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The controls at the external borders of the Schengen Area and their reform

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Abstract: The Schengen Area is one of the most important achievements of the EU integration process and its security and functioning depend on a common efficient management of the EU external borders. The recent massive flows of migration have put pressure on certain member states' external borders, causing deficiencies in controls and arising worries of the other countries which have reintroduced controls at their internal borders. Some reforms have been proposed by the Commission, but they seem to be not enough because of a common response and the lack of solidarity of some member states.

KEYWORDS: Schengen Area - External borders - Controls - Migration - Reforms

1. INTRODUCTION

The Schengen Area represents one of the major achievements of European integration and it is constituted by two pillars: the abolition of controls at internal borders and the common management of the European external frontiers. The second one is thought to assure the functioning of the Area, preventing threats to member states' public policy\security\health, securing their international relations and combating illegal migration and transnational crimes.

In particular, the "external pillar" is a very important part in the functioning of the Schengen System, since it establishes all the conditions governing the entry of migrants into the territory of the European Union. External Borders must be crossed only in determined and fixed points and at predetermined opening hours. This common management of external borders consists in intense controls which change according to the status of the person (EU citizen or TCN) aimed at verifying if the person fulfils all the entry requirements and if he is not reported in the SIS (the Schengen information system). The Member States bear the responsibility of these

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controls, but the procedures and norms that regulate this operation are pointed out in the Schengen Border Code (Regulation 2016\399).

Nevertheless, the recent massive flows of migration have put the external borders of some member states under an unprecedented pressure, causing serious deficiencies in the carrying out of border controls. To face this situation, the Commission has planned certain measures, in particular the establishment of the European Border and Coast Guard with the Regulation 2016\1624 and 2019\1896, by reforming the pre-existing Frontex Agency, which plays an important role in the supervision of control of external borders, tackling the implementation deficit of the Common Border Management Policy. Its main objectives are to monitor Member States with external borders and to carry out vulnerability assessments in order to intervene with the deployment of European border guard teams and propose strategic plans in case of need.

Another measure involves the adoption of digital tools to collect, share and check data about migrants to assure the security of the Schengen area, such as the SIS, the VIS and the ECRIS_TCN. Despite these advances, technical problems remain and doubts about their effectiveness and the protection of privacy have risen.

Assuring the functioning and the effectiveness of the controls at the external borders, even in case of migratory crisis, is essential to assure the security of the Schengen Area, avoid the entry of irregular migrants and the ensuing concerns for secondary movements, providing incentives to other member states to reintroduce controls at their internal borders.

Despite these reforms, some critical situations remain and the states concerned are left alone to deal with them: a clear case is the challenge of irregular entries via the central Mediterranean towards Italy and the absence of a concerted EU response. These conditions cause problems concerning the respect of human rights, of migrants' dignity and of standards for reception and should be solved by the Union. For the moment, however, some member states which don't experience directly migratory crisis remain reluctant to a concerted action in the name of solidarity.

2. THE EU LEGAL FRAMEWORK

The Schengen Area represents the basis from which the European Union tried to become a "borderless Europe", creating a common travel area with a common set of rules concerning free movement of persons and goods.

The legal framework on which the topic of free moment, related with immigration, is based, is quite complex and articulated.

On 14 of July 1985, France, Germany, Belgium, The Netherlands and Luxembourg signed the so-called "Schengen Agreement". This agreement was signed with the aim to abolish the checks at the internal borders among the Member States, making an effort to improve controls at the external borders of the Union and establishing a closer cooperation among police forces in order to combat organized crime. On 19 June 1990, the Convention implementing the agreement at issue was signed, but the system was implemented on 26 March 1995, following the participation of other countries such as Italy.

The Schengen Agreement was born "outside" the EU legal order, but it was further incorporated in it with the Treaty of Amsterdam. The European Union was thus granted the possibility to elaborate binding acts concerning the movement of people across borders and it started the process of communitarization of the Schengen Agreement which was incorporated in the EU legal framework, dived into the three pillars of the Common Foreign Security Policy, the competences of the European Commission and Justice and Home Affairs Council to which was added the topic of migration. Other juridical bases have been further developed with the Lisbon Treaty.

In the so-called "Schengen Area", the majority of the Member States share the dispositions concerning the free movement of people, in relation with Liechtenstein, Switzerland, Iceland and Norway; even though they are third-

countries, so non-EU Member States, they share the principles for the topic of free movement. On the contrary, the United Kingdom and Ireland opted out.

The pillars of the Schengen Area are the abolition of control at internal borders and the common management of Eu external borders. These principles have to be read in conjunction with the rationale of the Area of Freedom, Security and Justice, linked with the legal basis of Art. 77(2)(b) TFEU, which includes the coordination of the controls and activities at external borders, towards a gradual establishment of an integrated management system for external borders.

The Union code governing movement across borders in the Schengen Area is the Regulation 2016/399, also known as Schengen Borders Code.

Article 2 contains the definition of the basic concepts: the internal borders are all the access points from one country to another whether on land, water or airports while the external borders are what unify the Schengen Area with the outer world.

The crossing of external borders is allowed only at border crossing points during fixed opening hours and for third-country nationals only when they meet the entry conditions laid down in Article 6.

The Schengen Borders Code also provides general directions for the conduct of border checks (Art.7): the border guards shall respect human dignity, in particular in cases involving vulnerable persons, the principle of proportion for any measures taken and the principle of non discrimination in the performance of their duties. Then Article 8 distinguishes between the checks on persons enjoying the right of free movement under Union law and on the third-country nationals. In both the cases, all persons shall undergo a minimum check in order to establish their identities and the validity of the documents authorising the legitimate holder to cross the border.

On a non-systematic basis, during these checks in the case of persons enjoying the right of free movement, border guards may consult national and European databases in order to ensure that such persons do not represent a serious threat to the internal security.

In addition to these controls, on entry and exit third-country nationals shall be subject to checks in order to verify if the persons meet the entry conditions laid down in the Article 6 of the Code: a valid identity card, valid travel document entitling the holder to cross the border and a valid visa, if required, sufficient means of subsistence for the duration of the stay and for the return in the country of origin, in addition to the justifications of the scope of entry and not have an alert refusing the entry in Schengen information system, not being a threat to public policy/security or health of European countries, avoiding also to damage their relations with other countries.

The border checks may be relaxed as a result of exceptional and unforeseen circumstances which cause excessive traffic at the border crossing point; these relaxations shall be temporary, adapted to the circumstances and introduced gradually.

The Schengen Border Code also provides border surveillance at the Article 13 whose main purpose shall be to prevent unauthorised border crossing and to counter cross-border criminality and which shall be carried out by the Member State at the external borders.

The responsibilities of these states in controlling the flux of migrants have been increased by the Regulation 604\2013, also known as Dublin III Regulation, which fixes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection since in the majority of the cases it is the country of first entry of the asylum seeker.

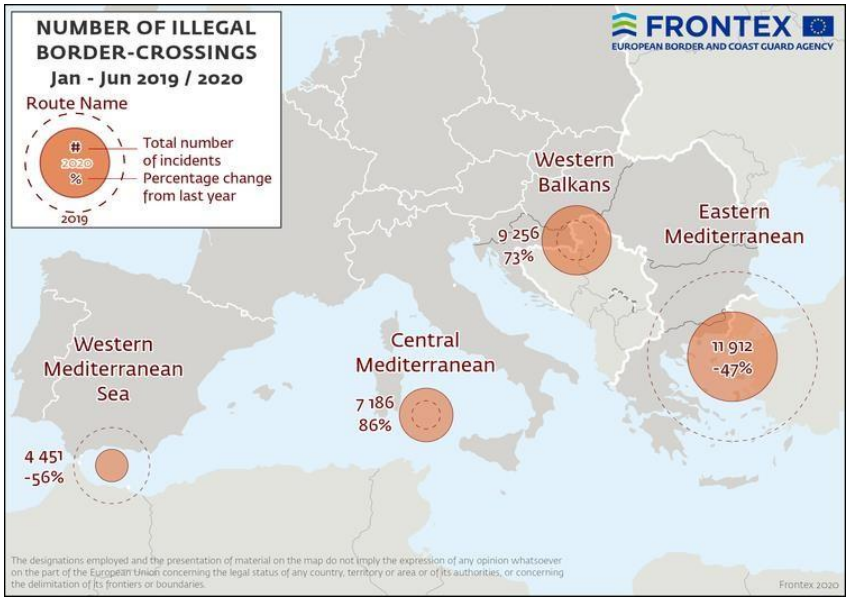
As a consequence, the Dublin Regulation proved to be as controversial as ineffective and inefficient for the unequal distribution of responsibilities among the Member States, contrary to what should be a common migration policy because the states at the external borders continue to deal with the large majority of applications for international protection and with migrants illegally entering the Schengen Area.

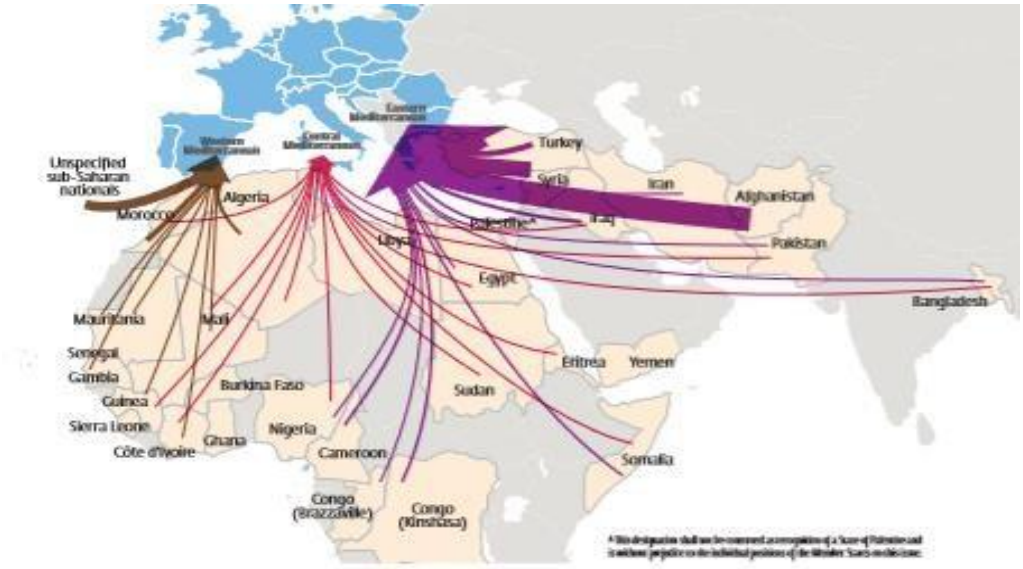
Even if the degree of informality is high, Member States can independently conclude Readmission agreements with the aim to develop the association, the

cooperation, the stabilization and the partnership agreements between EU and third-countries.

In 2016, the EU and Turkey have agreed on a joint statement with some action points, such as: all irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey with the EU bearing all the repatriation costs, then for every Syrian being returned to Turkey from Greek Islands, another Syrian will be resettled from Turkey to EU.

4. DATA





ThThe main flow of migration towards Europe

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FREE MOVEMENT, COVID-19 AND TRAVEL BANS

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ABSTRACT

The restrictions on the intra-EU free movement of persons have been at the core of the political responses of the European Union to the coronavirus pandemic. Those measures, although justified by the MSs with the need to contain the transmission of the virus by the art. 29 of Directive 2004/38/EC, highlight crucial issues on the stability of the fundamentals of the EU. They are also profoundly intrusive regarding the fundamental rights of individuals and display a substantial lack of coherence in the coordination of provision at the EU level, generating various and overlapping networks of different travel bans restrictions among the Member States. What is pivotal is to understand how those restrictions are placed in the light of EU free movement law: concerning fundamental principles such as legality, non-discrimination and proportionality and which provisions could be implemented to ensure effective coordination and the enforcement and application of the EU law.

KEYWORDS: Free Movement Directive, travel bans, Covid-19, legality, soft-law instruments

1. INTRODUCTION

Since March 2020, when the WHO assessed COVID-19 as a pandemic, European Member States have fallen into the chaos of unilateral urgent measures to contain the rapid spread of the disease. Intra-EU travel bans have been one of the most severe national measures implemented on the ground of public health exception under Article 29 of the Free Movement Directive, resulting in a limitation to the crucial right to free movement of persons in the EU. For the first time, the EU institutions too have been dealing with such a crisis affecting all the Member States, which especially posed a very serious challenge to the EU legal system. When addressing the disruption of the right to free movement of persons, both the provisions laid down in Schengen Borders Code and EU free movement law should be considered. Nevertheless, the Schengen Regulation provisions on temporary reintroduction of internal border checks appear to be parallel and complementary for the sake of this study, which instead focuses on the unprecedented implementation of the intra-EU travel restrictions due to the current health crisis. Therefore, only the EU free movement rules envisaged in the EU Treaties and secondary legislation will be addressed in this paper, in order to assess the compliance of the intra-EU travel entry restrictions.

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Firstly, we will provide an overview of the relevant EU rules and permitted restrictions which will be needed for the development of the following paragraphs. Then we will discuss the topical issues resulting from the implementation of national travel restrictions in an area of free movement, focusing on the measures carried out by Italy. After a recall on the production of soft-law instruments by the EU institutions for coordination purposes, we will finally dive into the main criteria and benchmarks that the CJEU will refer to when those travel bans will be likely subject to a judicial review.

2. THE EU LEGAL FRAMEWORK

a. PRIMARY LEGISLATION

Article 3(2) TEU: allows for the freedom of movement of persons within the Union.

Article 18 TFEU: contains the principle of non-discrimination on the ground of nationality.

Article 21 TFEU: Union citizens benefit from free movement as the right to move and reside freely within the territory of Member States.

Article 45 TFEU: is the main reference point for the free movement of workers within the EU, entailing the abolition of any discrimination based on nationality between workers of the Member States. This right could be subject to any limitations justified on grounds of public health.

Article 46 TFEU: Through the ordinary legislative procedure the European Parliament and the Council issue directives or make regulations setting out the measures required to bring about freedom of movement for workers as defined in article 45.

Articles 72 e 347 TFEU: safeguard clauses for Member States, exercising their responsibilities with regard to the maintenance of law and order and the safeguarding of internal security; however the Member States shall consult each other to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order.

Article 292 TFEU: enables the Council to adopt recommendations. According to this provision, the Council shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission.

Article 21 CFREU: contains a wide principle of non-discrimination based on any ground.

Article 45 CFREU: for the right to free movement of EU citizens within the territory of the Member States. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 3 of Protocol No 4 of the European Convention on Human Rights: states that no one shall be deprived of the right to enter the territory of the state of which he is a national.

b. SECONDARY LEGISLATION

Directive 2004/38/EC, 29 April 2004: is the cornerstone of EU citizenship since Union citizens (and their family members) benefit from a constitutional guarantee to cross-border movement whose limitations are subject to legal supervision. **Article 4** is about the right of exit, while **Article 5** is on the right of entry, in particular no entry visa-style certificates may be imposed on Union citizens.

Article 24 recalls the principle of non-discrimination on the basis of nationality, establishing that all Union citizens residing in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State. **Article 27** provides the grounds that may be used to justify temporary restrictions of free movement, exceptional circumstances being considered public policy, public security or public health. Thus, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality (principle of non-discrimination). The same article states that Member States shall allow their nationals who have been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality. **Art. 29** elaborates on the public health justification and foresees that a disease with epidemic potential, as defined by the relevant instruments of the World Health Organization may justify measures restricting freedom of movement.

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C(2020) 2051, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, 30 march 2020.

(2020/C 126/01) Joint European Roadmap towards lifting COVID-19 containment measures, 17 April, 2020.

C(2020) 3250, Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls,13 May 2020.

COM(2020) 499, Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, 4 September 2020 and **Council Recommendation (EU) (2020/0256)**, 13 October 2020.

3. COVID-19: TRAVEL BANS AND FREE MOVEMENT

Travel bans are intended as measures which temporarily prohibit or forbid the entry of citizens and residents of another Schengen country for public health reasons. Travel (entry) restrictions concerning COVID-19 address the actions implemented by EU+ countries that limit entry, set supplementary entry conditions or apply compulsory measures as a direct effect of entry into the territory of the person concerned. Although travel restrictions are often not officially presented as 'internal border controls', they have in many cases an equivalent effect as intra-EU border controls (Carrera, Luk, 2020, B). Differentiating border controls from travel restrictions is essential: while the first ones do not cause problems in the current situation, the second ones are completely unprecedented and pose significant legal issues (Thym, 2020). Border controls and travel restrictions represent an extremely serious encroachment on several fundamental rights such as free movement, non-discrimination, privacy and, in a more general sense, equal and effective access to health care and medical

treatment. In this regard, Member States have not provided detailed information on the practical effects of these arrangements on the free movement of persons and, furthermore, not all Member States have fulfilled their obligation to safeguard the principle of non-discrimination as regards the comparison of COVID-19 restrictions applicable to nationals with those applied to EU citizens and their families and resident third-country nationals benefiting from EU rights and administrative guarantees (Carrera, Luk, 2020, B). The free movement of persons entitles EU citizens and their family members to move and reside legally and freely within the EU and it represents the backbone of EU citizenship. It has been established that movement within the single market and the Schengen area has been withdrawn from the competence of Member States and is subject to EU law. In this respect, Directive 2004/38/EC (the Free Movement Directive) has codified various pieces of legislation in this area, including case law related to the free movement of persons (Omran, Mavrommati, 2020). Ordinarily, Union citizens are granted with a constitutional guarantee to move across borders whose limits are under legal control. However, at the beginning of March 2020, many EU Member States have re-imposed internal border controls across the Schengen area, travel within the EU are limited through entry bans and the blockage of international passenger transport (Carrera, Luk, 2020, B). The resulting multi-layered and dynamic set of restrictions has led to profound legal insecurity for individuals and has had a damaging impact on EU rights and freedoms (Linka, Rahman, Goriely, 2020). It should be considered that Member States may use extraordinary measures during times of crisis, although they cannot legally act as they wish. As the pandemic grows worldwide, it may justify travel restrictions under Article 29 of the Free Movement Directive (Thym, 2020). Moreover, it should be acknowledged that, under Article 21 TFEU, all EU citizens have the right to free movement (even if they are not engaged in economic activities) (Thym, 2020). As an example, for several years, the Court of Justice has stressed that the free movement of workers constitutes a 'fundamental principle' and required the restrictive interpretation of derogations, allowing frontier workers and other economically active persons to move into a particular country to work there in similar conditions to domestic workers (Thym, 2020). The same cannot be said for the tourism sector, which has been among the industries most impacted by the effects of the pandemic because of the lack of coordination in travel restrictions, which has lowered traveller confidence and decreased consumer demand (Schengenvisainfo.com). The gravity of the current situation has severely constrained the principles contained in Article 21 TFEU and made it clear that restrictions must be proportionate. As a general rule, the Court of Justice concentrates on an individualized assessment considering each case separately but, given the situation, border control officials can actually use generalized criteria with little or no margin for individualized balancing (Thym, 2020). Although it is acceptable that, in order to combat an epidemic potential disease, border control officials may use generalized criteria with little or no margin for individualized balancing, Member States do not have “carte blanche” (Carrera, Luk, 2020, B). On the contrary, a generalized proportionality assessment may differentiate between several categories of persons. However, although the 'public health' exception may justify severe and generalized restrictions on mobility, the associated principles of proportionality and consistency might require Member States to adapt their practices on the ground to conform to EU law (Thym; 2020).

4. THE IMPLEMENTATION OF TRAVEL BANS: THE ITALIAN CASE STUDY

Italy, one of the worst affected nations in the world, was the first country in the European Union to impose national restrictions on movements when the first cases began to surface in the northern regions of the country.
Following the Council of Ministers' declaration, on 31 January 2020, of the state of emergency for a period of six months (based on articles 7 and 24 of the Civil Protection Code), a wealth of legal measures aimed at preventing and containing the spread of COVID-19 have been adopted by the Government, the Prime Minister and the Ministry of Health through acts of primary and secondary rank (decree-laws, decrees of the Prime Minister and executive orders) based on the exercise of urgent and emergency powers (Negri, 2020). In most cases, their legal basis is to be found in articles 16, 32, and 117 of the Italian Constitution, which state that travel restrictions may be established by law for reasons of health or security (*ibidem.*). Since the Italian Constitutional rules that restrictions to fundamental freedoms cannot be enacted or regulated only by laws and acts having the force of law, on 23 February 2020, Decree-Law n. 6 was issued, containing emergency provisions in order to limit infection due to the Covid-19 pandemic, granting the 'competent authorities' with the power to order 'any appropriate restrictive measure' on those living in affected areas (Canestrini, 2020).

Before presenting an overview of the provisions adopted by the italian Government to handle the crisis and by which travel bans are implemented, a brief specification is necessary on the following Decrees adopted by the PCM (from now known as DPCMs): Those decrees adopted by the PCM do not have the same legal force as laws and acts having the force of law, i.e. legislative decrees (art. 76 Italian Constitution) and decree-laws (art. 77 Italian Constitution) (Vedaschi, Graziani, 2020). As regards the Coronavirus emergency, the decrees of the PCM explicitly clarify in their title, that they implement Decree-Law 6/2020. Art. 3 of the latter establishes that the PCM can adopt his own decrees to enact measures to contain or prevent the spread of Cobid-19. It means that restrictions imposed by the decrees of the PCM are justified since grounded on a primary source (*ibidem.*). Nevertheless, the vagueness of Decree-Law 6/2020 and the fact that, in any case, secondary law cannot regulate the liberties, the actual legality of the following Decrees remains uncertain.

4.1 Provisions adopted by Italy to implement travel bans:

In this paragraph, we intend to provide an overview of the implementation of travel bans in Italy from the beginning of the pandemic to now. Given that our investigation topic is the limitation on Free Movement, we will only consider the provisions which imposed travel restrictions from and to Italy referring to the mobility within the European Union.
First of all, as we already know, the core instrument on which italian response on Covid-19 is framed is the decree-law 6/2020 which was converted into law by Parliament (law 13/2020). Subsequently, a number of legislative and administrative measures were passed and enforced at different levels (national, regional, local), including other decree-laws by the CM, several decrees of the President of the Council of Ministers (PCM), ministerial orders, and autonomous decrees of the Presidents of the main regions affected by the virus (Beqiraj, 2020). Although we focus on national initiatives, it is interesting to point out that also Regions and Municipalities have employed their emergency powers, occasionally generating problems in coordination.

DPCM 8 March: which (for certain areas) set limitations to mobility, assembly and economic activities, and prohibited everyone from moving from their home, unless for reasons related to work, necessity or health care; The limitations are extended until April 3.
Art 1(a): "to avoid any movement of natural persons entering and leaving the territories referred to in this Article, as well as within the same territories, except for movements motivated by well-grounded work-related reasons or situations of need or movements for health reasons. It is permitted to return to one's own domicile, home or residence";
DPCM 9 March: which extended said limitations to the entire national territory;
Joint order by the Ministers for Health and for Home Affairs (as national authorities for health and public safety emergencies) on 22 March 2020 (G. U. No. 76) prohibited everyone from traveling to another municipality, except for documented reasons of work, absolute necessity or health.

These measures have progressively limited freedom of movement, first in Northern Italy and then for the entire national territory, up to the nearly total lockdown extended until 3 May 2020 (Tega, Massa, 2020). Although the movement across italian borders is not taken into account in the articles of DPCM, we deduce that introduction of lockdown and restriction of internal mobility affected the exercise of the Free Movement both for italian nationals and for others union nationals to leave or enter in the italian territory (Carrera,Luk, 2020, B).

March 28: **Art. 1(1)(a) and (2) Order of the Minister of Health** of 28 March 2020 an entry ban into Italian territory is introduced, except for documented reasons of work, absolute necessity or health;
April 10: **Art. 4(1)(a) and (2) Decree of the President of the Council of Ministers** of 10 April 2020 (G.U. No. 97 of 11 April 2020)

> *(...) only movements motivated by proven work needs or situations of necessity or for health reasons are allowed and, in any case, all natural persons are prohibited from moving or travelling, by public or private means of transport, to a municipality other than the one in which they are currently located, except for proven work needs, absolute urgency or for health reasons (...);*

DPCM of 26 April 2020 (G.U. No. 108 of 27 April 2020): superseded both Order of Health of 28 March and Decree of the President of the Council of Minister of 10 April 2020. It establishes that all travellers entering Italy are required to fill-in a certificate stating the reasons for their travel and the address where they will spend a 14-day mandatory quarantine period. The same certificate is required to be filled in by all travellers transiting through Italy. All arrivals are required to report to the local health authorities and undergo a 14-day self-isolation quarantine and health-monitoring period. Those who enter Italy for work for a maximum period of 72 hours are exempt from the requirement to report to the health authorities and observe the quarantine. All travellers entering Italy are required to reach their home or the chosen address with a private means of transport (Travelbans.org).
Art. 1(1)(a) Decree of the President of the Council of Ministers of 26 April 2020 (G.U. No. 108 of 27 April 2020), later superseded by **DPCM of 17 May 2020** (G.U. No. 126 of 17 May 2020): form May 4 the reasons permitting entry into Italy and movement within Italy was expanded to include 'returning to one's home or residence';
Art. 6 Decree of the President of the Council of Ministers of 17 May 2020 (G.U. No. 126 of 17 May 2020), which will be in effect from 18 May to 31 July 2020. It established that until 2 June, international travel is prohibited except for proven work needs, situations of urgent

need, or health reasons. From 3 June, international travel to and from the following States will be allowed without restrictions or quarantine requirements: a) European Union member states; b) Schengen area member states; c) United Kingdom; d) Andorra and Monaco; e) Republic of San Marino and Vatican City (Travelbans.org).

After months of "isolation" free movement is finally restored in and to Italy since the "entry ban" into Italy was expanded to exempt intra-EU+ travel and, from 1 July 2020, travel from selected third countries (Carrera, Luk, 2020, B). In fact, through the implementation of **DPCM 7 August**, Italy defines six categories of countries for the purpose of COVID-19 restrictive measures for entry into Italy, with EU+ countries listed in categories A (San Marino and Vatican City) for which no limitation is provided, B (all EU+ countries not in categories A and C) and C (Bulgaria and Romania) for which the entry is not permitted (Observatory on Border Crossings Status due to COVID-19). Regarding the EU+ countries of category B travelling in or to Italy is allowed without restrictions also for tourism without the obligation to self-isolate on return, but travellers arriving from Croatia, Greece, Malta and Spain must either present a certificate of a negative COVID-19 test performed up to 72 hours before their arrival in Italy, or submit to a swab test (Travelbans.org). Since 8 October, Croatia, Greece, and Malta are no longer included in this "sub-list" as defined by the the Order of the Minister of Health of 7 October 2020, but the same measures, still valid, was imposed to Belgium, the whole France, the United Kingdom, the Netherlands, the Czech Republic, Spain (Observatory on Border Crossings Status due to COVID-19).

5. THE EU GUIDANCE AND RELATED COORDINATION MEASURES

If EU law does not necessarily require a uniform response from all Member States in order to grant them with a margin of discretion, coordination may be warranted politically and a common framework is desirable for the consistency of the EU legal order. It is the responsibility of the supranational institutions to guide through the EU law a gradual alignment of national practices, in order to enhance legal certainty for citizens and third country nationals. Therefore, from the beginning of the pandemic, the European Commission has made every effort to ensure a uniform action by all EU Member States and Schengen Associated States (Omran, Mavrommati, 2020), which is even more important if we consider that the challenge has been both of protecting the health of the population whilst avoiding disruptions to the free movement of persons across Europe.

Unilaterally adopted entry bans and restrictions of movement to other Member States has resulted in a patchwork of intra-EU+ mobility restrictions in response to the pandemic. Nevertheless, as the European Commission and the European Council have highlighted in the Joint European Roadmap "the spread of the virus cannot be contained within borders and actions taken in isolation are bound to be less effective" (p.5). In March, the EU stepped in just after many Member States had already taken such measures, so through a number of soft-law instruments (guidelines, communications and recommendations) issued by the Commission, in an attempt to provide guidance as to the application of EU law in the current context and promote a coordinated approach among Member States (Omran, Mavrommati, 2020). In particular, recommendations' adoption by the Council is foreseen in Article 292 TFEU: the Council shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission, and this applies

in the current situation. Despite being non-legally binding, these documents make use of normatively strong language in many of their passages, including the word *should*, which underlines Member States' obligations under EU law (Carrera, Luk, 2020B).

Already on 13 February 2020, the Council urged Member States to act together, in cooperation with the Commission, in a proportionate and appropriate manner, but still stressing on the safeguard of the free movement within the Union. One month later, the epidemiological situation had already deeply worsened: the Commission abandoned the stance of defending open-borders and on 16 March 2020 it published both a *Communication* and *Guidelines for border management measures aiming at protecting the health of the population*. With respect to the external borders, the Communication featured a temporary restriction on non-essential travel from third countries into the EU+ area. To limit the impact of the restriction to the necessary minimum, the recommendation adopted a distinction between (non-)essential travel based on the reason for border crossings, an approach already in use by some European States: only specific categories of travellers with an essential function or need were allowed to enter. This list served as a definition of a novel legal term in the context of emergency situations, that of "essential travel" (Omran, Mavrommati, 2020).

The *Border Management Guidelines*, according to Daniel Thym (2020, p.4), needed to be understood as "a starting point of a legal and political process that gradually specifies the contours of the travel ban and supports the spread of best practices among Member States". Through this document, the Commission started dealing politically with the different restrictive national measures addressed to intra-EU mobility, in order to mitigate their consequence. In particular, the guidelines stressed on the interpretation of the non-discrimination principle as to discourage the refusal of entry to EU citizens or third-country nationals residing on a Member States' territory; the need to assess the proportionality of national measures; lastly, Member States are urged to let (not only essential sectors') frontier workers to cross their borders (Omran, Mavrommati, 2020).

With an eye on the deep economic integration in the Single Market, the right of free movement of workers is reiterated in a complementary document, the *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, issued by the Commission on 30 March. It stresses again on the idea that while restrictions to the right to free movement of workers may be justified on grounds of public health, they must be necessary, proportionate and based on objective and non-discriminatory criteria. Thus, Member States are invited to take specific coordinated measures for frontier, posted and seasonal workers, in order to let them reach the place of work, in particular if they exercise one of the essential occupations listed in the Guidelines. As concerns other jobs, Member States should allow frontier and posted workers to continue crossing their borders to their workplace if work in the sector concerned is still allowed in the host Member State.

The European institutions kept striving on a coordinated approach even at a later stage of the pandemic. In April the discussion about the lifting of restrictive measures and its interweaving with the integrated Single Market was reflected in the publication *Joint European Roadmap towards lifting COVID-19 containment measures*, by the Commission and the European Council. The Roadmap set out recommendations to Member States: whilst recognising their specific situations, the available scientific evidence must be also taken in consideration. A phased approach for a gradual reopening of internal borders is adopted; it should give priority to cross-border and seasonal workers avoiding any discrimination.

Restrictions on travel should first be eased between areas with comparably low reported circulation of the virus.

Since the epidemiological developments across Europe continued their positive trend, the Commission and the Member States allowed for restoring some aspects of the functioning of the Single Market including free movement for essential cross-border travel. On 13 May, the Commission presented the *Communication Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls* as part of a package of support measures relating to Tourism and Transport. The process aimed to take into account the specific epidemiological situations in each Member State and its areas as an objective basis essential to ensure that restrictions are lifted in a non-discriminatory way. Moreover, the Commission continued ensuring and verifying the principle of proportionality in the intra-EU travel restrictions, intervening when considered disproportionate. At the end of May, all Member States started lifting travel restrictions and internal border controls. Some weeks later, the Commission strongly encouraged the remaining Member States "to finalize the process of lifting the internal border controls and restrictions to free movement within the EU by 15 June 2020" (Marin, 2020, p.3). As a result, during summer, most of the internal entry bans had been lifted. Though, when COVID-19 cases started to increase in the Union in August 2020, some Member States reintroduced diverging restrictions to free movement.

To cope with the resurging uncertainty affecting EU citizens, on the 4 September 2020, the European Commission published a *Proposal for a Recommendation on a coordinated approach to the restriction of free movement* in response to the COVID-19 pandemic, which was adopted by the European Council on the 13 October. Even lacking legally binding nature, the Recommendation aims to coordinate the Member States when deciding for the adoption of new measures on grounds of public health; it stresses that restrictions should be 'strictly necessary and non-discriminatory'. For this purpose, three key points were decided: the application of common criteria and thresholds for the reintroduction of restrictions to free movement; a coordinated approach as to the measures applied to persons moving; a precise mapping of the level of risk of COVID-19 transmission based on an agreed colour code. Accordingly, restrictions should be limited to persons travelling from specific "risky" regions, rather than the entire territory of a particular member country (Carrera, Luk, 2020B). For this reason, the drafting of a common map of risk was envisaged in order to support the EU States' decision-making process: first, regional/local data are made available by EU Member States, while the map is weekly updated by the European Centre for Disease Prevention and Control. Areas are marked following a traffic light system: green, orange, red or grey. Member States intending to apply restrictions to persons travelling to or from an red or grey area should inform other Member States and the Commission of its intention according to a timeline. What is significant is that possible measures for travelers (both EU citizens and returning nationals) coming from higher risk areas are already foreseen: undergo quarantine; or undergo a test for COVID-19 infection after arrival. In any case, Member States should not refuse the entry of persons travelling from other Member States.

6. ASSESSING INTRA-EU TRAVEL RESTRICTIONS' COMPATIBILITY WITH EU FREE MOVEMENT LAW

Although the EU soft-law instruments have been issued as an emergency response in order to promote a uniform approach among Member States, according to the case law of the Court of Justice, they need to be taken into consideration by national courts and therefore, they would be used for interpreting the EU law provisions in this time of crisis. In the next future, some measures involving deprivation of the right of movement will likely pass the judicial review by the Courts of the EU, in charge of assessing the legality of such restrictive national measures in the frame of the EU free movement rules (Omran, Mavrommati, 2020). We have detected a series of criteria and benchmarks that both the Courts and Member States need to take into consideration.

The Free Movement Directive clearly foresees public health issues as a permissible reason to adopt exceptional measures; in particular since Article 29 foresees cases of "diseases with epidemic potential", the current COVID-19 crisis undoubtedly fits under this justification. Accordingly, travel bans implemented by Member States may be a justified solution to deal with the emergency (Carrera, Luk, 2020B). The Court of Justice has even recognized the necessity to confer Member States a margin of discretion when recurring to the concept of public [health] since the particular circumstances which justifies it may vary. In addition, that discretion can be reinforced in difficult times by the safeguard clauses in Article 72 and in Article 347 TFEU, influencing the interpretation and possibly even the deviation from other rules of the supranational legal order (Thym, 2020). Furthermore, on the one side, the Directive seems to allow a generous interpretation concerning the possibility to ban those without symptoms too, this is because fighting an epidemic requires preventive action and Article 29 does not, unlike Article 27, limit restrictions to personal conduct (Thym, 2020). On the other side, we will discuss below that the restrictions need to comply with the principle of proportionality: the case law of the Court of Justice confirmed this by insisting on the obligation to perform an individualized assessment considering each case separately before a potential refusal of entry, for which the idea of a travel ban seems to run contrary (Carrera and Luk, 2020).

If there are, therefore, good reasons that travel bans can be justified as a matter of principle, we need to undertake an analysis of the rest of the applicable conditions and requirements under EU law, which will soon call it into question. The patchwork of diverse and incoherent restrictions to the intra-EU free movement of persons is problematic. Member States' discretion is limited even in times of crisis since restrictions imposed should be based on specific and limited public interest grounds, namely the protection of public health. In the case of intra-EU travel bans, matters of compliance of their application as regards to the general principles of EU law arise. In particular, the proportionality and non-discrimination of these domestic decisions will be challenged (Carrera, Luk, 2020B).

The measures temporarily prohibiting entry of nationals and residents of another Eu+ country on grounds of public health are clearly problematic, since this definition immediately makes us wonder about the compliance with the principle of **non-discrimination** under EU law. Non-discrimination between Member States' own nationals and resident EU-citizens is one of the safeguards guaranteed by the Free Movement Directive, in particular in Articles 24 and 17; it is also enshrined in Article 21 of the Charter, Articles 18 and 45 TFEU. The

significance of the non-discrimination principle between EU nationals is also highlighted in most of the coordination measure issued by the EU institutions in the 9 months of emergency. We can read this principle in conjunction with Article 3 of Protocol No 4 of the European Convention on Human Rights: in such a way EU citizens, at least those legally residing in the State's territory, would be elevated to the same level as nationals, to which the right to return cannot be denied. It appears that any measures prohibiting the entry of EU citizens legally residing in the State's territory would be in direct violation of the non-discrimination clause on grounds of nationality (Omran and Mavrommati, 2020). As regards repatriation measures too, assistance by the State should not differentiate between a Member State's own nationals and others lawfully resident in that State (ELI, 2020). Furthermore, Article 27(4) of the Free Movement Directive can be read as a prohibition to the Member State of origin not to apply any travel restrictions to returned nationals on grounds of COVID-19, since EU Member States must admit to its territory its own nationals and their families which have been expelled on grounds of public health "without any formality" (Carrera, Luk, 2020B). For the resident Union citizens, their family or third-country nationals residing in a Member State's territory, non-binding documents from the EU institutions have been stressing from the beginning that a Member State should not deny them the right of entry. This clearly means that if measures are adopted, they should address both nationals and EU citizens. This also applies when the Member States set up appropriate and less severe measures, such as self-isolation upon return from an area affected by Covid-19 provided they impose the same requirements on their own nationals (Carrera, Luk, 2020B). As far as it concerns the free movement of workers, we may recall that in the Guidelines already discussed in the previous paragraph, the Commission has specifically outlined the principle of non-discrimination on the basis of nationality in respect of restrictions to the right of free movement of workers.

The principle of **proportionality** is also particularly critic in relation to the travel bans imposed to avoid the spread of Covid-19: given the variety of restrictions and the wide discretion of States it is not easy to understand whether the measures were, and are, "proportionate to achieve its protective function and if they were the least intrusive option among those available that might achieve the desired purpose" (OHCHR, 2020). Therefore, even though the restrictions appear essential for the protection of public health and to minimizing the number of personal contacts and transmissions, it is much more difficult to determine whether they satisfy the criteria of proportionality and to understand if the bans are congruent with the Article 29 of the Directive 2004/38/EC of the European Parliament and the Council (Thym, 2020, A). In particularly, some issues proved to be extremely critical: firstly, at the time when most EU member states decided to introduce rigorous travel restrictions and bans, the level of scientific knowledge about Covid-19 was not sufficient to judge with certainty that less restrictive measure would protect public health efficaciously (Ramji-Nogales, Golder Lang, 2020). It follows that it was not possible to provide any scientific evidence of the *necessity* for such provisions and whether the same result could have been achieved by decisions less invasive and restrictive of fundamental freedoms (Carrera, Luk, 2020, A). Secondly, the multiplicity travel bans implemented by Member States shows different levels of interference to free movement in the EU (Ramji-Nogales, Golder Lang, 2020). It is, reasonably, attributable to the gravity of the pandemic in each country, but at the same time it creates an extremely jeopardized situation and total lack of policy coherence in the European Union (Carrera, Luk, 2020). Moreover, most of the Ministries of the Interior have failed to provide evidence-based of the necessity and proportionality of border controls and travel bans and their impacts on mitigating the

pandemic. In fact, someone might argue that the mobility restrictions have turned out to be ineffective in preventing the importation and the transmissions of cases of Covid-19 (Carrera, Luk, 2020, A), and in a certain sense the case of Italy, still struggling with the massive amount of cases, fits the bill. Additionally, the United Nations World Health Organization, provided a Recommendation on 29 of February, in which stressed the relevance of seeking alternatives to movement restrictions, which may be useful in slowing down the expansion of the virus but should be temporary, without diverting the resources from more crucial policy needs, such as increasing testing or strengthen the capabilities of response of the States (Carrera, Luk, 2020, A).

It is arguable that, with the increase of global travel and trade, a threat in any part of the world can be a menace to the entire global community (Errett, Sauer, Rutkow; 2020). Under these difficult circumstances, travel bans are considered as the most severe travel restrictions since they can have an economic, social and political impact (Errett, Sauer, Rutkow, 2020). As stated by Daniel Thym in '*Travel Bans in Europe: A Legal Appraisal (Part II) - Immigration and Asylum Law and Policy*', Member States have more leeway when it comes to applying the public health exception. Indeed, Thym points out that such leeway can support a generalized assessment of proportionality, may influence the definition of categories for legitimate travel and, furthermore, it could justify stricter documentation requirements. Following the reflections developed by Daniel Thym, it is possible to demonstrate that this leeway may also influence the interpretation of the public health exception in a specific period in which the European Union represents the epicenter of the epidemic. As a result, the EU travel ban itself concerns not only the protection of Europeans, but also seeks to avoid negative repercussions for third countries (Thym, 2020). According to Thym, it is necessary to consider the issue more at global level and, for this purpose, the EU Member States together should act in a spirit of solidarity in order to support each other in the struggle against COVID-19 and to reduce the danger of contagion both inside and outside Europe to a minimum. To conclude, it can be affirmed that, in times of crisis, rapid action may be necessary, however, it must under no circumstances damage the rule of law in the medium term, upon which the European Union is dependent in order to fulfil its aims (Thym, 2020).

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EU Mobility and Migration Law Course

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THE NEW PACT ON MIGRATION: WHAT FUTURE FOR THE DUBLIN III SYSTEM?

Laura Matri*

ABSTRACT: The New Pact on Migration and Asylum was recently published by the EU Commission, as a way to overcome the Dublin III Regulation, often criticised for being unfair to the countries of first arrival.
After the refugee crisis in 2015/2016, that made all the weaknesses of this system evident, the European Commission proposed a reform of the system of allocation of responsibilities for asylum applications, urging solidarity among all Member States. However no agreement was found on the proposed reform, mostly due to the opposition of the so-called Visegrad countries. Now the EU Commission is trying to promote change again. The purpose of this paper is therefore to analyze the main reforms that approval of the measures included in the New Pact on Migration would determine, in particular comparing it to the current system.

KEYWORDS: Dublin regulation - Common EU asylum system - EU law - new pact on migration

1. INTRODUCTION

The refugee crisis in 2015-2016 made clear that the current EU asylum system is profoundly unfair.
The Dublin III Regulation in theory provides a hierarchic classification of criteria for the identification of the State that should examine an asylum application: first if the asylum seekers are minors, they can be reunited with any relative in the EU territory (and therefore the State which is already hosting the relative will be responsible for the request); second if the applicants for international protection are instead adults (excluding particular cases we are not going to examine here, the specific case can be found in articles 7-17 Regulation, 604/2013, the so-called Dublin III Regulation), they can ask to be reunited only to their minor sons or their spouses (if they have any).

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If none of these situations occur, the responsibility is on the first country of entry. This is the reality in most of the cases, so countries such as Greece and Italy, bear the responsibility for an overwhelming number of asylum requests.

A real change has been asked by the Commission since 2016 and attempts to change the current regulation, by enhancing solidarity among Member States, have been made. The main problem, is that some Member States, namely the so-called Visegrad countries, are not willing to be supportive and to accept refugees in their territories. This state of affairs led recent proposals for reform to end up in a failure.

In this context, the President of the European Commission Ursula von der Leyen launched the New Pact for Migration and asked Member States for more solidarity, in particular in this difficult moment.

The aim of this paper is to present one of the main components of the new Pact on migration, namely the proposed reform of the current system for determining the Member State responsible for an asylum application, and to outline the main differences with the current Dublin III system.

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The New pact on Migration and Asylum:

1. ILLEGAL MIGRATION

The first point of the New Pact on Migration is to create partnerships with third countries, in order to tackle illegal migration in the first place. First of all, this partnership should include support to third countries' economies. Then, it would entail the creation of legal paths to Europe in order to fight trafficking in persons.

2. THE NEW SYSTEM

The migrants, who arrive to Europe illegally, before entering in the European territory will be medically checked, identified and their fingerprints will be inserted in EURODAC, the EU fingerprint database.

It is important to do so, in order to avoid what happens with the current system. The State that it is responsible it is, in most of the cases, the State of first entry: in order to determine which is the State of first entry, fingerprints registration is fundamental. In the current system, people that do not want to stay in the first entry country, try to run away without making their fingerprints being registered and they register only once they reach the country they want to stay in. This can cause problems in determining which State should be responsible for the asylum seeker. In order to avoid unauthorized movements, remedies and/or incentives should be available in the event of or to avoid non-compliance with the rules.

In this respect, a proposed amendment to the long-term residents Directive will make it possible for refugees to obtain the status of long term residents, after three years of legal and continuous protection in that Member State (in the current system, it is possible only after five years). It can also foster the integration process in the host State and it should diminish the unauthorized second movements in EU territory.

According to the New Pact on Migration there should be a division between a normal examination of the asylum request and the fast one: the fast-tracking one will apply to people who have low chances to be accepted and will be examined in a quick way, without entering the Member State territory. This methodology for instance will involve seekers coming from safe countries, people that are considered a threat to the national security and people that try to mislead the authorities. *Non-refoulment* principle and fundamental rights should be any way respected.

In case the person is refused his request for international protection with the fast-tracking procedure will be sent back to his country in order to avoid non-authorized movement and to launch a signal to migrant smugglers.

3. SOLIDARITY MECHANISM:

The proposed solidarity mechanism will be triggered only in risk situation.

The Commission will declare whether a system is "under pressure" or "at risk".

That will be the case for the solidarity mechanism to be enacted. There will be a fair share of contributions, nevertheless States will have three different choices to contribute to the system: relocating migrants in their territories, sponsoring the return in their own countries of the asylum seekers whose application has been rejected (and therefore have no right to stay in Europe) or give operational support; they will also be able to decide to what extent resorting to one method to the other in parallel.

DIFFERENCES WITH DUBLIN III REGULATION:

- According to the statistics "only about a third of people ordered to return from Member States actually leave" (New Pact on Migration, EU Commission). Therefore a common EU system for return should be implemented: the Return Directive should be amended and Frontex should be given operational support on this issue.
- Negative consequences (not specified, yet) in case of unauthorized secondary movement
- Fast-tracking procedure being applied in specific cases
- Implementation of an organized system that activates in critic situation (no more ad hoc solutions).

WHAT FUTURE FOR THE DUBLIN III REGULATION?

At the end of this brief paper, one can contend that, even though the New Pact was presented as a revolutionary step for the EU Asylum system, actually the weak points of the Dublin III Regulation have not been overcome: in fact family reunion is possible only for minors, meanwhile for adults it is still limited to the reunion with the spouse or with the offspring.

Another persisting weakness is the principle of the first country of entry. The first entry State, in non-critical situations, will be still obliged to take the responsibility for the examination of asylum application.

In fact, Member State will be obliged to provide help to other countries but only in emergency situations and still, they will be able to decide whether to host asylum seekers or just to provide economic support for return of the people who do not fit in the criteria for obtain asylum protection.

So, we can say that, even if somehow the New Pact on Migration improves the organization of the system, it does not overcome the substance of the Dublin III Regulation.

2. THE EU LEGAL FRAMEWORK

- **Dublin III Regulation (Regulation 603/2013)**: it describes which State has to take care of the examination of the asylum request. The main criticism is upon the fact that most of the requests end up being examined by the first countries of entry
- **Return directive (Directive 2008/115/EC):** it states common rules for the return of the irregular migrants
- **New Pact on Migration and Asylum**: new Commission proposal for overcoming the Dublin III Regulation on a common asylum system
- **Regulation 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: it completes going more into detail, the New pact on Migration and Asylum
- **Council Directive 2003/109/EC:** it describes the conditions for obtaining as third-country nationals the status of long-term residents in the EU and it regulates the procedures.

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POLICE CONTROL HAVING AN EQUIVALENT EFFECT TO PROHIBITED CHECKS AT EU INTERNAL BORDER: THE SCHENGEN BORDERS CODE AND THE CJEU CASE LAW

Margherita Rosi and Leila Kentache*

ABSTRACT: This paper is aimed at outlining the activity of police control in the internal border area of the Schengen space and how they should not have an equivalent effect to prohibited checks. In this regard, blurring boundaries of Article 23 of the Schengen Border Code not only allow great discretion to each Member in the way those controls must take place, but also leave wide room for interpretation. The Court of Justice has tried to fill this legal vacuum by helping in the definition of police controls at the internal border through mainly three cases: *Melki and Abdeli*, *Adil* and *A*. In the last part of our examination, we elaborated an overview of the best practices and recommendations that the EU provided to foster police cooperation among Member States. Notwithstanding an apparently converging tendency, a fragmented legal panorama persists.

KEYWORDS: Police control – Internal borders – Schengen Border Code – Equivalent effect – Police cooperation

1. INTRODUCTION

Integration has always been a delicate matter in Europe from the very first steps. Recently, the discourse became very animated because of the new wave of populist tendencies widespread in many European Countries. Euroscepticism, political and historical events since 2015 deeply influenced the concept of European integration and its relationship with a space of free movement.

Among historical and social facts, the great influx of refugees at European borders, highlighted and confirmed by Eurostat through an enormous number of asylum seekers registered (more than 1.2 millions), is certainly one of the major causes that led to a strong reaction from Member States and the consequent reintroduction of internal borders (Policy department, Citizens' rights and constitutional affairs, 2016)

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European treaties contain many provisions which contribute in the defining and shaping what is a space of free movement and its features. The Lisbon Treaty deals with the area of freedom, security and justice even before the provision of internal market, demonstrating the great importance and the shift in the consideration of this subject by the institutions (G. Lessing, 2017). Article 67(2) TFEU stated that: "[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals." The creation of an area of freedom, security and justice is subordinated to the respect of Human rights and National legal system.

The main idea behind the institution of the Schengen Area is expressed in Article 3(2) of TEU, i.e. the guarantee that "the free movement of persons [without internal frontiers] is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Specifically, the absence of internal borders is covered in Article 77 TFEU through the duty to develop a policy capable of:

(a) Ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

As we will see in the analysis carried out in this report, legislative developments in the field brought by the last Schengen Border Code leave open the possibility for Member States to reintroduce internal borders in the event of serious threat to public policy or internal security and the possibility up to each Member States of carrying out activities of police controls at internal borders, not equivalent to border checks.

In order to overcome the traditional obstacles stemming from a fragmented legal scenario, the European Union encourages measures for coordination and cooperation between police and judicial authorities and other competent authorities among its Member States, as ruled in Art. 67(3) TFEU.

2. THE EU LEGAL FRAMEWORK

The Schengen *acquis* is a group of several rules and provisions resulting from agreements between European countries, created and implemented to promote a space of free movement among them. In comprehends: the first international agreement signed on 14 June 1985, the 1990 European Treaty implementing the Schengen Agreement and the decisions of the Executive Committee and the Central Group (Council Decision 1999/435/EC).

While the initial decision to abolish internal borders was taken to facilitate the newly created free trade area for goods, the Members have increasingly moved in the direction of protecting the right of free movement of their citizens (Di Pascale, 2020). The pivot of the functioning of the Schengen system revolves around the reinforcement of external borders in favour of a total abolition of internal ones. In fact, the adoption of any of such measures as visa policy, the Schengen Information System, data protection, police

cooperation, judicial cooperation in criminal matters and drugs policies at the external borders are completely justified to guarantee safer movements within the space (COM(2017) 570 final).

At the same time, temporary reintroduction of internal borders seems to be more and more used by Member State to face situations that involve serious threats to public policy or internal security.

Commission Regulation No. 399/2016, the so-called 'Schengen Borders Code', replaced Regulation 562/2006. Article 22 stated that

> Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.

The exceptions to the general rule of free movement are specified in Article 23 of the Schengen Border Code, stating that the abolition of border control at internal borders shall not affect:

> (a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas.

Following Article 2 paragraph n. 11, 'border checks' can be defined as those checks carried out at border crossing points, to ensure that persons […] may be authorised to enter or leave the territory of the Member States.

While the regime of temporary reintroduction is extensively defined in the Regulation through Article 25-27, allowing Member States to act harmonizing common measures, the one of checks within the territory seems to have a much more nuanced definition. Precisely, Article 23 shapes the establishment of different cases giving a further meaning to the first part of the sentence and defining that

> The exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:
>
> (i) do not have border control as an **objective**,
>
> (ii) are based on general police information and experience regarding possible **threats to public security** and **aim**, in particular, **to combat cross-border crime**,

These two points define the general purposes and the motivation for which police controls can be justified. Based on the above definition of border checks in the Schengen border code, it can therefore be deduced that the objective of police checks should not be to control only the border crossing. More precisely, they cannot have the specific aim of

> activity carried out at a border […] in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance. (Art. 2 (10) Regulation n. 399/2016)

Otherwise, the maintenance of internal law and order remain a national prerogative, compatible with secondary law. Commission Recommendation on proportionate police checks and police cooperation in the Schengen area defines some of the cross-border crimes that could be tackled through police checks, such as

> burglaries, vehicle theft, drugs trafficking, unauthorised secondary movement of third country nationals, migrant smuggling or trafficking in human beings.

and identifies an increased risk at the borders and therefore a need to monitor them more effectively (C(2017) 3349 final).
The last two points instead help defining some procedural indications on the nature of those controls, namely

> (iii) (they) are devised and executed in a manner **clearly distinct from systematic checks** on persons at the external borders,
>
> (iv) (they) are carried out on the basis of **spot-checks**;

The duration or prolongation in time of the controls and their systematic nature results in the obligation to check not every border situation, but only those that meet the above-mentioned requirements. Those checks result to be more efficient, because they are flexible and thus they can be more easily adopted to face evolving risks (C(2017) 3349 final). Notwithstanding those clarifications, great discretion is given to Member States for what concerns allocations, along the main transport route for example, and intensity of the controls. The extent of this discretion has been debated by many authors, highlighting its strengths and weaknesses. For some, the wide discretionary power could result in a misuse (or abuse) of controls (Maartje van der Woude, Joanne van der Leun, 2017). For others, *it is not always evident that the human dignity of those seeking to cross Schengen borders is fully respected* (E. Guild, E. Brouwer, K. Groenendijk, S. Carrera, 2015). The position of the European Commission, regarding the entity of those measures is that they should

> (14) […] not lead to obstacles to the free movement of persons and goods **which would not be necessary**, justified by and **proportionate** to those threats to public policy or internal security and that it **fully respects fundamental rights** and in particular the **principle of non-discrimination.**

Despite the presence of these fundamental principles, protected by EU laws, recalled by the Commission in its 2017 Recommendation, there are no common binding measures on States to ensure their application or at least to monitor their non-implementation in compliance with the principle of proportionality, fundamental rights and non-discrimination. The Commission further suggested to develop cross-border cooperation and the exchange of best practices among States, as we will see in the last paragraph of this report.

The EU strategy aims at strengthening and promoting police checks before implementing measures aiming at the reintroduction of borders, defined as a last resort measure (Council Decision (EU) 2017/2466). In this perspective, the greater discretion given to States could allow them to consider conducting police checks instead of reintroducing borders, a much stricter measure contrary to the Schengen spirit.
The Schengen Borders Code is currently the subject of a reform proposal, in particular concerning the rules on the temporary reintroduction of internal border control (Di Pascale, 2020). Developments in the relevant legislation could perhaps resolve some of the uncertainties arising from the Regulation.

3. The main case law of the Court of Justice of the European Union

As previously stated, the Schengen Border Code does not affect police controls carried out by Member States: it leaves the possibility for certain, definite (at least on paper) kind of controls. In particular, Article 23 of Regulation n. 399/2016, allowing for police controls as long as their effect is not equivalent to border checks, leaves the Member States a quite wide discretion as to the modalities through which the police checks are carried out.

Once the substance of this provision is outlined, some clarifications are still due on the conditions on which the national police powers may carry out checks: to assess whether a control is carried out exclusively in response to an intention to cross that border is complex.

The meaning and boundaries of this provision have been outlined more specifically in the jurisprudence of the CJEU – in particular, this paper will draw attention on the cases Melki and Abdeli (Joined cases C-188/10 and C-189/10), Adil (C-278/12 PPu) and A (C-9/16).

Melki and Abdeli – Joined cases C-188/10 and C-189/10, 2010

The main characters of the Melki and Abdeli judgments are Mr Melki and Mr Abdeli, namely two Algerian citizens who were irregularly staying in France. They were controlled by the police (acting under the French Criminal Procedure Code, art 78-2 fourth paragraph) in the area between the land border between France and Belgium and were consequently put under detention. The arrest of Mr Melki and Mr Abdeli triggered a preliminary reference by the Cour de Cassation to the CJEU: the question referred was whether Article 67 TFEU (constitution of an area of freedom, security and justice and absence of internal border controls for persons) precluded national legislation such as the one at issue – providing that the identity of any person may be checked in the area between the land border of France with the States parties with the Schengen Convention (with the aim of ascertaining whether the obligations laid down by law to hold, carry and produce papers and documents are observed). In these circumstances, the Court has provided important criteria for the performance of police controls in the areas of internal borders.

The Court in its reasoning (para 68) underlined that controls provided in the French Criminal Procedure Code are carried out within the national territory, they are not carried out at the time when the border is crossed – thus, "those controls constitute not border checks prohibited under Article 20 of Regulation 562/2006, but checks within the territory of a Member State, covered by Article 21 of that regulation" (now Article 23 of Regulation 399/2016); controls within the territory of a Member State are, pursuant to this article, prohibited only where they have an equivalent effect to border checks. The Court highlighted that, in relation to the equivalent effect to border checks, the objective of the controls at issue was that of "checking whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled" – and not the prohibited one of

ensuring that persons may be authorized to enter the territory of a Member State or leave it. This obligation is not affected by the abolition of border control at internal borders.

The Court has clarified the territorial scope of Article 20 and 21 of the Regulation n. 562/2006 (now Article 22 and 23 of Regulation n. 399/2016): they apply also to border areas within 20 kms from the internal borders – thus, "the fact that the territorial scope of the power granted by the national provision at issue in the main proceedings is limited to a border area does not suffice, in itself, to find that the exercise of that power has an equivalent effect within the meaning of Article 21(a) of Regulation n. 562/2006" (para 72).

What may create conflict with Article 20 and 21(a) of the Regulation, in virtue of legal certainty, is the fact that national law at issue – authorizing controls irrespective of the behaviour of the person concerned and of specific circumstances giving rise to a risk of breach of public order – does not provide any detail or limitation on the national authorities power for what concerns intensity and frequency of the controls; such delimitations would be necessary for avoiding a consistent application of those powers that may result in having equivalent effect to border checks (para 73).

In paragraph 74 the Court defined what would have consequently become a guideline for the future jurisprudence:

> "In order to comply with Articles 20 and 21(a) of Regulation No 562/2006, interpreted in the light of the requirement of **legal certainty**, national legislation granting a power to police authorities to carry out identity checks – a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order – must provide the **necessary framework** for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power. That framework must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks, as evidenced by, in particular, the circumstances listed in the second sentence of Article 21(a) of Regulation No 562/2006"

Thus, Article 20 and 21 of Regulation n. 562/2006 preclude national legislation granting to the police authorities of the Member States the power to check, exclusively in an area of 20 km from the land border, the identity of any person, independently from his behaviour and of specific circumstances giving rise to a risk of breach of public order, to ascertain whether that person fulfills the obligation to hold, carry and produce papers and documents – "where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks" (para 75).

Adil - C-278/12 PPU, 2012

The second judgment worth examining when it comes to the interpretation of Article 23 is Adil (C-278/12 PPU). In this occasion, the Court ruled on the compatibility of a Dutch law on the mobile security monitoring checks ("Mobiel Toezicht Veiligheid" or MTV) with EU law, providing for further clarifications on the legitimacy of police checks.

Mr Adil was travelling on an Eurolines bus when he was stopped during an MTV check by the royal mounted police. The report on the stops, transfer and detention (28 March 2012) discloses that the MTV check, lawful under the Dutch law (Article 4.17 of the decree of 2000), was carried out on the basis of information or experience regarding the illegal residence of persons after they have crossed the border and that it took place within an area 20 kilometers from the land border with Germany. Mr Adil was placed in detention pursuant to the law on foreign nationals, of which Article 50(1) provides that "the officials responsible for border surveillance and for monitoring foreign nationals have the power to stop persons in order to establish their identity, nationality and residence status, either on the basis of facts and circumstances which, measured by objective criteria, give rise to a reasonable suspicion that such persons are illegally resident or in order to combat illegal residence of persons after they have crossed the border" (para 15).

The applicant brought the case before the District Court, alleging that the MTV checks carried out had the equal effect to a border check and that there was no reasonable suspicion of illegal residence. The appeal arrived at the Dutch Council of State, which in its turn referred a preliminary ruling to the CJEU, asking essentially whether Article 21 of Regulation n. 562/2006 (now Article 23 of Regulation n. 399/2016) precluded the exercise of a national power "to carry out checks on persons in areas behind internal borders with a view to establishing whether those persons satisfy the requirements for lawful residence laid down by the Member State concerned".

According to the CJEU, Article 20 and 21 of the Regulation n. 562/2006 allow police checks with the aim of controlling immigration within 20 kilometers from the land border if not equivalent to border checks (Di Pascale, 2020, p. 15). The Court, in recalling the general aim of Article 67(2) TFEU – that it is for the Union to ensure the absence of internal border controls for persons – and Article 72 TFEU – that the Treaties shall not affect the States' responsibilities as to the maintenance of law and order to safeguard security – underlines (in para 62) that the checks provided for under the Netherlands legislation principally seek to deter illegal residence, differently from what a border check's aim would be, i.e. to ensure that persons are authorized to enter the territory. Moreover, the controls at issue are selective.

"It follows", the Court goes on in paragraph 67, "that the objective of combating illegal residence pursued by the Netherlands legislation does not render the MTV checks at issue in the main proceedings equivalent to border checks prohibited by Article 21(a) of Regulation n. 562/2006.

It is at this point of the judgment that the Court reintroduces the conclusions of *Melki and Abdeli* (C-188/10 and C-189/10):

> "Compliance with European Union law and, in particular, Articles 20 and 21 of Regulation No 562/2006, must be ensured by setting up and complying with a framework of rules guaranteeing that the practical exercise of that power, consisting in carrying out identity controls, in the context of combating illegal residence and cross-border crime linked to illegal immigration, cannot have an effect equivalent to border checks"

To identify how specific the legal limitations shall be, the Court states that "the more extensive the evidence of the existence of a possible equivalent effect, (…) the greater the

need for strict detailed rules and limitations laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations, in order not to imperil the attainment of the objective of the abolition of internal border controls set out in Articles 3(2) TEU, 26(2) TFEU and 67(1) TFEU, and provided for in Article 20 of Regulation No 562/2006" (para 75).

This framework should be enough clear and precise, the requirements being that

- The objectives pursued by police controls should be distinguishable in essential respects from those pursued by border checks;
- Police controls shall be based on general police information and experience regarding illegal residence after the crossing of a border and aimed at combating illegal residence and in virtue of this information they should be carried out selectively;
- They should be clearly distinct from systematic checks on persons at the external borders of the Union.

Eventually, the Court ruled that Article 20 and 21 of Regulation n. 562/2006 must be interpreted as not precluding national legislation which enables officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks, in a geographic area of 20 kilometers from the land border, aimed at establishing whether the persons stopped satisfy the requirements for lawful residence (under national law) when those checks are based on general information and experience regarding the illegal residence of persons at the places where the checks are to be made, when they may also be carried out to a limited extent in order to obtain such general information and experience-based data in that regard, and when the carrying out of those checks is subject to certain limitations concerning, inter alia, their intensity and frequency.

A - C-9/16, 2017

The fact that national legislation shall provide limits to this police controls close to the land border has been vividly recalled even in A. The facts of the case concern A, who on the 1st of April 2014 crossed on foot the Europe Bridge on the border between France and Germany. Two German Federal Police officers on patrol in that area saw him and carried out an identity check, on the basis of German national law (*The Law on the Federal Police*), providing for police surveillance to prevent unlawful entry into the territory and criminal offences against the security of the border within an area of 30 kilometers from the land border. A attempted to resist to that check and was charged with the offence of resisting an enforcement officer.

The Local Court of Kehl referred to the CJEU two questions, namely whether Article 67(2) TFEU and Article 20 and 21 of Regulation n. 562/2006 were to be interpreted as precluding a rule of national law such as the one at issue and whether the same provisions precluded national legislation permitting the police authorities to carry out, on board trains and on premises of the railways, identity or border crossing document checks on any person, if knowledge of the situation or border police experience give reason to suppose that that area is used for unlawful entry.

On the first question, the Court, recalling the criteria stemming from Melki and Abdeli and Adil judgments numerous times along its reasoning, underlined in paragraph

46 that the identity and papers checks provided by the German national law are aimed not only at preventing or terminating unlawful entry into the German territory, but also at preventing criminal offences, in particular those "undermining border security as well as those allegedly committed through the crossing of the border". This element was not deemed to be an objective of border control (that would have been contrary to Article 21(a)(i) Regulation n. 562/2006).

Doubts on the legitimacy of such checks arose as to the lack of clear definitions by the national law: "it is not apparent from the order for reference that the checks (…) are based on police knowledge of the situation or experience" (para 55); on these grounds, it seems that "those checks are authorized irrespective of the behaviour of the person checked and of circumstances giving rise to a risk of breach of public order". Moreover, nothing in the national provision clearly draws a distinction between the provided checks and systematic checks on persons at the external borders of the EU (para 56): the national provision contains no details or limitations on the power conferred to the police authorities as to the intensity and frequency of the checks that may be carried out – criteria which was underlined again in *Melki and Abdeli*:

> "In the absence of such a framework in the national legislation, it cannot be considered that those checks, first, are selective and thus not systematic like border checks and, second, are police measures applied on the basis of spot-checks, as required by Article 21(a)(iii) and (iv) of Regulation No 562/2006".

As to the second question, the Court differently confirmed the legitimacy of police checks on the identity or border crossing documents on any person, as long as those checks are based on knowledge of the situation or border police experience – provided that these are subject to national detailed rules and limitations which determine intensity, frequency and selectivity of the checks.

The ECJ in A defined its narrow interpretation of today's Article 23 of Regulation n. 2016/399, especially as to the modalities in which such police controls should be circumscribed by national law.

It is true that the EU has no competence to rule on how its Member States manage their police forces – national order and security remain national competences; nevertheless, the CJEU along its jurisprudence has been targeting legal transparency: Member States shall be able to show that their management of police controls in these land border cases are specifically governed by national law. The EU thus attempted to circumscribe the discretion on the pursue of these controls that States enjoy.

4. COOPERATION AMONG POLICE FORCES: RECOMMENDATIONS, BEST PRACTICES AND EVALUATIONS

In a dimension of national competences, the Schengen area's objective may be undermined by heterogeneity and lacking transparency as to the activities carried out by police forces at the internal borders.

It is true that through primary and secondary law, the Union has laid down the general principles that must be respected and through its jurisprudence, the European Court of

Justice defined some guidelines on the general management and ruling of such activities: a minimum standard seems to be evolving.
Yet, as put forward in the preamble of the *Recommendation of 12.5.2017 on proportionate police checks and police cooperation in the Schengen area* (recital 15):

> The area without internal border control also relies on the effective and efficient application by the Member States of accompanying measures in the area of cross-border police cooperation. The Schengen evaluations conducted so far in the field of police cooperation have highlighted that even though Member States are generally legally compliant with the Schengen acquis, a number of obstacles hamper the practical use of some of the cross-border police cooperation tools available to Member States. Member States should therefore be encouraged to tackle these obstacles to better address cross-border threats.

In the realm of police cooperation, the Recommendation mentions joint police patrols (e.g. on board of cross-border trains), highlighting how such an instrument would enhance security, by overcoming the obstacle of lack of symmetry in controls. Another instrument would be joint threat analysis and cross-border information exchange between Member States, with the view of establishing efficient police checks addressing in a more informed way specific threats.

The EU has been active in promoting guidelines for Member States to pursue police controls in a more efficient way, respecting the fundamental rights and freedoms enshrined in EU law. It is useful to consider the *Schengen Catalogue, Recommendations and Best Practices, Police Cooperation* (15785/3/10 REV 3) in this respect: this Catalogue is a complementary document to all the other relevant documentation on police cooperation.
Its first Chapter, titled *Recommendations and best practices*, opens up with the recommendation for the Member States, on the one hand, to "develop a national plan defining the steps to be taken to establish an organizational structure and strategy to support police co-operation as required by the Schengen Convention" – i.e. the "Schengen Road Map". On the other hand, concerning "best practices", the document states that «A coordination mechanism – "National Schengen Working Group" – could be established to coordinate the national preparatory process to enter Schengen».
A "Central authority" as responsible and point of contact for the cooperation should be designated – this subject will be relevant for the whole cooperation actions: from compiling management information and operational information on police cooperation, to holding a list of requests for which direct assistance can be given in urgent situations. This authority should coordinate with Joint Police Stations and the Police and Customs Co-operation Centres – whose procedure for exchange of information should be regulated in the national plan above mentioned. As to information exchange, any means of communication could be used (respecting existing rules on data protection and data security). Best practices even suggest that nationally authorized officers should be knowledgeable in the commonly spoken language for an efficient bilateral communication.
More detailed guidelines are provided for the function of the Central authority: they are aimed at constituting a network to exchange operational needs to develop practical modalities of their co-operation and improve the quality of their service. As to an efficient

exchange of information, "all Schengen states should be able to provide the relevant and available data on crime statistics and crime trends in their territory" – the document encourages them to create: a joint database structure, meetings between heads of service and joint training sessions.

The Catalogue is quite exhausting, it further concerns the conclusion of agreements among Schengen countries, what an agreement on the setting up of common patrols should include, training and education of the officers involved in the international cooperation… Eventually, it lists a series of relevant legal tools for further best practices and for cross-border operations.

It should one more time be noted that this Catalogue represents a recommendation for Member States: heterogeneity stemming from Member States' competences persists and such soft law can by now initiate a slow and gradual converging path.

In parallel to these suggested best practices, the European Union is attentive in the monitoring of the implementation of Schengen; in particular, through *Council Regulation No 1053/2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis (…)*, the EU institutions set the legal basis for a more persistent control on the States' activities in the application of the Schengen acquis, consisting in monitoring and evaluative works. The latest updates related to this instrument are recent, and they include specifically an evaluation on police cooperation: the *Report from the Commission to the Council and the European Parliament on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to Article 22 of Council Regulation (EU) No 1053/2013*. This evaluation underlines how the legislative framework for Schengen police cooperation "remains more fragmented than other components of the Schengen *acquis*", leaving "great flexibility to the parties in the way they choose to implement it". In fact, apart from the non-binding Catalogue on good practices, the main provisions of the Schengen Convention are mainly implemented through bilateral or multilateral agreements concluded by States.

All in all, the evaluation describes how Member States are generally compliant with the Schengen *acquis* in this field of police cooperation: no great deficiencies were identified, solely a few mainly in the area of information exchange. The identified areas in need for improvement in the view of reaching the full potential of police cooperation are: strengthening law enforcement information exchange, the development and sharing of strategic crime threat assessments and risk analyses to allow a better joint response to cross-border crime and revising the bilateral or multilateral agreements concluded by Member States to extend and facilitate the possibilities for operational cross-border cooperation (COM (2020) 779 final, p. 11).

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THE NOTION OF 'SAFE THIRD COUNTRIES' AND THEIR IMPLICATIONS FOR AN APPLICATION FOR INTERNATIONAL PROTECTION

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ABSTRACT: This paper aims at analyzing the concept of "Safe Countries" in European Migration and Asylum Law, focusing in particular on the notion of "Safe Third Countries", countries in which the asylum seeker has transited and to which he/she may be returned because the Member States acknowledge that the asylum application should have been abided there. Most recently, the notion of "Safe Third Country" has been used in EU migration law to guarantee the viability of one of the most important documents at the centre of the EU response to the refugee crisis: the EU-Turkey Statement. A transit country may be designated as safe only if the competent authorities decide that the applicant's life and liberty are not threatened by reasons such as race, religion, or sexual orientation.

KEYWORDS: Asylum – Refugee – Safe Country – Safe Third Country – EU-Turkey Statement

1. INTRODUCTION

Asylum is a fundamental right first recognised in the 1951 Geneva Convention on the protection of refugees, granted to people fleeing persecution or serious harm in their own country, and who are therefore in need of international protection (European Commission, 2014).

Since 1999, the European Union has been working to create a Common European Asylum System (CEAS), a legal framework covering all aspects of the asylum process, in order to develop a common policy on asylum, subsidiary protection and temporary protection within the EU consistent with the Geneva Convention. One of the main assumptions of the CEAS is that all Member States adhere to international human rights law, and therefore that refugees and asylum seekers will be able to live under acceptable and fair conditions. This presumption is connected to the principle of mutual recognition, a general principle found in many areas of European Union law: in line with this, the concept of "safe third country" has developed, meaning that some countries are to be considered "safe"

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for an international protection applicant to have their request examined (ECRE, 2014).

This paper aims to examine this notion of "Safe Countries", focusing in particular on the notion of "Safe Third Country". After an overview of the EU legal framework on the matter, we take a look at an example of this notion in practice within EU asylum policy: the EU-Turkey Statement, agreed upon in 2016. Finally, we briefly examine recent data and statistics on asylum seekers in the EU, provided mostly by Eurostat.

2. THE EU LEGAL FRAMEWORK

By definition, a "safe country" is a country in which human rights are granted, the situation is governed by the law and no persecution takes place against the individuals. First of all, a distinction needs to be made. In the notion of "safe country" two different elements take place: safe country of origin and safe third country.

> "A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict." (Annex I, Directive 2013/32/EU on common procedures for granting and withdrawing international protection).

The legal basis for the notion of "safe country of origin" emerged in 2005 under the Community law in the first Asylum Procedures Directive. The transposition of the directive into national legislations appeared in the adoption by numerous Member States of the lists of countries which were considered safe. Some Member States recently adopted this list as a measure taken in the context of the crisis of EU's recent migration policies.

According to the Protocol n. 24, all the Member States must be considered "safe countries of origin", except from some extraordinary cases, such as:

1. The MS has availed itself of the derogation to the ECHR under Art.15 of that Convention.
2. If Art.7 TEU has been triggered: Art.7 refers to the political procedure allowing the Member State and the EU institutions to declare that the serious risk of the systemic violations of the values of European Union or of fundamental rights risks to occur (or it already happened) in a Member State. (Ex: Poland)

3. On the basis of a unilateral decision of a MS. In such a situation, the Council must be informed in advance and the application must be presumed baseless.

The "safe country of origin" principle allows states to deny the access to the asylum system to refugees, arguing that human rights are protected in a sufficient way in their country of origin. This principle is differently developed in the "safe third countries", where it's possible that refugees can be removed from the EU's external borders or sent back to "safe" countries where they previously stopped to produce their asylum applications.

A safe third country, a non-EU country, represents a country in which the asylum seeker has transited and to which he/she may be returned because the Member States acknowledge that the asylum application should have been abided there. As a consequence, the application for asylum is examined by the safe third country and not by the Member State.

> "A third country can only be considered as a safe third country (...) where: (a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations; (b) it has in place an asylum procedure prescribed by law; and (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies. (...) The applicant shall be allowed to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his or her particular circumstances." (Article 39(2) of directive 2013/32/EU on common procedures for granting and withdrawing international protection).

Relating to Art. 38 of the Asylum Procedures Directive, a transit country may be designated as safe only if the competent authorities are "satisfied" that the applicant's life and liberty are not threatened for certain reasons, such as: race, religion, nationality, membership of a particular social group or political opinion, sex or sexual orientation.

Another concern of the authorities is to make sure that the applicant does not face any risk of harm to his rights, any torture or inhuman treatment, removal to a country where there would be a chance of persecution or exposition to the risk of violation of their human rights. In conclusion, there must be a valid connection between the person and the transit country to which they could be returned. Awaiting the decision of the competent authority, the person cannot be removed to the transit country, which is considered safe.

Safe third countries can be furthermore divided into 4 other categories, provided by Arts 35-39 Dir. 2013/32:

1. Art.38: "Safe third country". In this case, the national authority must be satisfied that the person seeking international protection will not go through persecution, respect of non-refoulement, and that the person

concerned can lodge an application for refuge and can be granted appropriate protection.

2. Art. 39: Safe third European Country". This category is addressed to the European States, not members of the EU, which meet all the requirements listed in Art. 39, such as:
    - Ratification of the Geneva Convention without geographical limitations.
    - Has in place asylum procedures prescribed by law.
    - Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.
3. Art. 35: "First country of asylum":
    - He or she has been recognized in that country as a refugee and can still avail himself/herself of that protection.
    - He or she enjoys sufficient protection in that country, including the benefit of the principle of non-refoulement.
4. Arts 36-37: "Safe country of origin". Country of nationality or habitual residence in case of stateless persons. (Presumption of safety).

The aforementioned categories have important consequences for the individual concerned. Each one of the Member States is authorized to outline a list containing safe third countries. If an applicant happens to be a national of one of these States, his/her application will surely be rejected, and the applicant can be deported to his/her country of origin. Furthermore, protection will not be granted unless a prior individual examination or a considerable assessment of the application take place.

2.1. THE NOTION OF "SAFE THIRD COUNTRY" IN PRACTICE: THE EU-TURKEY STATEMENT

The notion of safe third countries played a key role in guaranteeing the viability of one of the most important documents at the centre of the EU response to the so-called refugee crisis: the EU-Turkey Statement.

This Statement, which took effect in March 2016 following an agreement between EU Heads of State or Government and Turkey, aimed at relieving migratory pressure on the Eastern Mediterranean route, striving to replace irregular and dangerous pathways from Turkey to the EU with legal and safe routes to Europe for those eligible for international protection.

The agreement stipulated that all new irregular migrants and asylum seekers crossing from Turkey to Greece were to be returned to Turkey, on the implicit

premise that it was a "safe third country". The Turkish government would also have to take necessary measures to prevent new irregular routes to the EU, whether by sea or by land, from opening, and cooperate with Europe in improving humanitarian conditions inside Syria. In return, the Statement specified that for every Syrian refugee returned from Greece to Turkey, another Syrian would be resettled to the EU from Turkey. The EU also agreed to substantial additional funding for a Facility for Refugees in Turkey, the activation of a Voluntary Humanitarian Admission Scheme, the acceleration of the visa liberalisation roadmap for Turkish citizens to travel to the EU, and a re-energisation of Turkey's accession process (European Commission, 2016).

The EU-Turkey Statement was met with a fair amount of criticism by academics, INGOs and NGOs in the field of migration, as well as international bodies such as the UNHCR. One issue raised was that Turkey could not be considered a "safe" country for refugees on account of the widespread unrest and political instability in the country, as well as alleged human rights violations (Cortinovis, 2018). Some national courts also raised doubts, claiming that since Turkey had ratified the Geneva Convention with a geographical reservation, meaning that the country's protection obligations under the 1951 Refugee Convention are restricted only to people originating from Europe (Tsiliou, 2018)

Nevertheless, it continues to be implemented and is often cited by EU institutions as a success in migration policy.

A report published by the European Commission in March 2020 found that since the EU-Turkey Statement:

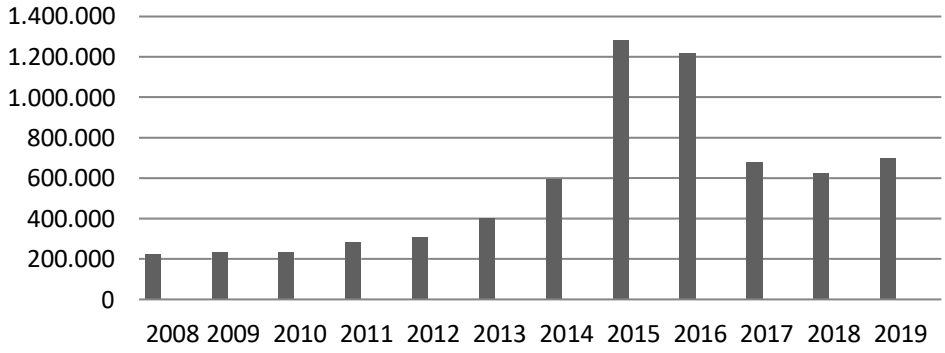
- Irregular entries to the EU through Turkey have dropped by 94%
- The number of deaths in the Aegean Sea has also decreased significantly
- Around 27,000 Syrian refugees have been resettled to an EU Member State
- A total of €6 billion have been allocated to help refugees and host communities in Turkey through the Facility for Refugees for the period 2016-2025
- A total of 18,711 migrants have returned voluntarily from Greece to the country of origin through the Assisted Voluntary Return and Reintegration Programme

All in all, however, the Commission calls for further action to strengthen the return process, which remains slower than they strived to achieve, especially with regards to Syrians, of which only 2,735 have been returned in the past four years (European Commission, 2020)

3. DATA

2019 saw a rise in applications for international protection in Europe for the first time since the so-called refugee crisis of 2015, with over 700,000 requests made in EU countries – 11% more than those lodged in 2018 –, with some countries like France and Greece receiving more applicants in 2019 than during the crisis itself (European Asylum Support Office, 2020).

Figure 1: Asylum applicants - annual aggregated data (2008-2019)

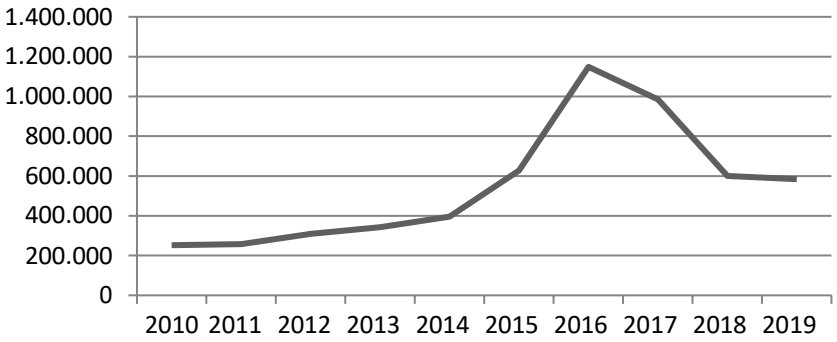


Source: Eurostat [TPS00191]

As per previous years, in 2019 there were more applications for international protections (740,000) than detections of illegal crossings (140,000), even though some border countries saw an increase in illegal border crossings compared to the previous year, such as Greece, Cyprus and Bulgaria. Two-thirds of applicants were male, and nearly half were between 18 and 34 years-old. A quarter of all applicants came from just three countries: Syria (down 6% on the previous year), Afghanistan (up 28%) and Venezuela (up 103%) (European Asylum Support Office, 2020).

While the last few years have seen a rise in applications for international protections, however, the number of first instance decisions taken on those has declined significantly compared to 2016. In 2019, just under 585,000 decisions on first instance applications were taken out of the 740 000 applications lodged, slightly less than the 601,000 taken in 2018, but almost half of those taken in 2016 (1,148,915), as shown in the following figure:

Figure 2: Frst instance decisions on applications in Europe (2010-2020)



Source: Eurostat [MIGR_ASYDCFSTA]

Two fifths of all first instance decisions in 2019 were positive, with just over half of them granting refugee status to the applicants. Applicants from certain countries, such as China, Egypt, Iran and Turkey, were granted refugee status more often than subsidiary protection, while most positive decisions issued to Venezuelans granted humanitarian protection (European Asylum Support Office, 2020).

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