent and F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*. 2018, pp. 86–94.

64 S. Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*. 2016, Heidelberg: Springer International Publishing, p. 47.

realize that the drive for flexibility turns the EU into a facilitator (not a supervisor) who lays the groundwork for reinforced and variegated bilateral cooperative patterns,⁶⁵ especially when it comes to dealing with rules of identification and redocumentation of migrants, interagency cooperation, effective protection of personal data, exchange of information between each member state and a cooperative third country and, last but not least, with such procedural safeguards as due process and right to remedy.

Beyond these technical aspects, it is important to realize that the cobweb of bilateral agreements linked to readmission has expanded as a result of tremendously complex bilateral dynamics that go well beyond mere management of international migration.⁶⁶ Bilateralism remains and will remain a predominant feature of this expanding cobweb, especially with reference to third countries located in Africa and in the MENA region,⁶⁷ because of the unequal costs and benefits cooperation on readmission invariably generates, and because the latter is contingent on a much broader cooperative framework involving other strategic issue-areas often unrelated to migration-management matters. These remarks are crucial to understanding that we need to reflect properly on the conditionality pattern that has driven the external action of the European Commission, especially in a regional context where interdependence among state actors has gained so much relevance over the last two decades. The conditionality pattern of the European Commission stands in stark contrast with the bilateral *modus operandi* of most EU Member States on the ground. The latter are predominantly premised on incentives and compensatory measures aimed at lubricating a modicum of cooperation on readmission, be it effective or not. To be sure, and despite the official rhetoric reported by the media, EU Member States are not fond of conditionalities, especially when they might impact other strategic issues of high politics.

In sum, given the clear consensus on the weak correlation between cooperation on readmission and visa policy (the European Commission being no exception to this consensus), linking the two might not be the adequate response to ensure third countries' cooperation on readmission, especially when the latter are in a position to capitalize on their strategic position with

65 C. Favilli, "La cooperazione UE-Turchia per contenere il flusso dei migranti e dei richiedenti asilo: Obiettivo riuscito?" *Diritti umani e diritti internazionali*, 10 (2), 2016: 422.

66 J.-P. Cassarino, ed., *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*. Washington: The Middle East Institute, 2010.

67 Federica Zardo and Chiara Loschi (2020) "EU-Algeria (non)cooperation on migration: A tale of two fortresses", *Mediterranean Politics*: 1–22.

regard to some EU Member States. Previous works by scholars across disciplines have extensively documented third countries' empowered position.⁶⁸

7 Conclusions

This article has highlighted a trend which has taken shape in the practices of migration control enacted over time and especially after the 2015 refugee crisis, with the hotspot approach, for example; this same trend is further consolidated in the Pact and in the measures proposed by the Commission in its 2020 reform package analysed above. It is here argued that these proposals are an expression of a broader trend of internalization of externalized migration control policies.⁶⁹ It has been shown that the proposals for a pre-entry screening and the 2020 amended proposal for enhanced border procedures are creating something we 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, in various manners. 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 border areas; however, these border areas are supposed to become 'grey zones' where the territory of a state, and therefore, the European territory, is less 'meaningful' than it should be in terms of the quality of the legal order. As we have explained above, in a legal order, persons can rely on institutions to enforce the law. The latter also implies rights for the individuals concerned by the exercise of public powers carried out by the former: to use a metaphor, if these measures are enacted, they will turn the borders and border areas of the EU into a

68 See, among others, Phuong, C. 2007. Building a community return policy with third countries: An equal partnership? In, *Whose freedom, security and justice? EU immigration and asylum law and policy*, Baldaccini, A., Guild, E. and Toner, H. Hart, Oxford, England, pp. 337–357. Paoletti, E., *The migration of power and North-South inequalities: The case of Italy and Libya*. 2011. Palgrave Macmillan, New York, USA. İçduygu, A. and Aksel, D.B. 2014. Two-to-tango in migration diplomacy: Negotiating readmission agreement between the EU and Turkey, *European Journal of Migration and Law*, 16(3), pp. 336–362. Wolff, S. 2014. The politics of negotiating EU readmission agreements: Insights from Morocco and Turkey. *European Journal of Migration and Law*, 16(1), pp. 69–95. El Qadim, N. 2015. *Le gouvernement asymétrique des migrations: Maroc/Union européenne*, Dalloz, Paris, France. Yildiz, A.G. 2016. *The European Union's immigration policy: Managing migration in Turkey and Morocco*. Palgrave Macmillan, London, England. Cassarino, J.-P. 2017. Approaching Borders and Frontiers in North Africa. *International Affairs* 93(4), pp. 883–896.

69 For the expression, see Zaiotti, R. and Abdulhamid, N. Offshoring in the Pandemic Age.

‘lower density’ territory in terms of rights and guarantees, a territory where a subtle and creeping de-legalisation is taking shape.⁷⁰

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, depending on how the established fast-track system qualifies his or her situation.

However, the paradox highlighted in the “return sponsorship” mechanism shows that readmission agreements or arrangements are no panacea, for the vested interests of third countries must also be taken into consideration when it comes to cooperation on readmission. In this respect, it is telling that the Commission never consulted third countries on the new return sponsorship mechanism, as if their territories were not concerned, which is far from being the case.⁷¹ For this reason, it is legitimate to imagine that the main rationale for the return sponsorship mechanism may be another one, and it may be merely domestic. In other words, the return sponsorship, which could transform itself into a form of relocation if the third-country national is not expelled from the EU territory after eight months, subtly tries to move away non-frontline European states from their comfort-zone and engage them in cooperating on expulsions. If they fail to do so, namely if the third-country national is not expelled after eight months, non-frontline European states are as it were ‘forcibly’ engaged in a ‘solidarity practice’ that should be conducive to relocation.

Given the disappointing past experience of the 2015 relocations,⁷² the effectiveness of this new mechanism is questionable. Moreover, it should not be forgotten that one can get stuck in a revolving door. It is here argued that

70 For parallel research in other domains, see Kilpatrick, C. 2017. The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality. *Current Legal Problems*, Volume 70, Issue 1, Pages 337–363; and Joerges, C. 2015. Constitutionalism and the Law of the European Economy, in *Beyond the Crisis: The Governance of Europe's Economic, Political, and Legal Transformation*. Dawson, M., Enderlein, H. and Joerges, C. (Eds.), OUP, Oxford, England; in the context of the AFSJ, see Fahey, E. 2019. Hyper-legalisation and de-legalisation in the AFSJ: on contradictions in EU external migration law, in *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis*. Carrera, S., Santos Vara, J. and Strik, T. (Eds.) Elgar, Cheltenham, England, pp. 116 ff. In a different scientific perspective, see Papoutsis, A. et al., *The EC hotspot approach in Greece*.

71 For a reaction on the Pact from an African perspective, we quote: “I see you have a problem, brother. As we say: after being bitten by a snake, you will flee from a rope. You need to rebuild harmony. Do it and then let's talk.” This quote can be found in S. Manservigi. 2020. *The EU's Pact on Migration and Asylum: A Tsunami of Papers but Little Waves of Change*. IAI Commentaries. issue 88/2020.

72 As shown in Savino, M. 2020, *On Failed Relocation and Would-be Leviathans: Towards the New Pact on Migration and Asylum*. ADiMBlog.

these new procedures might create more uncertainty for the administrations concerned and for migrants too, as it will contribute to expanding a grey zone located in border areas that migrants will try to escape; some will probably succeed but will then remain in a limbo of irregularity.

Whether the negotiations of the Pact fail or not, the various measures extensively studied in this article might increase legal uncertainty for some migrants, and might not contribute to an effective management of migration, given the empowered agency of some strategic third countries. If these measures will not be adopted, the subtle de-legalisation which is already taking place, in the practice, might continue in a more concealed manner, and will jeopardize the accountability of public actors involved. Overall, the provisions contained in the Pact might reinforce the image of a European Union which cannot successfully face one of the most salient challenges that contemporary European society is facing, being stuck in its 'fortress Europe' machinery.

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