

## Bordering in the EU – How the New Pact on Asylum and Migration challenges human rights obligations

*Sanae Youbi*

### Executive Summary

- > In September 2020, the European Commission proposed a reform of the current European Union (EU) approach to migration and asylum entitled a 'Common European Framework for Migration and Asylum'. A major novelty of this 'New Pact on Migration and Asylum' is the proposal to introduce a 'Pre-Entry Screening' procedure (Screening Regulation), allowing European authorities at EU external borders to channel irregular third-country nationals towards either an asylum or a return procedure.
- > As it stands, the proposed Screening Regulation seeks to address the issue of irregular entries and asylum-seekers' mobility through policing via one single tool, namely a fast screening procedure. This may lead to policy incoherence and human rights abuses justified in the name of internal security and public safety.
- > Instead of endorsing this restrictive approach, this policy brief argues that the Council and the European Parliament should amend the proposed Regulation by designing an approach inspired by a solidarity-driven system, aligned with EU values. Detention outside the EU borders must not be generalized but based on real security risks, not assumptions based on threat perceptions. The instrumentalization of migration should be rejected, and the focus should be on more sustainable legal venues for humanitarian and labour migration.

During the last few decades, migration and asylum issues have garnered increased attention from politicians, the public, and the media throughout the European Union (EU). Although immigration is not a new phenomenon in Europe, the recent increase in the number of migrants and refugees has been seen as a cause for concern. A significant response to this influx has been an intensifying tendency to 'other' migrants, the phenomenon whereby a supposedly homogenous 'in-group' characterized by a shared national identity is contrasted with an 'outside' characterized by those perceived as 'others' (Doty 1999). This anti-immigrant sentiment has contributed to expanding the external aspects of EU asylum and immigration policies, reinforcing the nexus between security and migration, and reviving the idea of 'Fortress Europe.' This concept refers to the tightening of the EU's immigration policies and increasingly exclusionary practices towards those attempting to cross EU borders in search of a better life (Bigo 2004; Geddes 2009). The importance given to border control, with the objective of "[preventing] any threat to the Member States' internal security, public policy, public health, and international relations" (European Commission 2020, 1.4.3), shows, therefore, that migration is being framed as a security issue for the EU.

Following a peak in the number of asylum-seekers and irregular migrants in 2015, alongside a growing perception of the danger posed by terrorism, the European Union has sought to address deficiencies in managing its external borders. As part of this effort, the European Commission proposed a New Pact on Migration and Asylum (2020) to reform the EU's existing approach. Currently, this new proposal is still in the legislative process.

This brief focuses on a major novelty that forms part of the first pillar of this Pact, namely the proposal to introduce a Pre-Entry Screening Regulation (hereafter Screening regulation). It starts by examining the status quo of the

current EU legislation on asylum and migration before analysing the changes proposed by the Regulation. Based on this, the brief then engages in a reflective analysis of the proposed legislation and its implications for asylum-seekers before offering policy recommendations. Overall, it argues that while the official aims of the proposal are to simplify asylum procedures, in its current form, the Screening regulation is overly focused on preventing unauthorized entry of third-country nationals into the EU, since it treats illegal migrants and asylum-seekers with the same legislative instrument. This blurs the distinction between illegal migration and asylum, highlighting the reality of a policy framework where security and border control concerns dominate.

### Current EU legislation on asylum and migration

In the current EU legal framework, the Schengen Area border crossing rules are laid down in the Schengen Borders Code. The Common European Asylum System (CEAS) is a framework of EU legislation and policy that aims to harmonize asylum procedures and standards across all EU member states. It includes (i) the Dublin Regulation, which determines which EU member state is responsible for examining an application for international protection, (ii) the Asylum Procedures Directive, setting out the minimum standards for the procedures used by member states to grant or refuse international protection to asylum-seekers, and (iii) the Reception Conditions Directive establishing minimum standards for the reception of asylum-seekers in member states, including accommodation, food, clothing, and access to healthcare.

### Changes proposed by the Pre-Entry Screening regulation

The Screening regulation proposed by the European Commission aims to introduce a procedure consisting of (i) preliminary health and vulnerability checks; (ii) identification based on information in European databases; (iii) registration of biometric data in the appropriate databases (i.e., fingerprint data and facial image data); (iv) security checks through a query of relevant national and Union databases (via the European search portal) to verify that a person does not constitute a threat to internal security; (v) the filling out of a de-briefing form; and, finally, (vi) referral to the appropriate procedure (return or asylum). The deadline for completing the procedure is set at five days (exceptionally extended by five days) when applied at the external border and three days within the territory of an EU member state.

Compared to current procedures, the Commission proposal claims to improve procedures by:

- Creating uniform rules concerning the identification of third-country nationals who do not fulfil entry conditions referred to in the Schengen Borders Code and submitting them to the health and security checks at the external borders;
- Ensuring that entry is not authorized to third-country nationals whose status is not yet confirmed and thus help prevent their absconding;
- Facilitating decision-making and implementation of the appropriate procedure in each case, that is return or, in case of an application for international protection, the normal asylum procedure, an accelerated procedure, the asylum border procedure, or relocation to another member state; and
- Creating a framework for screening third-country nationals who entered the territory of a member state without authorization.

Many elements included in the Screening regulation are similar to what border authorities are already asked to do under the existing legislative frameworks. However, the Screening regulation complements existing rules concerning border controls set out in the Schengen Border Code (Article 8(3)) by providing more detailed rules on how member states should screen third-country nationals attempting to cross EU borders by checking their identity and performing a security and health screening where necessary. Nevertheless, while the Schengen Border Code does not include any specific obligation concerning medical checks of third-country nationals, some member states like Greece have already been conducting health checks since before the pandemic. Furthermore, these procedures are already recommended by operating guidelines adopted in the context of the hotspot approach (European Commission 2017, sec. 6). The Screening proposal also confirms existing obligations under the Eurodac regulation concerning the fingerprinting of third-country nationals, only adding specific deadlines.

Consequently, the Screening regulation does not add much new or simplify asylum protection access, as it claims. Rather, it seems to be an attempt to re-purpose what the migration 'hotspots' were intended to do, namely improving coordination between EU agencies and national authorities at the EU's external borders in the initial reception, identification, registration, and fingerprinting of asylum-seekers and migrants (Darren et al. 2016).

### Why is the Commission's proposal problematic?

Migrants and asylum-seekers could face several difficulties if the Commission's proposal passes in its current state.

### *Scope of application*

The Screening regulation would apply to three groups of persons: migrants who have entered illegally, asylum-seekers who entered without authorization, and persons who disembarked after a search and rescue operation. Hence, if the same procedure applies to all these groups, officials will have five days to distinguish between someone in real need of protection and an irregular migrant.

Officially, the Commission presents the Screening procedure as the first formal step in the asylum-seeking process. Still, many experts from non-governmental organizations are sceptical about the real intent of this proposal. As it stands, asylum requests would be subjected to border control requirements, which concretely means that the Screening regulation is not aligned with the standard procedures for asylum requests under international law. For instance, it entails that during Pre-Entry Screening, third-country nationals are considered unlawfully present on the territory of an EU member state. This precludes them from human rights protections, namely those against pushbacks and non-refoulement, which countries are obligated to guarantee under international law only to those who have entered the territory lawfully before applying for asylum.

### *Length of the screening procedure*

The restrictive time limits placed on authorities to screen irregular migrants will disproportionately burden member states in southern Europe. Considering the Italian and Greek experiences over the past decade, the time period allocated for processing irregular migrants is unrealistic and risks generating exclusionary practices and hence limiting the right to asylum protection.

Complying with the five-day delay to conduct the screening means that “Member States will be forced de facto to reject many asylum applications, even those that meet the conditions for asylum to be granted, in order to avoid increasing numbers of people being held together in inhumane conditions” (European Economic and Social Committee 2021, para. 2.1).

### *Normalizing de facto detention?*

Detention is a substantial risk arising from the proposed Regulation. During the pre-entry phase, the Commission's proposal categorizes third-country nationals as not lawfully on EU territory, which is why they have to be kept in special 'locations' “at or close to external border or transit zones” (European Commission 2020). The regulation leaves it to the member states to determine the most appropriate locations to carry out the pre-entry

screening procedure, taking into consideration the location and existing infrastructure and thus suggesting it may eventually occur in existing hotspot areas. This is concerning, considering the experience with overcrowded hotspots, such as the Moria camp in Greece, which burnt down in 2020 (Human Rights Watch 2020; Eonomopoulou et al. 2017).

Thus, this screening procedure would come with measures amounting to the systematic detention of asylum-seekers, as it seems difficult to imagine how a pre-entry screening can be conducted at the external EU borders without it.

In fact, although the regulation never employs the word ‘detention’, it fails to require individual justifications for the imposition of area-based restrictions, as generalized area-based restrictions of movement cannot be justified based on public interest considerations except in the very short term in order to document entry. This is clearly stated in a broad range of international treaties, such as Article 9 of the International Covenant on Civil and Political Rights. Hence, by relying on more systematic restrictions of movement in border procedures, the proposed Screening regulation might restrict third-country nationals from access to basic services at the border, including legal assistance and representation (Carrera 2021).

### *(Illegal) migrants or (legal) asylum-seekers?*

The proposal builds on the assumption that asylum-seekers and migrants are in the same categories of unauthorized entrants and disregards the fact that in international law asylum-seekers’ need for protection prevails over the entry requirements.

Connecting illegal migration and asylum and stressing border security does not consider that mobility, more often than not, is not a choice (Carrera et al. 2019).

The proposed Screening regulation thus acts as a policy framework that seeks to justify returns and refoulement and limit access to the EU asylum system.

As proposed, asylum-seekers are automatically labelled as “illegal migrants” and treated as such during the entire procedure, without any judicial oversight or access to a lawyer, nor any decision on whether detention is necessary and proportional in the individual case. Moreover, the Screening regulation would apply to everyone, including families and children, creating more ‘grey zones’ where different laws and procedures apply (Levy 2010), leading to an increase in discriminatory policing at EU borders.

## Conclusion and policy recommendations

In the current context of prevailing security discourse, where migrants are increasingly viewed with suspicion, and the problem is defined almost entirely by the perceived danger created by 'others', migration is more and more instrumentalised. The priority is to secure borders and prevent third-country nationals from entering the EU, which has also led to an increasing externalization of border control and procedures. The objective is far from accommodating or facilitating asylum procedures. Therefore, introducing the Screening regulation as proposed by the Commission, could be disastrous for those in need, as its approach seems to favour the acceleration and ease of return procedures. This could result in a significant risk of fundamental rights violations and the degradation of the already fragile status of asylum-seekers.

Hence, at this stage, the role of the co-legislators is pivotal. In the legislative process, they should amend the regulation before adoption by designing a solidarity-driven approach.

The Screening regulation should not inhibit asylum-seekers' mobility and access to rights or increase the risk of refoulement based on the perception that migrants are a threat rather than a positive resource for European societies. Instead, EU policy-makers should condemn the current repressive approach and restore EU law and standards at EU external borders by stopping pushbacks.

In particular, and in light of the analysis and critique of the proposed Regulation, they should:

- Regulate the screening of third-country nationals arriving at an external border without fulfilling regular entry conditions while acting in full respect

of the fundamental rights and international law. In particular, the screening procedure should be carried out without prejudice to the ability of a third-country nationals to apply for asylum protection. Concretely, it should be carried out on a case-by-case basis, allowing for more than five days for the admissibility check to ensure high procedural standards.

- Foresee clear and specific legal safeguards, such as access to legal aid and translation services, as well as ensure the right to an appeal or complaint procedure for all third-country nationals, irrespective of their status.
- Ensure that the current proposal is subject to procedural guarantees and that the screening is carried out in adequate facilities, complying with necessity and proportionality requirements, and in line with the existing conditions in the EU Reception Conditions Directive.
- Limit the use of detention in the context of the screening process. Deprivation of liberty needs to be strictly reserved if needed following a case-based assessment and not become a standard part of the screening procedure.

Implementing these changes would constitute a departure from the current securitised EU migration and border management approach. However, given the saliency of the topic and the growth of far-right and populist parties in the EU, it is likely that the Commission might be able to reach an agreement with the co-legislators before the end of the current legislature, and adopt the proposed Screening regulation without making the amendments needed, bolstering a trend that emphasises controlling and policing EU external borders.

## Further Reading

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## About the Author

Sanae Youbi is an academic assistant at the European Political and Governance Studies Department at the College of Europe, Bruges. Her previous work experience includes coordinating policy and legislative activities at the European Parliament and collaborating on various political communication and outreach activities. Her research focus is on migration and home affairs.

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