

THE NEW PROPOSAL FOR A SCREENING PROCEDURE AT THE EXTERNAL BORDERS

COMMENTS AND SUGGESTIONS

1) Screening procedure: towards a consolidation of the hotspot approach?

With the Proposal for a Regulation introducing a screening of third-country nationals at the external borders [COM (2020) 612 final], the European Commission proposes the introduction of a mandatory border screening procedure. The adoption of this measure would amount to a consolidation of the selective and excluding character of the current border procedures.

The approach of the Regulation proposal is clear: it aims at a generalized application of screening procedures, conducted in places located nearby the external border. The assessments are to be carried out within five days from the apprehension. However, this period can be extended by a maximum of an additional 5 days in exceptional circumstances, such as the influx of a disproportionate number of foreigners which need to be subject to the screening at the same time.

The Regulation proposal provides that checks at the external border shall be carried out with respect to foreign nationals who are intercepted following an unauthorized crossing of the external border or search and rescue operations at sea, regardless of whether they have applied for international protection. Moreover, checks involve those who apply for asylum in transit zones or at border crossings and do not meet the requirements for entry set out in the Regulation 2016/399 (Schengen Borders Code). The procedure could also be applied to foreign nationals who are intercepted on the territory of the Member State and are unable to prove that they have crossed the border legally. In this circumstance, the screening would not take place at the border but anywhere within the territory.

National authorities are provided with a Standard de-briefing form, attached to the Regulation proposal, to collect all relevant information during the screening procedure. On the basis of such information, foreign nationals would be redirected towards either towards return, refusal of entry or the proper procedure for the assessment of the asylum application (either border, accelerated or ordinary procedure). In the latter case, the authorities should identify the appropriate asylum procedure based on the Procedures Regulation proposal made by the Commission in 2016 and revised in the framework of the New Pact on Migration and Asylum, where all the recent proposals on migration policy made by the Commission are grouped.

ASGI highlights that screening procedures like those envisaged in the proposal have been implemented since 2015 in the disembarkation areas in Italy and, notably, in the hotspots. Indeed, such procedures appear to be very similar to the health screening, pre-identification and

identification procedures that are described in detail in the "Standard Operating Procedures for Italian Hotspots", an administrative document drafted by the Ministry of the Interior with the support of the European agencies and relevant international organizations.

The activities conducted by Italian authorities in the hotspots have been widely criticized, both in relation to *de facto* detention to which foreign citizens were subjected for the duration of their stay, and in relation to the way in which the "screening" module (the so called *foglio notizie*, used for the identification of the persons and their reasons for emigration) was filled out.

ASGI has already pointed out that these procedures have a negative impact on fundamental rights of foreigners, preventing or severely reducing the access to the right to asylum and the right to defense in the context of return procedures. This happened especially for foreign nationals from specific countries, and resulted in their deprivation of liberty for variable and indefinite periods of time.

However, the Commission proposal marks a further step towards the definitive dismantling of the European asylum system: during the period in which investigations are carried out near the external borders, foreign citizens would indeed not be allowed to enter the territory of the State. This would lead to the consolidation of a fictitious situation of non-entry, which many EU countries are already experiencing in some transit or border areas, at a very high cost in terms of fundamental rights, which would be harshly restricted, and in terms of border management capacity. This approach is in clear contradiction with the constitutional provisions on the right to asylum existing in Italy and in other Member States of the European Union.

The draft Regulation also contains some measures aimed at upholding the rights of foreign citizens, such as the establishment of independent monitoring mechanisms and the obligation to provide specific information. Nevertheless, the Italian practice shows that the effectiveness of the existing guarantees is severely limited, since investigations take place in closed places, often characterized by totally inadequate reception conditions.

Both Italy and Greece, where the hotspot approach has already been widely implemented, have been characterized by alarming developments in asylum law. In both countries, worrying practices have been registered: in particular, approximate identifications, summary interviews without the slightest regard for the trauma of the journey, absence of adequate assessment of individual situations and conditions of vulnerability, discrimination based on country of origin ("racial profiling"). The right to international protection is becoming increasingly selective and unfair from the very early stage of application.

With the new proposal, it is likely that the hotspots approach will be substantively institutionalized, through the establishment of an apparatus aimed at identifying and fingerprinting migrants with the support of EU agencies. Thus, a selection process would be established, grounded on the distinguishing between those who have the right to seek asylum, and 'economic migrants' to be detained for the purpose of immediate return. The procedure described above is the heart of the new restrictive policy that further undermines the already weak right to asylum within the EU.

2) Screening procedure and the hotspot approach: the main critical points already emerged in Italy

As stated above, the hotspot approach has been implemented in the Italian legislation for several years already. Although there is no provision that allows for the generalized detention of foreign citizens in hotspot centers or other centers located at the border during the pre-identification phase, this practice is currently implemented on the Italian territory. The current architecture of the hotspot approach in Italy is entirely reproduced and expanded in the proposal under consideration. For this reason, it is important to highlight some critical issues that have already emerged on the Italian territory and that risk being implemented at EU level, with severe consequences for the protection of the fundamental rights of the persons involved.

- a. **Impact on the right to liberty:** The lack of authorization to enter the territory could lead to a restriction of the freedom of movement of foreign nationals reaching the external borders. According to what emerges from the Regulation proposal, such a restriction could take the form of deprivation of the individual's liberty in the absence of any legal basis, in places that were not previously identified (both at the borders and within the territory) and likely to be inadequate (as are the existing hotspots and airport transit zones). Indeed, recital 12 of the proposal states that *"The Member States should apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening. In individual cases, where required, this may include detention, subject to the national law regulating that matter"*. Article 8 on the "provision of information" states that foreign nationals undergoing screening must be informed of *"their rights and obligations during the screening, including the obligation to remain in the designated facilities during the screening"*. The Italian legal system does not provide for the generalized detention of foreign citizens at this stage of the procedure, despite the introduction, through Law no. 132/2018, of the hypothesis of detention at the border of asylum seekers under certain conditions (art. 6 c. 3 *bis* Legislative Decree 142/2015) and of detention at the border of foreign citizens subject to a removal order (art. 10 c. 2 *bis* and art. 13 c. 5 *bis* Legislative Decree 286/98). In these cases, the measure is to be implemented *after* the definition of their legal status and not during the identification procedure. Any form of limitation, or even deprivation, of personal liberty linked to the implementation of the screening procedure would at this stage be in contrast with Article 13 of the Constitution, as it would not be regulated by any law and would not be subjected to judicial validation.

Further concerns arise in relation to those who would be subjected to the procedure - and to the consequent limitation of individual liberty: all foreign citizens, including vulnerable persons and unaccompanied minors. Despite the promise of taking into account the "specific needs of minors and vulnerable persons" (Recital 26), no proper guarantees are provided. The detention already implemented at border locations, whether in hotspots or in transit zones, results in the systematic violation of the right to personal liberty. According to Article 6 (2) of the draft regulation, in cases of screening of foreign nationals already present within the territory, this may take place 'at any appropriate location in the territory of the Member State'. This last hypothesis, which seems to recall the notion of "suitable place" introduced in 2018 in Italian law, raises serious concerns. The places in which foreigners could be deprived of their liberty must in fact be defined and ascertainable. The use of locations which do not have such characteristics, and which are not known beforehand by, *inter alia*, security agencies, would amount to a violation of Article 13 of the Italian Constitution.

- b. **Arbitrary exclusion from the right to asylum on the basis of nationality:** As it is currently occurring in hotspots (with pre-identification procedures and the filling in of the so-called 'foglio notizie') and in airport transit zones, screening procedures could lead to a progressive

racialization of the right to asylum, through the exclusion of a number of nationalities from accessing this right. Such racialization would entail the risk that each individual application will not be assessed individually and specifically. Indeed, the tendency to increasingly anticipate the assessment of people's rights, which is a complex and individualized procedure, is reinforced. The standard form attached to the proposal, that should be filled at the end of the preliminary examination by the competent authorities of Member States, does not describe precisely the criteria that the authorities will apply to determine who is an asylum seeker and who is not.

- c. **Lack of access to full and correct information:** Access to information is a fundamental precondition for the exercise of the right to asylum and the right of defense. The Regulation proposal does not seem to solve the serious shortcomings observed in hotspots and airport transit zones regarding the access to full and correct information. There is no obligation to provide information on the right to asylum prior to the screening. The draft provides for the distribution of a written information sheet exclusively for those who have already applied for asylum or where there are indications that they intend to do so. This method, as already highlighted in the case of hotspots, may constitute a discriminatory treatment against those who, for various reasons, are unable to understand the written information.
- d. **Right of defense:** The standard form, like the 'foglio notizie', should be filled in by the authorities. There seems to be no obligation to issue a copy of this document or any possibility to challenge it. Even though it represents a fundamental moment for the determination of the status of the third country national, there are no remedies to contrast its effects. Moreover, the right to access legal protection during the procedure is not clearly provided for and States do not appear to be obliged to adopt measures to guarantee this right.
- e. **Fiction of non-entry:** During the screening procedure foreigners are not allowed to enter the territory. A fiction of non-entry is established, similarly to what has already been observed in airport transit zones, where it has been used by States to exclude any responsibility for the treatment of individuals and led to practices that are highly detrimental to the rights of foreigners. In the context of the proposed screening procedures, third country nationals could find themselves in a situation like that experienced by the recipients of a delayed refusal of entry order, prior to the intervention of the Constitutional Court's judgment no. 275/2017. Such situation would entail that neither the jurisdiction of the judicial authority nor the ex post jurisdictional validation of the Questore's decree would be provided for. The fictitious non-entry, together with the provision of forms of detention at the border, is likely to play a key function in preventing the access to the territory of persons who are not applicants for international protection.

3) Beyond the hotspot approach: towards a system of reception and protection

The screening stage of incoming foreigners is a crucial moment to understand the needs and intentions of the people arriving in the territory of the European Union. It is necessary to remember that foreign citizens at the external borders without a visa and/or without the requirements for entry into the Schengen area have often arrived through dangerous and exhausting journeys. During such journeys, they may have suffered torture or other violence and may have lived in inhuman and degrading conditions, especially if transiting through Libya and the Balkan route. It is therefore necessary to establish reception and need-assessment procedures to meet the material and psychological needs of persons on entry. These procedures

must be obviously carried out in full compliance with the right to personal liberty and within the national territory. All procedural safeguards must be guaranteed and the intervention of protection bodies, civil society organizations and independent entities must be permitted.

Procedures for examining health conditions and vulnerabilities are necessary, and the availability of medical and psychological assistance services play a key role: those services can be only implemented within the territory and not at the border. Similarly, it is necessary to set up measures to take care of and accommodate people with special needs and to have vulnerabilities identified by specialized personnel. Such care needs appropriate time and place: one of the reasons for the failure of the hotspot approach lies precisely in the desire to afford assistance and protection within a limited timeframe. Moreover, a distinction must be made between the identification phase, where the main actors are the police authorities, and the care and assistance phase, that must be conducted by independent third parties.

It is necessary to ensure that foreigners have full access to complete and correct information, provided in a manner and timeframe appropriate to ensure the full understanding of their contents and implications. It is only after this phase that foreigners can consciously express their intention to apply for international protection, possible causes of ineligibility can be evaluated, and the willingness to access relocation procedures or voluntary repatriation can be assessed. At the same time, it is essential to guarantee the access to protection bodies or lawyers who can provide legal support. Finally, it is necessary to guarantee the existence of and access to effective remedies at every stage of the determination of third country nationals' legal status.

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