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The Complex Landscape of Asylum Border Procedures in the new Asylum Procedures Regulation

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At the heart of the negotiations for the [New Pact on Migration and Asylum](#) lies one of its most contentious elements: the regulation of border procedures. During the Council negotiations, the [Asylum Procedures Regulation](#) (APR) underwent significant modifications, particularly in the provisions that regulate border procedures, to incorporate perspectives from all Member States. Despite expectations for improvements during dialogues with the Parliament, the final outcome in [December 2023](#) witnessed a [step back](#) from many of the anticipated safeguards. Border procedures are perceived in the agreed text as an important '[migration management tool](#)' and as a [responsibility mechanism](#), mandating the examination of asylum applications at the borders, while asylum seekers will be subject to the 'non-entry' fiction. This blogpost aims to examine the complex landscape of border procedures based on the [final text](#) of the APR.

The Arduous Negotiations on Border Procedures

The EU Pact placed a paramount emphasis on the EU's external borders, introducing a 'seamless link' between all stages of the pre-entry phase, from the [screening procedure](#), to an expanded use of [asylum border procedures](#) and where applicable, [return border procedures](#) for rejected asylum seekers. [Border procedures](#) involve the swift processing of asylum claims at border locations, while third-country national are subject to the '[non-entry](#)' fiction. The main reason for their implementation is to guarantee the first-entry states' responsibility by keeping asylum seekers at the external borders and preventing secondary movements within the EU. Despite being initially regulated in only two provisions within the [amended proposal for an APR](#)

(Article 41 and 41a APR), the final text includes twelve provisions on border procedures (Article 43-54 APR), highlighting their contentious nature during the negotiations and the difficulty of Member States in reaching an agreement.

The most difficult and divisive question during the negotiations was whether border procedures should be obligatory or voluntary. On the one hand, [central](#) EU countries sought to make the use of border procedures obligatory to prevent '[secondary](#)' movements of asylum seekers and manage migration at the EU external borders. On the other hand, [southern](#) EU states opposed this, given that their widespread implementation would place a further strain on their resources and overburden their capacities for processing asylum claims. In addition, they argued that whether or not to apply border procedures, as well as the categories of persons to whom these should apply, should remain a prerogative of Member States, that are best placed to decide if a procedure is feasible given their specific circumstances.

Despite years of negotiations, with the APR text being discussed since 2016, the outcome is an extended regulation of border procedures, rendering them mandatory in some cases. This prolonged negotiation process has resulted in a complex framework with many provisions designed to accommodate the diverse interests of all involved Member States.

The scope of application of border procedures

Despite challenging negotiations on border procedures, the agreed text extends their scope of application (Articles 44-45 APR). Firstly, it renders their use mandatory when certain acceleration grounds are met. The mandatory application of border procedures is stipulated for those that have a low probability of international protection (20%) according to Union-wide average Eurostat data (Article 45 APR), those who pose potential threats to national security or public order and cases involving applicants who mislead the authorities. Regarding the last category of applicants, the APR text foresees that 'after having been provided with a full opportunity to show good cause', those considered to have intentionally misled the authorities are subject to mandatory border procedures. While this wording aims to guard against arbitrary practices, there still remains a risk of wide interpretation by authorities.

Regarding the first reason, and according to the [Council](#), an effective and meaningful border procedure should ensure that the number of persons that would actually be channeled to the border procedure remains high, and despite proposals from the Parliament to reduce the threshold to 10%, the [recognition rate](#) of 20% remained in the final text with a corrective mechanism introduced during the negotiations with the Parliament (Article 45 and Article 42j APR). The corrective mechanism allows authorities to deviate from this threshold if there has been a significant change in the applicant's country of origin since the publication of the relevant Eurostat data. It also allows states to take into account significant differences between first-instance decisions and final decisions (appeals). For example, if there is a notable discrepancy indicating that many

initial rejections are overturned on appeal, this could be a factor in deciding not to apply the border procedure to an applicant from that country. However, this practice introduces a nationality-based criterion for the application of border procedures which may lead to discrimination, and it also raises important issues as there are significant discrepancies in the recognition rates of asylum seekers across European countries.

In addition to these obligatory cases, border procedures may be used at the discretion of authorities to examine the merits or the inadmissibility of an application under certain conditions. Specifically, this discretion applies if any of the circumstances listed in Article 42(1), points (a) to (g) and (j), and Article 42(3), point (b), are met, as well as when there is an inadmissibility ground in accordance with Article 38. This discretionary use could impede harmonization across the EU due to varying interpretations and implementations by different Member States.

Moreover, the regulation broadens the personal scope of border procedures, allowing their application following the screening, and when an application is made a) at an external border crossing point or transit zone (this was also foreseen in the APD), but also b) following apprehension in connection with an unauthorized border crossing of the external border, which means that individuals who are already within the territory of a Member State could be subjected to border procedures, and finally c) following disembarkation after a search and rescue operation (Article 43 APR).

Another important aspect discussed during the negotiations was the application of border procedures to unaccompanied minors with an agreement on excluding them from border procedures always, except for national security grounds (Article 53 (1) APR). Families with minors will be included in border procedures with additional safeguards: de-prioritisation of their examination and always reside in facilities that comply with the [Reception Conditions Directive](#) (RCD). Specifically, Article 44 (3) APR foresees that where the number of applicants exceeds the number referred to in the provision that regulates the member State's adequate capacity level, priority shall be given to applications of certain third-country nationals that are *not* minor applicants and their family members. To the contrary, following admission to a border procedure, priority shall be given to the examination of the applications of minor applicants and their family members. Finally, vulnerable individuals will be exempted from border procedures only when it is assessed that the 'necessary support' cannot be provided to applicants with special reception or procedural needs (Article 53 (2) APR).

The concept of adequate capacity

In exchange for increased responsibility of frontline states through the wide implementation of border procedures, the APR introduces the concept of 'adequate capacity', with two distinct levels identified: the Union-level which is set at 30,000 (Article 46 APR), though the derivation of this figure remains unexplained, and the individual Member State level which is calculated based on numerical factors: by

multiplying the number set out in Article 46 (Union-level adequate capacity) by the sum of irregular crossings of the external border, arrivals following search and rescue operations and refusals of entry at the external border in the Member State concerned during the previous three years and dividing the result thereby obtained by the sum of irregular crossings of the external border, arrivals following search and rescue operations and refusals of entry at the external border in the Union as a whole during the same period according to the latest available Frontex and Eurostat data (Article 47 APR). Only applications subject to the border procedure should be calculated towards reaching the adequate capacity.

Once 'adequate capacity' is reached (Article 48), the Commission will be notified and it will have to examine if the state is identified as being under a migratory pressure according to the [Asylum and Migration Management Regulation](#). In such case, states will be able to derogate from the provisions that mandate the use of border procedures, and e.g. choose to keep asylum seekers at the borders and refer them in regular asylum procedures or transfer them within the territory and once again implement regular asylum procedures. However, such authorisation will not exempt the Member State from the obligation to examine in the border procedure applications made by applicants that are considered as a danger to national security or public order.

The introduction of the concept of 'adequate capacity' was designed to render the prescribed use of border procedures cognizant to the needs and migratory pressures on first-entry states and in this way to ensure their buy in. However, the final provisions demonstrate that the calculation of 'adequate capacity' is rather complex, while it relies solely on numerical data, overlooking the specific characteristics of arrivals or the actual capacity of first-entry countries. It seems that, in essence, this concept was added to ensure 'predictability' by making sure that southern states will fulfill their responsibilities by examining a minimum number of applications through border procedures.

In addition, this will in practice incentivise Member States to use even more border procedures to reach their 'adequate capacity', in detention or other designated spaces created for these procedures, turning the process into a 'lottery' largely dependent on the timing of arrivals. If a person arrives before the 'adequate capacity' is reached, they will most probably be subjected to border procedures. Conversely, if they are fortunate enough to arrive once the capacity is reached, their cases will be examined under a regular asylum procedure with more safeguards. Finally, this approach is also potentially hindering harmonisation by prioritising national-level exception measures over solidarity and relocation in times of pressure.

Rights at Risk

Although border procedures were initially implemented exceptionally in some Member States to address the 2015-2016 refugee 'crisis,' this practice has become the 'norm' in certain [Member States](#), such as [Greece](#) and [Italy](#), where they are routinely applied, even in situations with no notable increase in arrivals. It is expected that their use will rise as border procedures become mandatory for certain categories of asylum seekers.

Border procedures have been described as [sub-standard](#) procedures, due to the fast processing of asylum claims, the locations where these procedures are implemented, and the legal fiction of 'non-entry', a concept which means that asylum seekers will be considered as not entered into the territory while their claim will be examined in a border procedure. This provision is also maintained in the final text (Article 43 (2) APR). The legislation creates therefore avenues for disentangling the relation between physical presence of an asylum seeker on the territory and the legal presence. As scholars have pointed out, this legal fiction, justifies the creation of '[liminal](#)' space or '[anomalous](#)' zones where common legal rules do not fully apply. Notably, Article 54 APR, allows their implementation within the territory, justifying the application of the 'non-entry' fiction even in locations far away from the actual territorial border. By shifting the border [inwards](#), entire areas are treated as 'borders', and asylum seekers in these locations are subjected to a different, often more restrictive, set of rights compared to those who apply for asylum through regular in-country procedures. This practice can imperil several key rights of asylum seekers as it will be described below.

Towards more detention

During border procedures, asylum seekers should be kept at or close to the borders, leading to increased and systematic [detention](#) or other [area-based restrictions](#). Within the APR, detention is not prescribed clearly, but it is not precluded either (Article 54 APR). The legal basis for imposing detention during border procedures can be found however in the agreed [Reception Conditions Directive](#), where it is envisaged that detention may be imposed '*in order to decide, in the context of a procedure, on the applicant's right to enter the territory*' (Article 8c RCD). To what extent policies of non-entry undermine the right to liberty and freedom of movement is a matter raised many times in the case law of the [CJEU](#), and in some cases of the ECtHR where the case-law on detention to prevent unauthorized entry (Article 5 (1) (f)) seems to be rather [controversial](#). What is important to note though is that the 'non-entry' fiction in conjunction with the absence of clarifying the reception conditions (Article 54 APR) applicable in border procedures may lead to increased and routinised detention practices in EU external states.

The issue of legal aid

The question of free legal assistance in border procedures has been another area of contention during the negotiations. While the European Parliament stressed its importance, the Member States were against expanding it to the first instance procedure due to financial and administrative constraints. A [compromise](#) solution was agreed offering free legal counseling for the administrative procedure (interview), excluding representation and allowing flexibility for Member States (Article 16 APR).

As outlined in the new APR (Article 16), legal counseling includes guidance and explanations of the administrative procedure, including information on rights and obligations during the process. Additionally, the legal counsellor will offer assistance with lodging the application as well as guidance on the different examination procedures and the reasons for their application e.g. admissibility rules or when someone is referred to accelerated or border procedures. However, this form of assistance does not extend to escorting individuals during the asylum interview, preparing them for the interview, or submitting legal memos at the first instance procedure.

In contrast, legal assistance and representation which is applicable in the appeal procedure (Article 17 APR) goes further, including the preparation of procedural documents and active participation in the hearing. Despite the supposed extension of legal aid, highlighted in a dedicated section (Section III), its provision remains in the form of counseling, marking a notable step back from the Parliament's initial proposal. Furthermore, in practice, limited access both to counselling and legal assistance may occur due to the locations that border procedures take place such as detention or remote locations near the borders. This situation underscores potential challenges in ensuring effective legal support within the border procedures.

The right to asylum and protection from *refoulement*

Other rights that may be undermined in the context of border procedures are the [right to asylum](#) and the protection from *refoulement*. These rights may be compromised primarily due to the limited procedural safeguards applicable in border procedures, such as the very short time-limits (as stipulated in Article 51 APR, border procedure shall be as short as possible and a maximum of 12 weeks) combined with the limited access to legal assistance due to the locations where border procedures are taking place (detention or *de facto* detention) which may significantly impact the overall quality of the asylum procedure.

In addition, implementing border procedures to vulnerable applicants raises concerns that their special procedural needs may not be appropriately addressed. These individuals shall be provided with the necessary support to enable them to benefit from their rights. However, the notion of 'necessary support' yet remains undefined in

the agreed text. It seems that it is mainly related to the special reception needs and the locations where the border procedures are implemented, assuming that border procedures are appropriate for applicants with special procedural needs unless 'the necessary support cannot be provided in the locations referred to in Article 54'. Failure to provide special procedural guarantees to asylum seekers who require them directly impacts the quality and [effectiveness](#) of the asylum procedure.

Finally, the right to appeal is modified in the APR. According to Article 68 APR, the appeal will not have suspensive effect when the case is examined under border procedures. Some guarantees should nevertheless be preserved in this case, such as the possibility for the applicant to request a right to remain within a time-limit of at least 5 days and the provision of interpretation, information and free legal assistance (Article 68 (3) a (ii) in conjunction with Article 68 (5) APR). Even though it is positive to at least ensure that these guarantees are applicable in border procedures, the time-limit of 5 days to prepare and lodge an appeal and an application to request the right to remain may not be enough to ensure an effective remedy in practice.

Concluding Observations

The extensive regulation of border procedures in the final APR underscores their role as a crucial 'migration management tool'. The persistence, during negotiations, to uphold border procedures at any cost resulted in intricate and complex provisions, emphasising their importance in ensuring responsibility of first-entry states. However, by containing asylum seekers at external borders, the EU risks exacerbating existing deficiencies, leading to overcrowd reception and detention centres and consequently violation of human rights. This directly impacts both asylum seekers, that will have to navigate asylum procedures with limited safeguards, and states grappling with overburdened capacities. As these rules take shape, a focus on rights-based interpretations and increased [judicial](#) oversight and monitoring are essential to safeguard the principles of fairness and respect for human rights at the borders.