



SOC/670

Asylum procedures under the New Pact on Migration and Asylum

OPINION

European Economic and Social Committee

Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing

Directive 2013/32/EU

[COM(2020) 611 – final 2016/224-COD]

Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC)

No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817

[COM(2020) 612 – final 2020-278-COD]

Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of

Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818

[COM(2020) 614 – final 2016-132-COD]

Rapporteur: **Panagiotis Gkofas**

Referral	European Commission, 01/12/2020
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
Adopted in section	08/02/2021
Adopted at plenary	25/02/2021
Plenary session No	558
Outcome of vote (for/against/abstentions)	210/9/28

1. Conclusions and recommendations

- 1.1 The EESC takes note of the New Pact on Migration and Asylum, which aims to tackle a multifaceted and complex phenomenon. The EESC believes that the new regulations make a positive contribution to more effective EU border security. A better and safer process is being set up to control those entering the EU. Nevertheless, an integrated, common EU strategy, one that is resilient and forward-looking, is much-needed and long overdue. Unfortunately, concerning the migration issue and asylum as a whole, the current proposals cannot be defined as the clear step forward that is very much needed. **What is more, the four or five Member States concerned will have to create "closed centres", based on the principle of non-entry¹, for human beings for a period of up to six or seven months, if not more, until the outcome of the procedures is known, resulting in situations that are much worse than before.**
- 1.2 Greater and further efforts are needed by the European Commission and the EU Member States. Recent EESC opinions (SOC/649, SOC/669 and SOC/670) criticise key aspects of both the Asylum and Migration Management Regulation (AMR) and the Asylum Procedures Regulation (APR). The EESC would also like to point out that from its examination of the nine regulations and its contact with Commission, the prospects for implementing these nine different regulations appear problematic in several aspects. A more comprehensive strategy on migration is needed to ensure better synergies between the different EU regulations and to secure answers to important issues in the Member States that are more impacted by migration.
- 1.3 The EESC wishes to express its concerns about the new border procedures, especially relating to the need to protect the right to request asylum and to the following issues:
- the flawed concept of "countries with low asylum recognition rates";
 - the use of ill-defined legal concepts ("security threat", "public order") that give rise to legal uncertainty;
 - foreign children between the ages of 12 and 18, who are also considered to be "children" according to the 1989 UN Convention on the Rights of the Child;
 - how and where people are going to be kept during the border procedure, and how to avoid legal limbo by guaranteeing the right to effective judicial protection.
- 1.4 The EESC recognises the added value of and need for common, comprehensive and effective asylum procedures that comply with international conventions and legal guarantees, for EU and Member State confidence derived from tangible solidarity mechanisms and for fairly shared responsibilities/commitments. Yet such a common asylum system – one that is comprehensive, demonstrates solidarity and apportions responsibility fairly among the Member States – is not included in this Commission proposal. **The provision regarding solidarity should also be included in the APR, right after screening has taken place, and with IT help from Eurodac. If "mandatory solidarity" does not take the form of "mandatory relocation" under the APR provisions, or if procedures are not created that allow people to apply for asylum in EU Member States without the need to cross EU borders, in practical terms the**

¹ The concept of non-entry is something that has existed both in Schengen and the asylum *acquis* (Article 43 of the Asylum Procedures Directive (APD)).

regulation will not be operational. There should be also incentives and disincentives for relocation, and in any case it should be possible for the APR process to be conducted in other Member States and not exclusively in the country of first entry.

- 1.5 The EESC underlines that the effectiveness of the proposed new procedures need to be constantly measured through **systems monitoring respect for fundamental rights**, particularly as regards the rights of vulnerable people and children, the **individual assessment of asylum claims and effective remedies**. However, the question arises as to where and how the **improved New Pact and the accompanying proposals are going to be implemented, and with what kind of solidarity, relocation or resettlement arrangements**.
- 1.6 The EESC supports a more **integrated and balanced IT migration management system based on an improved Eurodac database focusing on applications and applicants**. The EESC was under the impression that the Commission recognises the need for a common approach to compulsory pre-entry screening of finger prints and of health and security risks, but despite the sophisticated system proposed, there is unfortunately no possibility for a person to apply for asylum in a Member State other than the country of first entry – something that should be possible. **The rules on determining the Member State responsible for processing an asylum application, at present laid down in the AMR, should be set out in the APR, providing an opportunity through Eurodac for claims to be processed by other Member States as well.**
- 1.7 Although the EESC is in favour of new, faster decision-making procedures at EU borders, respecting all fundamental rights, human rights and legal procedures, there are a multitude of questions that arise, such as: How do we implement and secure these procedures? How do we implement returns? Where is the solidarity in the APR, not to mention the AMR – if indeed it makes any provision for solidarity? When a person is granted asylum, can they go to another Member State instead of the country of first entry²? Can the Member States grant asylum to protect people in need or will they start to reject them? The EESC therefore calls on the Commission to thoroughly verify and explain every part of the proposal, and especially to answer the question: "How does this New Pact improve the common asylum procedure and meet the right to request asylum?"
- 1.8 The EESC is concerned by the implementation of the new screening procedures of third country nationals at the external borders. This new mechanism increases pressure on those EU Member States with the EU's external maritime borders, and promotes the creation of closed centres at, or in the proximity of, the external borders. Similar centres have raised serious concerns in terms of protecting human rights and ensuring acceptable living conditions for the residents.
- 1.9 The outcome of the border procedures will be either the granting of asylum or rejection and return. In the case of asylum, the Member State granting it is responsible for integrating the persons concerned. In the New Pact scenario, however, this means integrating them in the

² In accordance with the provisions of the Qualification Regulation, the rights and benefits entailed by refugee/subsidiary protection status are linked to the Member State that granted the status.

countries of the south, without any possibility of relocation to, or solidarity from, the other Member States. If asylum is not granted, the Member State must return the rejected asylum seeker. This approach must look at ways of establishing EU agreements with the third countries of origin and transit and ensuring effective procedures, as provided for under international law and human rights instruments. No single agreements can be established between Member States individually, and nor does the Commission make any mention whatsoever of such a procedure.

- 1.10 The challenges of migration management – related in particular to ensuring rapid identification of those in need of international protection or implementing returns in practice (for those who are not in need of protection) – are supposed to be dealt with **in a "uniform manner" by the EU as a whole, but the current proposals cannot be considered to be doing this.** In actual fact, this is a matter to be dealt with by the Member State of first entry only and fair burden-sharing is lacking e.g. via mandatory relocation of asylum applicants during the APR and the examination of the asylum claim.
- 1.11 In particular, it is important to create a better procedure allowing for persons who are unlikely to receive protection in the EU to be identified³. The Commission proposal puts in place **pre-entry screening** that should be applicable to all third-country nationals (TCNs) who are present at the external border without fulfilling the entry conditions or upon disembarkation, following a search and rescue (SAR) operation. Unfortunately, however, this "pre-entry screening" is conducted in the territory of the country of first entry in the EU at the border. The "pre" means that the person concerned goes to a "closed detention centre" and stays there, without any possibility of moving until the Member State authorities decide either to grant them asylum⁴ or return them to the country of origin or of transit, and only if this return is possible – which it is not, in most cases.
- 1.12 The EESC supports the **EU framework putting in place uniform rules for the screening of irregular migrants** apprehended within the territory and **who eluded border controls on entering the Schengen area. This aims to protect the Schengen area and ensure efficient management of irregular or illegal migration.**
- 1.13 The EESC calls on the EU institutions, agencies and social partners to participate in drawing up further policies and programmes (such as Talent Partnerships), exchanges of best practice and multilateral twinning programmes regarding existing "humanitarian corridors". It also requests that new legal frameworks be developed, that rapid procedures be introduced enabling the **humanitarian visa** to be used more widely and by a greater number of people (through adjustments to the current provisions of Article 25 of Regulation (EC) No 810/2009), and that **"sponsorship"** also be included as an **ordinary legal channel for entry** in the field of

³ The share of migrants arriving from countries with recognition rates lower than 25% has risen from 14% in 2015 to 57% in 2018.

⁴ As regards the use of detention during the border procedure, see paras 179 and 183 of ECJ judgment C-808/18: *"Member States are authorised to place in 'detention', within the meaning of Article 2(h) of Directive 2013/33, applicants for international protection arriving at their borders, before granting them a right to enter their territory, on the conditions set out in that same Article 43 and in order to ensure the effectiveness of the procedures for which Article 43 provides"; "it follows from Article 43(1) of Directive 2013/32 that detention based on that provision is justified only in order to allow the Member State concerned to examine, before granting the applicant for international protection the right to enter its territory, whether his or her application is not inadmissible [...] or whether that application must not be rejected as unfounded [...]"*.

immigration policies, applicable to TCNs from non-EU countries. The EESC draws the attention of the co-legislators to the fact that previously existing EU legislation, such as the Schengen Agreement and the Lisbon Treaty, already provide for "**subsidiary and temporary protection**" for those fleeing wars or natural disasters. This demonstrates how, **using legislative instruments already available to the Member States of the European Union, regular entry can be guaranteed for vulnerable persons in need of international protection.**

2. **General concerns and comments**

- 2.1 The European New Pact advocates **integrated policy-making, bringing together policies in the areas of asylum, migration, returns, external border protection, combatting trafficking in migrants and relations with key third countries, reflecting a whole-of-government approach.** Ultimately, however, the proposed regulations under examination will place a huge burden on the Member States of southern Europe, with the inevitable consequence that the regulations will be inapplicable and will fail to achieve their intended result. After a reasonable period of time, Member States will be forced *de facto* to reject many asylum applications, even those that meet the conditions for asylum to be granted, in order to avoid increasing numbers of people being held together in inhumane conditions.
- 2.2 The Member States in the south of Europe have no choice but to be converted into either detention or pre-departure centres.
- 2.3 This opinion will focus on three of the nine instruments contained in the New Pact: **i) a new screening regulation; ii) an amended proposal revising the asylum procedures regulation; iii) an amended proposal for a recast Eurodac regulation.**

3. **Specific comments on the new screening regulation**

- 3.1 The new **screening regulation proposes a pre-entry screening** procedure in the territory of the country of first entry, one that should be applicable to all TCNs who are present at the external border without fulfilling the entry conditions or after disembarkation, following a search and rescue operation.
- 3.2 The available data demonstrate that the arrival of third-country nationals with clear international protection needs as observed in 2015-2016 has been partly replaced by mixed arrivals of persons.
- 3.3 **Specific comments on the objectives and main elements of the screening procedure**
 - 3.3.1 The objective of the screening is to contribute to the new comprehensive approach to migration and mixed flows by ensuring that people's identity, but also any health and security risks, are quickly established and that all third-country nationals who are present at the external border without fulfilling entry conditions or after disembarkation, following a search and rescue operation, are swiftly referred to the applicable procedure. The objective should also be to provide a useful tool and to enable the rest of the EU countries to participate and also evaluate the applicant during the APR.

3.3.2 The proposal provides that the fundamental rights of the persons concerned should be protected by a mechanism to be set up by the Member States.

3.3.3 The screening should consist in particular of:

- a) a preliminary health and vulnerability check;
- b) an identity check against information in European databases;
- c) registration of biometric data (i.e. fingerprint data and facial image data) in the appropriate databases, to the extent it has not occurred yet; and
- d) a security check through a query of relevant national and Union databases, in particular the Schengen Information System (SIS), to verify that the person does not constitute a threat to internal security.

3.3.4 The screening should be mandatory and should apply not only in the countries of first entry, but in every Member State, in line with the principle of EU solidarity. As described in the new Pact, the APR will only be conducted in the countries of first entry. **If "mandatory solidarity" does not take the form of "mandatory relocation" under the APR provisions, or if procedures are not created that allow people to apply for asylum in EU Member States without the need to cross EU borders, in practical terms the regulation will not be operational. There should be also incentives and disincentives for relocation, and in any case the APR process should be conducted in other Member States and not exclusively in the country of first entry.**

3.3.5 The proposed screening is expected to add value to current procedures and, with the exception of health issues, should not be conducted only in countries with external borders.

3.3.6 An independent, effective and ongoing monitoring mechanism should cover in particular the respect of fundamental rights in relation to the screening, as well as the respect of the applicable national rules in the case of detention and **compliance with the principle of non-refoulement**. It should furthermore ensure that complaints are dealt with expeditiously and in an appropriate way.

3.3.7 The proposal recognises the role of the EU agencies – Frontex and the European Union Agency for Asylum, which may accompany and support the competent authorities in all their tasks related to the screening – but is not clear enough. It also gives an important, but totally opaque, role to the Fundamental Rights Agency in supporting Member States in development of the independent monitoring mechanisms of fundamental rights in relation to the screening, as well as the respect of the applicable national rules in the case of detention and compliance with the principle of non-refoulement.

4. **Amended proposal revising the asylum procedures regulation**

4.1 The EESC considers the choice of a new, amended legislative proposal in the form of an EU regulation instead of a directive, as is the case today, to be appropriate. Nevertheless, for the EESC there is a clear question as to how it can be enforced and implemented in all Member States, in particular those which have been the subject of infringement procedures. **It can only**

endorse this proposal if it does not turn the Member States in the south into detention or pre-departure centres for human beings.

- 4.2 The EESC welcomes the intention of the Commission proposal to improve coordination and common procedures for the granting and withdrawal of international protection, and for further harmonisation of asylum and return decisions. However, it regrets that more proposals have been made to coordinate the implementation of closed detention centres in countries of first entry than have been made on the common asylum system, imposing the exclusive obligation to manage asylum seekers on the countries of first entry. This gives the over-riding impression that **the proposals to be implemented are addressed to the countries of the south, without any referral to relocation during the application of "border procedures"**.
- 4.3 Furthermore, the EESC regrets that potential problems in operating the return programmes have not been properly identified in the proposal, above all as regards the willingness in practice of non-EU countries, countries of origin or countries of transit to cooperate with the EU.
- 4.4 The EESC underlines the urgent need for a more comprehensive strategy based on a system of balanced and shared responsibility for the governance of migration flows between the EU and non-EU countries.
- 4.5 Moreover, the EESC stresses the need to provide adequate protection for families with children and urges the Commission to take special care with regard to unaccompanied minors, the overall effectiveness of asylum guidance procedures, indicators of operational standards and the compilation of examples of best practice (published by the European Asylum Support Office (EASO)). **It is not acceptable that a child is only considered as such if under the age of 12, and not 18, in accordance with international law. According to the 1981 UN Convention on the Rights of the Child, a child means every human being below the age of 18.**
- 4.6 In recent consultations, civil society organisations proposed revising certain rules on the determination of responsibility and providing for a mandatory solidarity mechanism, including for persons disembarked following a SAR operation. **Non-governmental organisations also advocated defining a common understanding of "responsibility" among Member States and called for the revised Dublin rules to include a more permanent relocation mechanism⁵. The EESC asks how a properly-functioning solidarity mechanism among Member States could be realistically implemented under the new amended proposal. The rules on determining the Member State responsible for processing an asylum application, at present laid down in the AMR, should be in the APR, providing an opportunity through Eurodac for claims to be processed by other Member States as well.**

⁵ CEPS Project Report, [Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?](#), June 2019.

5. **Amending the 2016 proposal for a recast Eurodac regulation**

5.1 **The amendment to the 2016 proposal for a recast Eurodac regulation aims to create a link between specific individuals and the procedures to which they are subjected in order to improve the control of irregular migration and the detection of unauthorised movements.**

5.2 The main goal of Eurodac is to identify asylum seekers and to facilitate, through finger print and facial image data ("biometrics"), the provision of evidence to assist with determining the Member State responsible for examining an asylum application lodged in the EU.

5.3 The EESC is not convinced that using Eurodac⁶ would be the appropriate tool for combatting irregular migration, nor that it would effectively support Member States in monitoring the granting of assistance for voluntary return and reintegration⁷.

5.4 The proposal amending the 2016 proposal builds on the provisional agreement between co-legislators, complements these changes and aims at **transforming Eurodac into a common European database to support EU policies on asylum, resettlement and irregular migration.**

5.5 Moreover, it aims to gather more accurate and complete data to inform policy-making and thereby better assist with the control of irregular migration and the detection of unauthorised movements by **counting individual applicants in addition to applications. However, the EESC believes that this sophisticated system must also provide the migrant with the possibility of applying for asylum in another Member State, without being limited to the country of first entry.**

5.6 Eurodac also aims to support the identification of appropriate policy solutions in this area by **allowing statistics to be drawn up combining data from several databases.**

5.7 The EESC agrees that common rules on the taking of fingerprints and facial image data for third-country nationals for the purposes of Eurodac need to be applied in the same way in all the Member States.

5.8 The EESC is in favour of a creating **knowledge instrument providing the European Union with information on how many third-country nationals enter the EU irregularly or following search and rescue operations and apply for international protection, something**

⁶ It will improve Member States' monitoring capacities in this field and prevent assisted voluntary return and reintegration (AVRR) "shopping", as Member States will have immediate access to this information and a person granted assistance in one Member State will have to refrain from moving to another Member State with the objective of obtaining another type of, or better, assistance. Currently, Member States have no common database or any way to find out if a returnee has already benefitted from return and reintegration support. This information is essential in combatting misuse and double-benefits.

⁷ The Entry/Exit System allows Member States to detect third-country nationals who have been staying on illegally although they have entered the EU legally. However, no such system exists for identifying illegally present third-country nationals who enter the EU irregularly at the external borders. The current Eurodac system is the ideal database for hosting this information as it already contains such data. For the time being, the purpose of collecting such data is limited to assisting in the determination of the Member State responsible for examining an asylum application. The identification of illegally present third-country nationals and those who have entered the European Union irregularly at the external borders will, in particular, assist Member States in re-documenting a third-country national for return purposes.

that is indispensable for sustainable and evidence-based policy-making in the field of migration and visa policy.

- 5.9 Another objective of Eurodac is to provide additional support to national authorities dealing with asylum applicants whose applications have already been rejected in another Member State, by marking rejected applications, but national authorities must be given the right to re-examine an application processed by another Member State.

Brussels, 25 February 2021

Christa SCHWENG
The president of the European Economic and Social Committee

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N.B.: Appendix overleaf.

APPENDIX to the OPINION
of the
European Economic and Social Committee

The following amendment, which received at least a quarter of the votes cast, was rejected during the discussions (Rule 43(2) of the Rules of Procedure):

Point 2.2

Amend as follows:

2.2 *The Member States in the south of Europe have no choice but to ~~be converted into either detention or~~ establish closed pre-departure centres where asylum seekers' situations are very problematic in terms of living conditions and rights.*

Reason

The current text is very easy to misinterpret as the countries themselves are not converted into either a detention centre or anything else. Pre-departure centres are established in the countries.

Outcome of the vote:

In favour: 96
Against: 100
Abstention: 47

The following paragraphs of the section opinion were amended to reflect the amendment adopted by the assembly but received more than one quarter of the votes cast (Rule 43(2) of the Rules of Procedure):

1.1 *The EESC takes note of the New Pact on Migration and Asylum, which aims to tackle a multifaceted and complex phenomenon. The EESC believes that the new regulations make a positive contribution to more effective EU border security. A better and safer process is being set up to control those entering the EU. Nevertheless, an integrated, common EU strategy, one that is resilient and forward-looking, is much-needed and long overdue. Unfortunately, concerning the migration issue and asylum as a whole, the Commission is serving up the same old soup, reheated and yet, as is standard practice, ladled out cold to the countries of southern Europe. **What is more, the four or five Member States concerned are going to become "closed detention centres"⁸ for human beings for a period of at least six or seven months, if not more, until the outcome of the procedures is known, resulting in situations that are 20 times worse than before.***

⁸ The concept of non-entry is something that has existed both in Schengen and the asylum *acquis* (Article 43 of the Asylum Procedures Directive (APD)).

Outcome of the vote:

In favour: 105
Against: 99
Abstention: 43

1.2 *The EESC wants to point out that there seems to be lack of goodwill on the part of the Commission regarding its suggestions. All its opinions (SOC/649, SOC/669 and SOC/670) criticise the adoption of both the Asylum and Migration Management Regulation (AMR) and the Asylum Procedures Regulation (APR). The EESC would also like to point out that from its examination of the nine regulations and its contact with Commission, the prospects for implementing these nine different regulations appear dysfunctional. It is typical of the Commission that it fails to treat immigration as a single issue, stating rather that any proposals or suggestions come under another regulation. As a result, no issues can be substantially linked, meaning that they are instead considered individually within the scope of each exclusive regulation. Put simply, "we throw the ball to another rule in every observation", or the Commission simply bats away all the comments on the grounds that they come under different rules.*

Outcome of the vote:

In favour: 101
Against: 97
Abstention: 41
