Screening of third-country nationals at the EU's external borders

OVERVIEW

In September 2020, the Commission put forward a new pact on migration and asylum, setting out a comprehensive approach to European Union (EU) migration policies that links external borders, asylum, return systems, the Schengen area of free movement and the external dimension of migration. The pact includes a proposal for a new regulation on the screening of third-country nationals at external borders aiming to clarify and streamline the rules on dealing with third-country nationals who are not authorised to enter or stay in the EU.

The proposal would introduce a pre-entry screening procedure allowing national authorities at external borders to channel irregular third-country nationals to the appropriate procedure, i.e. asylum or return procedures. The screening would start with preliminary health and vulnerability checks and finish with the transmission of a debriefing form to the appropriate authorities. The proposal would provide for the establishment, by each Member State, of an independent monitoring mechanism for fundamental rights.

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<th>Proposal for a regulation introducing a screening of third-country nationals at the external borders</th>
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<td><strong>Committee responsible:</strong></td>
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| **Next steps expected:** | Adoption of report in committee |
Introduction

In September 2020, the Commission put forward a comprehensive pact on migration and asylum. It builds on previous proposals and seeks to overcome the deadlock on the reform of the common European asylum system (CEAS).

Back in 2015, the peak in the arrival of high numbers of asylum-seekers and irregular migrants in the EU exposed deficiencies in the management of the EU’s external borders and of the CEAS. This triggered a series of reform initiatives aimed at remedying these deficiencies. In its 2015 communication on the European agenda on migration, the Commission set out four priorities for EU migration policies: (1) the reduction of incentives for irregular migration; (2) better border management; (3) a strong common asylum policy; and (4) a new policy on legal migration. The agenda also introduced a hotspot approach designed to provide emergency assistance for frontline Member States faced with the arrival of disproportionate numbers of migrants.

Progress has been made on measures to strengthen the management of the external borders. In September 2016, Frontex was transformed into the European Border and Coast Guard Agency, entrusted with responsibility (shared with national border authorities) for EU integrated border management. The mandate of Frontex was further revised in November 2019. The Schengen Borders Code was amended in March 2017 obliging Member States to carry out systematic checks on all persons crossing the EU’s external borders. A legislative package to strengthen the architecture of the EU’s information systems for migration and law enforcement comprised: revision of the Schengen information system (SIS), establishment of the entry/exit system (EES) and of the centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN, and interoperability regulations. A proposal to amend the visa information system (VIS) was put forward in May 2018.

Between May and July 2016, the Commission presented a package on the reform of the CEAS. Although negotiations between co-legislators on some of the proposals have progressed, significant disagreements remain, with particular regard to the revision of the Dublin system. Together with the proposal for a new regulation on screening third-country nationals at external borders, the pact also includes: a proposal for a new regulation on asylum and migration management; a proposal for a new regulation on asylum procedures; and an amended proposal for a regulation on Eurodac.

Context

The number of people trying to enter the EU irregularly has decreased significantly since 2015. Frontex reported about 142 000 detections of irregular EU border crossings in 2019, a 92 % decrease compared with 2015. While this trend continued in 2020, the number of irregular crossings detected at the EU external borders started to rise again in 2021, reaching 200 000 (see Figure 1).

The number of applications for international protection in EU Member States has also decreased since 2015, albeit less dramatically. According to data provided by the European Agency for Asylum (EUAA), about 740 000 applications for international protection (including repeated applications) were received in 2019, a 47 % decrease compared with 2015. After a further decrease in 2020, the number of applications rebounded in 2021, when 617 800 people applied for international protection in the EU+ area.
(EU-27, Norway and Switzerland). Despite the drop in applications up to 2019, the **backlog of cases** awaiting decisions remained significant. There were about 912,000 pending applications (at all instances) at the end of 2019. Moreover, as reported by the Commission, the share of applicants arriving from countries with recognition rates of less than 25% increased from 14% in 2015 to 67% in 2017, before decreasing to 57% in 2018 and 26% in 2019.

With regard to the **return of third-country nationals** who are not authorised to stay in the EU, data from Eurostat show stable trends until 2019, with respect to the numbers of both return decisions and effective returns (see Figure 2). The drop in the numbers recorded in 2020 is explained by the impact of the Covid-19 pandemic and by the discounting of UK data after Brexit. It is notable that of the reported 4.1 million people ordered to leave in the 2012-2020 period, only 1.7 million (40%) were effectively returned.

### Existing situation

#### Border checks

**Regulation (EU) 2016/399** on the Schengen Borders Code (SBC) sets out the rules governing the crossing of the EU’s external borders. According to the SBC, **border control** consists of border checks carried out at border crossing points and of border surveillance, which is carried out between border crossing points in order to prevent people from circumventing border checks. When crossing external borders, third-country nationals are subject to thorough checks, including verification of identity and nationality, and systematic consultation of relevant databases such as the SIS, the VIS (including fingerprint verification, where applicable), and Interpol’s database on stolen and lost travel documents (SLDT). Since April 2017, EU, EEA, and Swiss citizens have also been subject to systematic checks against SIS, SLDT and national databases of stolen, misappropriated, lost and invalidated travel documents. Among the entry conditions imposed on third-country nationals, Article 2 SBC requires that they not be considered to be a **threat to public health**, defined as infected with ‘any disease with epidemic potential as defined by the international health regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States’ (Article 2 (21) SBC). As pointed out by the Commission, the SBC **does not provide for any specific obligation concerning medical checks** on third-country nationals apprehended during border surveillance.

#### Return procedure

Third-country nationals who do not fulfil all the entry conditions and who are not authorised to enter are **refused entry** to the territories of the Member States. Third-country nationals apprehended while staying illegally on the territory of a Member State are subject to the procedures established by **Directive 2008/115/EC** on common standards and procedures in Member States for returning illegally staying third-country nationals. According to Article 2(2)(a) of this directive, Member States may decide not to apply the directive in the case of third-country nationals who are subject to a refusal of entry or who are apprehended or intercepted ‘in connection with the irregular crossing’. As pointed out in the EPRS implementation assessment study, the formulation ‘in connection with the irregular crossing’ provides Member States with broad margin for manoeuvre, which can lead to systematic refusal of people apprehended in border areas as per the minimum standard laid down in the directive.
Asylum procedure

Article 6 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection provides that Member States shall ensure that those other authorities that are likely to receive applications for international protection (such as the police, border guards and immigration authorities) have the relevant information and receive the necessary level of training to inform applicants as to where and how to lodge applications for international protection. Article 43 of this directive provides for the possibility that Member States apply a border procedure in order to decide, at the Member State’s border or in transit zones, on the admissibility of an application and/or the substance of an application in certain cases. In its September 2020 staff working document, the Commission reports that 16 Member States have border procedures or specific procedural arrangements and the use of these procedures seems marginal. According to the Commission, Member States may be reluctant to use the border procedure due to difficulties in assessing quickly whether an applicant could qualify for processing in the border procedure, the length of appeal procedures, the need to invest in specific infrastructure and personnel, and the weak prospects of swift returns for rejected applicants.

Article 3(b) of the SBC provides that the application of the regulation shall not bring prejudice to the rights of refugees and persons requesting international protection. Annex VI of the SBC provides that, at land borders, ‘a third-country national asking for international protection on Member State territory shall be given access to relevant Member State procedures in accordance with the Union asylum acquis’. However, according to the Commission, the SBC ‘does not provide for sufficient instructions for the border guards on how to handle third-country nationals seeking international protection at border crossing points’.

Implementation issues

Beyond legal provisions, a major challenge remains that of addressing persistent deficits in the implementation of rules on asylum and border controls. This is exemplified by the de facto suspension of border checks at several external borders in the summer of 2015, and by repeated allegations of rights violations and pushbacks at external borders, including incidents denounced by the Council of Europe Commissioner for Human Rights. Deficiencies in the hotspots have also been revealed by the tragic destruction by fire of the Moria reception and identification centre on the Greek island of Lesvos in September 2020.

Parliament's starting position

The European Parliament has consistently called for solidarity and fair sharing of responsibility in the area of asylum and for action to reinforce the EU’s external borders in order to address migration and security challenges. In its resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, Parliament stressed the need to fully implement the common rules on asylum so as to achieve harmonisation and solidarity among Member States. It also reiterated that the integrity of the Schengen Area and the abolition of internal border controls were dependent on effective management of external borders, with high common standards applied by all Member States. The Parliament supported the targeted revision of the SBC aiming to reinforce border checks at external borders, as well as the reinforcement and upgrade of Frontex.

Council starting position

Substantial disagreements have persisted in the Council on key issues relating to CEAS reform, such as the solidarity mechanism under the Dublin system and the border asylum procedure. Despite progress on several proposals, the package approach taken by the Council meant that no instrument could be adopted before reaching an agreement on all proposals. In the meantime, the
Council was able to agree more speedily on a number of proposals aimed at strengthening controls at the external borders, including the upgrade of Frontex and the revision or expansion of EU information systems for border management. The Council has also given fresh impetus to the development of an EU integrated border management (EUIBM) strategy as a shared responsibility of the Union institutions and the Member States.

Preparation of the proposal

The new pact on migration and asylum consists of a package of legislative and non-legislative measures aiming to exploit synergies between asylum, external border controls, and return procedures. According to the Commission, the pact builds on the work and exchanges carried out in the context of the ongoing legislative negotiations in the areas of asylum and migration, as well as on additional consultations with Member States, the European Parliament, and various stakeholders. On 30 July 2020, the Commission published a roadmap for the new pact on migration and asylum, inviting citizens and stakeholders to provide feedback; it received 1,829 answers by 27 August 2020, the deadline set for the consultation. The proposal for a regulation on asylum and migration management is accompanied by a Commission staff working document containing data and elements supporting the proposed approach. No impact assessment was carried out for the proposal on the screening of third-country nationals at the external borders.

The changes the proposal would bring

The proposal seeks to clarify and streamline the rules on dealing with third-country nationals who are not authorised to enter or stay in the EU, in order to increase the efficiency of the management of the EU’s external borders and protect the Schengen area. It would establish a pre-entry screening procedure allowing irregular third-country nationals to be channelled to the appropriate procedure, i.e. asylum or return procedures.

The screening procedure would apply to third-country nationals who: (1) are apprehended in connection with an unauthorised crossing of the external border; (2) are disembarked following a search and rescue operation; or (3) apply for international protection at external border crossing points or in transit zones and do not fulfil the entry conditions. The procedure would not apply to third-country nationals: (1) who fulfil the conditions of entry set out in Article 6 of SBC, for whom the Member State is not required to take the biometric data pursuant to Article 14(1), and of Regulation (EU) 603/2013 (Eurodac Regulation) for reasons other than their age; or (2) with regard to whom the Member State may or shall apply a derogation as regards the entry conditions in line with Article 6(5) of SBC (e.g. who hold a residence permit or a long-stay visa from a Member State, or who overstayed their visas).

Elements of the procedure

The screening procedure would consist of:

1. preliminary health and vulnerability checks,
2. identification based on information in European databases,
3. registration of biometric data in the appropriate databases (i.e. fingerprint data and facial image data),
4. security check through a query of relevant national and Union databases (via the European search portal),
5. the filling out of a de-briefing form, and
6. referral to the appropriate procedure.

The purpose of the new preliminary health check would be to identify any needs for immediate care or isolation on public health grounds. The competent authorities would have the possibility to decide, however, not to carry out a preliminary medical screening based on the circumstances concerning the general state of the individual third-country nationals concerned and the grounds
for directing them to the screening' (Article 9). Member States would have to designate qualified medical staff to carry out the health check, and may involve child protection authorities and national anti-trafficking rapporteurs in cases of minors or vulnerable persons.

The screening procedure would end with the completion of a de-briefing form, which would be transmitted to the authorities examining applications for international protection or to the authorities competent for return. In the case of applicants for international protection, the authorities responsible for the screening would also indicate any elements that may seem to be relevant for determining whether the competent authorities should submit the application of the third-country national concerned to an accelerated examination procedure or to the border procedure. The amended proposal establishing a common procedure for international protection in the Union would provide for a fast border asylum procedure to be applied to applicants from countries with low recognition rates for international protection and to applicants who make fraudulent or abusive claims or who pose a threat to national security.

The deadline for completing the screening procedure would be set at five days when applied at the external border, and three days when applied within the territory. The five-day limit at external borders could be extended exceptionally by a maximum of five days ‘where a disproportionate number of third-country nationals needs to be subject to the screening at the same time’ (Article 6). It would be for the Member States to determine the appropriate locations for the screening, as well as whether the procedure required detention.

Member States would establish an independent monitoring mechanism to ensure the protection of the fundamental rights of the persons concerned. The monitoring mechanism would also concern the application of the national rules on detention during the screening and compliance with the principle of non-refoulement. The monitoring mechanism would be part of the governance and monitoring of the migratory situation provided for in the proposal for a new regulation on asylum and migration management. The EU Agency for Fundamental Rights would establish general guidance and, at the request of the Member States, support the development of the monitoring mechanism for the protection of fundamental rights. The competent authorities would be assisted or supported in the performance of the screening by experts or liaison officers and teams deployed by the Frontex and EASO/European Union Agency for Asylum, within the limits of their mandates.

The proposal would complement the rules on border control at the external borders set out in the SBC. In order to provide competent authorities carrying out the screening with access to relevant databases, the proposal would bring amendments to the VIS Regulation (EC No 767/2008), the EES Regulation (EU) 2017/2226, the ETIAS Regulation (EU) 2018/1240, and Regulation (EU) 2019/817 establishing a framework for interoperability between EU information systems in the field of borders and visas.

Budgetary implications

The Commission’s estimate of the financial resources necessary to support the implementation of the proposal is €417 626 million for the 2021-2027 period. The main costs would be related to infrastructure upgrades, access to the relevant databases, recruitment of additional staff, equipment, training and the setting up of the independent monitoring mechanism for fundamental rights. The expenses would be covered by the resources available to the Member States under the 2021-2027 multiannual financial framework.

Advisory committees

In its opinion on the New Pact on Migration and Asylum, the European Economic and Social Committee (EESC) considered that ‘the projected pre-entry screening system and border procedures are inadequate’ as they do not provide enough procedural guarantees for the respect of fundamental rights and do not address serious concerns about the conditions of reception for
migrants and asylum-seekers. The EESC also questioned the feasibility of the procedure and worried that the tight deadline would put greater pressure on countries to take a swift decision leading to a lower standard of protection.

In its opinion on the New Pact on Migration and Asylum, the European Committee of the Regions (COR) called for the proposed screening procedure to be conducted in a way that allows for an effective identification of “particular vulnerabilities” at an early stage. It also pointed out that the maximum period of five days provided for this screening will in many cases not be enough to effectively identify special protection needs.

National parliaments

The deadline for the submission of reasoned opinions on grounds of subsidiarity was 21 January 2021. The Hungarian National Assembly presented a reasoned opinion on the new Pact on Migration and Asylum arguing that ‘the competences of Member States are restricted’ and that ‘the geographic, economic and demographic conditions of the Member States are less recognised’.

Stakeholder views

The Commission’s new narrative surrounding the migration and asylum pact, which frames migration as a positive and ‘normal’ phenomenon, has been generally welcomed. Whereas some commentators have acknowledged the pragmatism of the Commission in putting forward a complex package-deal, others have warned of the risk of undue intergovernmentalism that would provide supranational legitimacy for certain problematic national practices.

A joint statement signed by more than 80 civil society organisations called the pact a ‘missed opportunity to fundamentally reform the Dublin system’. With regard to the screening procedure, the statement raised concerns about the discretion of Member States in respect of medical and vulnerability screening, reception conditions during screening, and the rights of people undergoing screening, including access to information, access to a lawyer, the right to challenge the decision, the right to privacy and data protection. Refugee Rights Europe voiced concerns about the adequacy of the preliminary vulnerability checks, and called the border screening ‘essentially a truncated asylum procedure with diminished due process guarantees’. In the same vein, Lyra Jakulevičienė of Mykolas Romeris University, Lithuania, worried that the proposal may blur the distinction between asylum-seekers and migrants, and that the new screening procedure would play a substantial though unwarranted role in the processing of asylum applications. Daniel Thym of University of Konstanz, Germany, questioned the novelty of screening as, he argued, all the elements of the screening procedure apart from explicit health checks were already provided for in existing legislation. Concerns about the practical impact and the effectiveness of the proposal in addressing existing shortcomings are broadly shared by commentators.

The provisions establishing a monitoring mechanism for fundamental rights have been broadly commended. As pointed out by the European Council on Refugees and Exiles, a monitoring mechanism managed by the Commission should not be a substitute for independent border monitoring. To ensure the independence of the monitoring mechanisms, Sergio Carrera of the Centre for European Policy Studies recommended creating a role for the European Ombudsman and the network of national ombudsmen, as well as for national data protection authorities.

Legislative process


In the Council, the proposal has been discussed together with the other proposals of the Pact. In December 2020, the German Presidency of the Council indicated that general support for the screening proposal existed among the Member States but acknowledged that there were concerns
about the feasibility and the practical implementation of the screening procedure (such as the place of the screening, the short deadlines, the use of detention, and additional financial burdens). Under the Portuguese Presidency, preparations at technical level reached deadlock due to slow progress on the other proposals in the package. Under the Slovenian Presidency, the Member States further discussed possible options for the obligation to prevent unauthorised entry. In February 2022, at an informal meeting in Lille, Home Affairs ministers endorsed the proposal of the French Presidency to take a gradual approach on asylum and migration negotiations. The issues of screening and registration at external borders is part of the first step of this approach.

In the European Parliament, the proposal has been assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE). Rapporteur Birgit Sippel (S&D, Germany) issued a draft report on 16 November 2021. To ensure compliance with EU asylum law, the rapporteur introduced amendments upholding the right of applicants for international protection to enter the territory (in line with the derogations in the Schengen Borders Code), and the right to remain in the Member State pending the examination of their application. The draft report maintained that the Reception Conditions Directive should apply in the screening from the moment an application for international protection is made.

The rapporteur rejected the Commission’s proposal also to apply the screening procedure to third-country nationals found within the territory, because, as concluded in the EPRS substitute impact assessment on the Pact, this is not covered by the chosen legal basis (Article 77(2)(b) TFEU). Other amendments sought to make health and vulnerability checks mandatory elements of the screening (with special guarantees for unaccompanied minors) and to expand the scope of the fundamental rights mechanism beyond the screening procedure (also by involving non-governmental institutions and organisations). Lastly, the rapporteur opposed granting authorities carrying out the screening ‘blanket access rights’ to several EU information systems, and proposed to allow them access to the Common Identity Repository with the possibility to query the system through those authorities that already have access rights. After further discussions on the more than 800 amendments tabled, the draft report will be put to a vote in the LIBE committee in the coming months.

EP SUPPORTING ANALYSIS


OTHER SOURCES

Introducing a screening of third-country nationals at the external borders, European Parliament, Legislative Observatory (OEIL), 2020/0278(COD).
ENDNOTES

1 The Schengen Borders Code applies to anyone crossing the external borders of the Schengen area, as well as those of Bulgaria, Cyprus, Croatia, and Romania from third countries.

2 Member States can decide, following an assessment of the risks, to temporarily replace systematic checks at specified border crossing points with targeted checks (Article 8(2a) SBC).

3 A threat to public health is defined as ‘any disease with epidemic potential as defined by the international health regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States’ (Article 2(21) SBC).

4 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under ‘EP supporting analysis’.

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