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The Normalization of Denial of Legal Safeguards in the proposed Asylum and Migration Legislation

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INTRODUCTION

In September 2020, the [EU Pact on Migration and Asylum](#) was presented by the Commission which aims to provide a 'fresh start' on EU asylum policy. Although the ambition of the [Common European Asylum System](#) is to guarantee harmonized and uniform standards for third-country nationals seeking international protection in the EU, it is highly questionable, how the proposed instruments, which leave the discretion to Member States to derogate in certain cases from basic rights and asylum guarantees, will achieve this objective. Already the expanded use of border procedures as presented in the amended [proposal for an Asylum Procedures Regulation](#), and the proposed [Crisis and Force Majeure Regulation](#) allow, and even vindicate, the non-application of the full sets of rights foreseen in the asylum *acquis* for those applying for international protection at the borders. One year later, in 2021, the proposal for a [Regulation](#) to address situations of instrumentalization in the field of migration and asylum was presented, that although it is part of the Schengen reform, it nevertheless regulates asylum matters and thus should be read in conjunction with the Pact.

In reality, if the above-mentioned texts are adopted as such, this will lead to a situation where the full sets of rights and guarantees of the asylum system will be applicable only to a very small number of asylum-seekers. The reason is that in these instruments, one can easily notice the wide use of legal fictions, new definitions, concepts and

techniques that justify the non-application or in some cases the 'semi-application' of EU law. As Valsamis Mitsilegas eloquently [notes](#), according to this reform, 'access to the EU will not simultaneously mean access to the law'. Finally, the possibility of derogating from certain obligations that exist under both international refugee law and EU law will be the exception or the new 'normal'? This blogpost aims to explain how the proposed rules in the EU asylum and migration policy will promote exclusionary practices and denial of legal safeguards, mainly at the EU's borders, that will be at the expense of legal certainty, uniformity and respect for fundamental rights.

THE 'NON-ENTRY' FICTION IN BORDER PROCEDURES

The Commission in its proposal for a [Screening Regulation](#) and the proposal amending the [Asylum Procedures Regulation](#) (APR) decides to establish a 'pre-entry' phase that will entail a 'seamless' link between the screening procedure, asylum border procedures and return border procedures. The presentation of these procedures falls outside the scope of this blogpost as they have been already analysed in depth [here](#) and [here](#). What is important to highlight here is the wide personal scope to whom the proposed procedures will apply. The screening will be applicable to almost all asylum-seekers that apply for international protection at the EU's external borders, or those apprehended in connection with an unauthorized crossing of the external border and those disembarked in the territory of the state following a search and rescue operation (Article 3 Screening Regulation), which means to the majority of asylum-seekers, as they are usually applying for asylum in border areas.

Moreover, the asylum border procedures are mainstreamed in the proposed Asylum Procedures Regulation and even become obligatory for some categories of asylum-seekers. Specifically, border procedures will be mandatory for the accelerated examination of three cases: a) Where the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to identity or nationality; b) Where the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States; and c) Where the applicant holds a nationality or has a country of former habitual residence for which the proportion of decisions granting international protection is 20% or lower (Article 41 amended proposal for an APR). Also, the decision on whether to refer someone to a regular or a border asylum procedure will be based on the minimum information acquired during the screening (Article 41 (a) amended proposal for an APR).

Finally, the return border procedure will be applicable to all those that are rejected under the asylum border procedures, thus to the majority of the failed asylum-seekers. In addition to this, states will still have the discretion to not apply at all the EU Return Directive in the so-called 'border cases' pursuant to Article 2 (2)(a) of the [Return Directive](#) (see also Article 41 (8) amended proposal for an APR). This means that the majority of failed asylum-seekers will be returned either through a border procedure or through national deportation procedures and the full application of the Return Directive will be the exception, only for those rejected in the country. The expanded personal scope of border procedures and the fact that they become mandatory in some cases, may result in border procedures becoming the 'new normal' in the EU asylum and return policy.

As [Galina Cornelisse](#) notes, 'although there is no common definition of what constitutes border procedure, it is a procedure in which the applicant for international protection is not granted entry to national territory during the time that the authorities examine his or her application'. However, the 'non granted entry' is a legal fiction, a technique that detaches fact and reality from law and gives the discretion to states to exclude asylum-seekers from rights and guarantees that would be otherwise applicable, if for example they had effected entry in the country. The 'non-entry' fiction is widely used by the Courts in the U.S to justify detention of aliens that are present at the borders but are not considered within the country for due process purposes. In the EU asylum legislation, the 'non-entry' fiction is already foreseen in Article 43 of the recast [Asylum Procedures Directive](#) (APD) which regulates border procedures. Border procedures were initially designed to handle asylum requests submitted at airports or transit zones, however nowadays it seems that the [border procedure](#) has become the *de facto* standard for the majority of asylum-seekers as most of them enter the EU territory through the borders. Also, based on the proposed reform, the 'non-entry' fiction will be applicable throughout the whole 'pre-entry' phase.

EU policy is thus driven by 'hyper-legalism' as it gives to states the means to evade their obligations towards asylum-seekers through the use of the 'non-entry' fiction that allows them to treat some aliens as rightless and 'not-entered' due to their unauthorized entry. This means that while at first the situation seems straightforward, as the person has set foot on EU territory and thus EU law should be applicable even in the border context, as border area territories constitute actual territory of the state, it seems that due to the ['non-entry' fiction](#) the states manage to enforce limited guarantees and justify human rights violations. This intimates that states, by [pushing](#)

[the border](#) inwards, deep into the interior, can create [‘liminal’](#) EU territory or [‘anomalous’ zones](#) where the law does not apply or apply in some cases. The same documents give the discretion to states to implement border procedures even ‘within the country’ (Article 41 amended proposal for an APR). As Minos [Mouzourakis](#) eloquently notes, ‘the persons may arrive in the island, be transferred to the mainland, but do not set foot on European soil in the eyes of EU law’.

The paradox here is that the law is not suspended *in toto*, but some rules may apply, while some parts of the legal order may be suspended. Thus, the exception regime that is created at the borders is what I call a practice of ‘semi-inclusion’ as the person may be simultaneously outside and inside the legal order. For example, while asylum-seekers will be bound by national law as they will be physically present in the state’s territory i.e. criminal law or civil law, and even being charged with a criminal offence, their rights associated to their registration or asylum process may be diminished as in the eyes of EU asylum law they will be considered as ‘not-entered’ in the territory.

Although asylum-seekers constitute a special category of aliens that their rights are not only protected by the European and international human rights instruments, but also by the 1951 Geneva Convention and its 1967 additional Protocol, it is assumed that the use of the ‘non-entry’ fiction envisaged in the reform will largely impact the rights of asylum-seekers. In practice, [procedures](#) that are premised on the ‘non-entry’ fiction usually involve detention, or even *de facto* detention, diminished procedural safeguards such as access to legal aid and interpretation, very tight time-limits that impact the quality of the asylum decisions, limited access to remedies and to an effective remedy, and this fiction may even hamper the right to asylum *per se* and the prohibition of *refoulement*. Also, many aspects of both the screening and the asylum border procedures are informal (such as the de-briefing form in the case of the screening that is not a formal decision) and thus, not subjected to [legal scrutiny](#). Consequently, the reform through the expanded use of border procedures, and the ‘non-entry fiction’, threatens to undo crucial legal safeguards for asylum-seekers that would be otherwise applicable if asylum-seekers would be referred to regular asylum procedures.

THE CASE OF ‘CRISIS AND FORCE MAJEURE’

The creation and use of the legal fiction of ‘non-entry’ is the one way to justify the impairment of the rights of those seeking international protection at the EU’s borders. However, in the EU Pact, we can find one more technique or concept that normalizes

a '*Régime d'exception*', and this is the concept of 'crisis and force majeure'. According to the proposed [Regulation](#), in cases of 'exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional and which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union' or even in cases there is simply a 'risk' of a crisis, the states will have the ability to derogate from some of their obligations, and thus EU law may be either suspended or continue applying with less safeguards for asylum-seekers.

Specifically, in case of a 'crisis', border procedures will be applicable to third-country nationals whose EU-wide first instance recognition rate is 75% or lower, in addition to the grounds already foreseen by the proposed APR, and the deadlines will be extended by an additional eight weeks. Also, the registration period can be extended, while the Regulation gives the possibility to derogate from certain provisions on the border procedure to carry out return, which may be extended up to 20 weeks. Overall, the 'non-entry' fiction applicable in border procedures combined with the invocation of the case of a 'crisis' or 'force majeure' may legitimise a situation where third-country nationals will be considered as 'not-entered' in the territory for a long period of time, even for 40 weeks, while they will have the discretion to deviate from crucial procedural safeguards in the asylum procedure and impose prolonged detention as usually border procedures take place in [detention](#) or *de facto* detention.

This means, that based on vague and abstract concepts of 'crisis' and 'force majeure' and even when there is a 'risk of a crisis' that could be subject to political interpretations and be used arbitrarily, states will be able to derogate from basic rights envisaged in the asylum *acquis*, seriously affecting the rights of those seeking international protection. Through this Regulation, the Commission legalizes [lawlessness](#) by creating a 'state of exception', a space without law justified by an emergency-driven and security narrative. It is questionable though how the extension of an exceptional regime and the mass scale use of border procedures will adequately respond to a 'crisis' situation, rather than exacerbate a humanitarian crisis in the EU, especially in the external EU border countries.

INTRODUCING THE INSTRUMENTALIZATION OF MIGRANTS

It is important to add on the afore-mentioned proposals, the upcoming 'instrumentalization' [Regulation](#) that also allows and legalizes the derogation from EU law and states' obligations. The definition proposed for the term 'instrumentalization' is not legally clear as it contains many elements and terms that cannot be concretely explained (i.e. actively encouraging, intention to destabilise the state, essential state functions) and are subject to political and national interpretations. [Scholars](#) have highlighted that the definition does not comply with the requirements of legal certainty and proportionality, calls into question the concept's grounding in the proposed treaty basis, and risks undermining existing human rights standards.

What is important to mention here is that dependent on the abstract, vague and not well-defined definition of 'instrumentalization', the Commission normalizes not only the derogation from some standards of EU asylum law, but even, in some cases, the direct application of national law. We should not forget cases that the arrival of migrants was characterized as 'instrumentalization' and this led to the complete [suspension](#) of the right to apply for asylum. The instrumentalization Regulation will not be further analyzed here as it is an instrument that has already received wide [criticism](#) and also [no majority](#) could be found in the Council.

CONCLUSION

Although the Commission's [Better Regulation Guidelines](#) set harmonization as the legitimizing notion for political action, it seems unlikely that the proposed procedures, if adopted as such, will achieve this objective. To the contrary, states will have the ability to easily derogate from guaranteeing the full set of rights to asylum-seekers and even escape accountability due to fictions and abstract definitions that the Commission is lavishly providing to them through the proposed legislation. If the full sets of rights related to regular asylum procedures will not be applicable to those in border procedures, derogation from EU law will be allowed in cases of 'crisis and force majeure', and even national law could apply when there is a case of 'instrumentalization', then to whom eventually the rights and the full guarantees of the asylum *acquis* will apply? It seems that the rights and guarantees of the common European asylum System will be the privilege of the most vulnerable, while other asylum-seekers will have to navigate the asylum system with minimum, even *below*-minimum standards.

Although there is no contestation that states are bound by human rights law and should protect asylum-seekers within their territory by establishing asylum procedures that fully guarantee their rights, it has been explained in this blogpost that the proposed asylum legislation allows states to restrict some of the rights and guarantees of asylum-seekers, mainly in the border context. By breaking the link between rights and territory through the 'non-entry' fiction applicable in border procedures and by employing other legal techniques, the EU has managed to 'legitimize' the erosion of rights for those seeking protection at the EU's borders. The normalization of derogatory regimes will be at the expense of those seeking international protection. Now that the above-mentioned texts are under negotiations, the Council and the European Parliament should make sure to [remove](#) abstract notions and fictions from the texts that allow Member States to claim the non-applicability of legal safeguards and adopt legislation that entails enhanced fundamental rights safeguards for the protection seekers.