

ADiM
Accademia Diritto e Migrazioni



UNIVERSITÀ
DEGLI STUDI DELLA
TUSCIA

ANNUARIO ADiM
2020

Raccolta di scritti di diritto dell'immigrazione

A cura di

Alessandro Bufalini
Giulia Del Turco
Francesco Luigi Gatta
Mario Savino
Flavio Valerio Virzi
Daniela Vitiello

Questo volume è stato realizzato con il contributo economico del Dipartimento di studi linguistico-letterari, storico-filosofici e giuridici (DISTU) dell'Università della Tuscia, nell'ambito del Progetto di eccellenza 2018-2022. L'iniziativa è promossa dall'Accademia di Diritto e Migrazioni (ADiM), rete scientifica che riunisce studiosi italiani e stranieri impegnati in attività ricerca e formazione in materia di immigrazione.

Tutti i diritti sono riservati

© Editoriale Scientifica srl 2021
Via San Biagio dei Librai, 39
80138 Napoli
979-12-5976-074-6

INDICE

<i>Presentazione</i>	10
----------------------	----

PARTE I: LA DIMENSIONE NAZIONALE

IL GOVERNO DELL'IMMIGRAZIONE IN ITALIA: IL DECRETO IMMIGRAZIONE 2020 E L'ATTUAZIONE DEI DECRETI SICUREZZA 2018 E 2019

MARIO SAVINO, Riforma o Controriforma? Il “decreto Lamorgese” e la tela di Penelope	13
ANTONIO MARCHESI, <i>Non refoulement</i> e rispetto della vita privata e familiare nel nuovo “decreto immigrazione”	19
SALVATORE FABIO NICOLOSI, Il decreto immigrazione 2020 e il dilemma della protezione umanitaria alla luce del diritto internazionale ed europeo	28
EMANUELA PISTOIA, Una questione di dignità. Il superamento dell'abolizione dell'iscrizione anagrafica dei richiedenti asilo in Italia	38
SIMONA D'ANTONIO, Una nuova formula per l'accoglienza dei richiedenti asilo	46
MANUELA CONSITO, L'accoglienza e il trattenimento del richiedente asilo dopo il c.d. decreto immigrazione 2020: tra (tiepidi) ritorni al passato e nuove restrizioni	58
MICAELA VITALETTI, Il lavoro degli stranieri e le modifiche introdotte dal decreto immigrazione 2020	68
ELISABETTA GIOVANNA ROSAFIO, Prime osservazioni in materia di immigrazione via mare a seguito dell'entrata in vigore del decreto immigrazione 2020	75
ANDREA DE PETRIS, Il decreto sicurezza I: luci e ombre per il nuovo sistema di accoglienza e integrazione	88
ANDREA DE PETRIS, Asilo ed accoglienza ad un anno dal decreto sicurezza I: una precarietà annunciata?	97
BARBARA BOSCHETTI, Servivano davvero gli artt. 1 e 2 del decreto sicurezza- <i>bis</i> ?	104
OMAR MAKIMOV PALLOTTA, La protezione temporanea per motivi umanitari nel sistema di tutela delle persone migranti delineato dal decreto sicurezza I	109
STEFANO ZIRULIA, Decreto sicurezza- <i>bis</i> : una riforma è urgente (benché l'arma sia ormai spuntata)	115

L'IMMIGRAZIONE E L'ASILO AI TEMPI DEL COVID-19

CECILIA CORSI, Esigenze di tutela e nuovi bilanciamenti: il trattamento dello straniero in tempo di pandemia	122
FLAVIO VALERIO VIRZÌ, L'emergenza sanitaria attraverso il prisma delle politiche migratorie	131
SIMONE PENASA, La formalizzazione della domanda di protezione internazionale come "zona d'ombra" del diritto dell'immigrazione: l'emergenza sanitaria e la giusta distanza	136
MADIA D'ONGHIA, Gli immigrati resi ancora più invisibili dal Coronavirus: una vita sospesa tra emergenza sanitaria e <i>lockdown</i>	143
ANDREA DE PETRIS, COVID-19 e immigrazione: l'urgente necessità di una regolarizzazione	152
FRANCESCA BIONDI DAL MONTE, Regioni, emergenza sanitaria e immigrazione. Riflessioni in tema di competenze a partire dall'ordinanza 22.8.2020 del Presidente della Regione Siciliana	160
GIUSEPPE TERRANOVA, La geopolitica del coronavirus tra isolamento nazionalista e solidarietà globale	170

I DIRITTI COLLEGATI AL SOGGIORNO DELLO STRANIERO

ROBERTO CHERCHI, L'aggiornamento o rinnovo del permesso di soggiorno UE per soggiornanti di lungo periodo tra norme vigenti e cattive pratiche amministrative	175
VIRGINIA PASSALACQUA, Diritto di residenza per il cittadino dell'Unione che dispone di risorse sufficienti derivanti da attività lavorativa illegale	182
MARIA TERESA AMBROSIO, La "provenienza" delle risorse quale criterio non valutabile per la concessione dello <i>status</i> di soggiornante di lungo periodo	190
VIRGINIA PASSALACQUA, Revoca dello stato di lungo soggiornante e ordine pubblico: secondo tentativo per le corti spagnole	197
MARIA TERESA AMBROSIO, Parità di trattamento e sicurezza sociale: il diritto all'erogazione dell'assegno familiare anche per i periodi di assenza dallo Stato membro	205
CARMEN SPINELLI, L'assegno sociale degli stranieri extracomunitari e gli "speciali" requisiti di accesso	212
MARTINA GALLI, Sfruttamento del lavoro e "stato di bisogno" legato alla condizione di straniero	218
MARIA TERESA AMBROSIO, Molestie razziali sul luogo di lavoro. La responsa-	

bilità del datore per le molestie perpetrate da un proprio dipendente a danno dei colleghi di origine africana	230
MARTINA GALLI, “Un sistema per disperati”. Migranti, sfruttamento lavorativo “digitale” e strumenti penali	237

**INTEGRAZIONE E ACCOGLIENZA
DEI RICHIEDENTI ASILO E DELLE VITTIME DI TRATTA**

MANUELA CONSITO, Per tornare a parlare di <i>Green New Deal</i> , tra diritto d’asilo e solidarietà	249
EMANUELE BOSCOLO, La città “con gli occhi degli altri”: l’integrazione negli spazi territoriali	255
CRISTIANA LAURI, L’iscrizione anagrafica dei richiedenti asilo. Verso un “diritto alla città”?	267
ANNA FAZZINI, L’accoglienza dei richiedenti asilo e il ruolo dei media <i>Public Watchdog</i>	279
GIULIA DEL TURCO, La revoca delle misure assistenziali ai richiedenti asilo: la dignità umana come limite invalicabile e la necessità di un intervento legislativo	288
MIRKO FORTI, Alla ricerca di un punto di equilibrio tra la salvaguardia dell’ordine pubblico e la tutela dei diritti fondamentali dei soggetti richiedenti protezione internazionale: la decisione della Corte di giustizia dell’Unione europea nel caso <i>Haqbin</i>	294
FRANCESCA CURI, A proposito del reato di tratta. La Grande Camera fissa un decalogo	299
FRANCESCO MORESCO, Quando il sistema accresce la vulnerabilità: la vittima di tratta scivola nelle pieghe dell’accoglienza	314
ALVISE SBRACCIA, La pericolosità convertita: note sociologiche sulla radicalizzazione jihadista e i processi di criminalizzazione	321

LE GARANZIE PROCEDIMENTALI E PROCESSUALI

FRANCESCO LUIGI GATTA, Equo processo e espulsione dello straniero (regolare). La Grande Camera di Strasburgo delinea i diritti di trasparenza procedurale	329
GIOVANNA LAURIA, La protezione dei migranti apolidi e il ruolo della Corte di Strasburgo: verso un obbligo di istituzione di procedure (effettive) per la determinazione dell’apolidia ai sensi della CEDU?	341
MONICA PARODI, The Respect of the Rule of Law in the EU Member States’ Legislation on Asylum: Which Role for the EU?	349

LAURA RIZZA, Diritto a un ricorso giurisdizionale effettivo e (limiti all') autonomia processuale degli Stati in materia di protezione internazionale	356
GIULIA DEL TURCO, Violazioni procedurali e clausole nazionali di non annullabilità: la Corte di Giustizia torna a pronunciarsi sul diritto ad essere sentiti	365
EMELLIN DE OLIVEIRA, The Determination of 'Other Authorities' and the Status of Applicant for International Protection: The Crossword Puzzle	374
LAURA PERGOLIZZI, Procedura per il rilascio del permesso di soggiorno e preavviso di rigetto. Verso una tutela "rafforzata" delle garanzie procedurali dei cittadini stranieri? A proposito di una recente sentenza del Consiglio di Stato	381
LAURA PERGOLIZZI, La rilevanza del termine di conclusione del procedimento di conferimento della cittadinanza italiana	388
LAURA PERGOLIZZI, Protezione internazionale e istruttoria del giudice ordinario: l'attenuazione dell'onere della prova tra principio di tutela giurisdizionale effettiva ed applicazione delle regole processuali	397
FLAVIO VALERIO VIRZÌ, L'attuazione del d.lgs. n. 33 del 2013 nell'ambito delle politiche migratorie: dal diniego generalizzato di accesso al diritto di accesso generalizzato	406
FLAVIO VALERIO VIRZÌ, L'accesso civico generalizzato (c.d. FOIA) e i suoi limiti in materia di immigrazione	412
SERENA STACCA, Il potere amministrativo in materia di cittadinanza: il vento sta cambiando?	418
DILETTA TEGA, I 20 anni della Carta di Nizza: l'impatto sull'immigrazione	426

PARTE II:

LA DIMENSIONE EUROPEA E INTERNAZIONALE

LA RIFORMA DEL DIRITTO EUROPEO DELL'IMMIGRAZIONE E DELL'ASILO NEL NUOVO PATTO

JEAN-PIERRE CASSARINO, Readmission, Visa Policy and the "Return Sponsorship" Puzzle in the New Pact on Migration and Asylum	433
ROSSANA PALLADINO, Efficacia dei rimpatri e tutela dei diritti fondamentali e della dignità dei migranti: quale equilibrio nelle prospettive di riforma della direttiva rimpatri?	442
LUISA MARIN, The 2020 Proposals for Pre-entry Screening and Amended Border Procedures: A System of Revolving Doors to Enter (and Leave) Europe?	452

EMANUELA PISTOIA, Il nuovo Patto e la gestione degli sbarchi	460
CHIARA SCISSA, The (New) Commission's Approach on Temporary Protection and Migration Crisis	468
MAURA MARCHEGIANI, Il nuovo patto sulla migrazione e l'asilo sotto il prisma della nozione di vulnerabilità	476
EMANUELA PISTOIA, Dai ricollocamenti alla riforma del sistema comune di asilo, e ritorno?	485
SIMONE PENASA, Il Nuovo Patto e l'idea di solidarietà: principio fondativo del sistema europeo di asilo o metodo di allocazione delle responsabilità tra Stati membri?	489
MARIO SAVINO, On Failed Relocation and Would-be Leviathans: Towards the New Pact on Migration and Asylum	498

**IL DIRITTO ALLE FRONTIERE INTERNE ED ESTERNE
DELL'UNIONE EUROPEA**

MARIO SAVINO, Oltre i decreti sicurezza: la "tirannia di Schengen" sulla politica dell'Italia in materia di immigrazione e asilo	508
CHIARA LOSCHI, The Regulation (EU) 2019/1896 on the European Border and Coast Guard Agency (FRONTEX): Preliminary Insights on Inter-agency Cooperation and Implications for Fundamental Rights	513
SIMONE PENASA, La <i>relocation</i> come "minaccia" alla sicurezza nazionale? Prerogative statali, obblighi di solidarietà e spinte sovraniste	521
GIORGIA LO TAURO, GIULIANA QUATTROCCHI, Managing Migration Flows at the Balkan Borders: Which Challenges to the Rule of Law?	527
FEDERICO CASOLARI, <i>International (Binding) Law Strikes Back: lo Statement UE-Turchia alla prova della recente crisi migratoria</i>	536
ANTONIO M. MORONE, Il nuovo <i>MoU</i> tra Turchia e Libia: una sfida alle politiche europee di contenimento delle migrazioni irregolari	540
ALICE RICCARDI, Falsa partenza per i visti umanitari di fronte alla Corte europea dei diritti umani	542
ELEONORA FRASCA, Private Sponsorship Programmes in Europe and the Rule of Law: Towards a Greater Involvement of Private Actors in International Protection	552
SIMONE MARINAI, L' <i>Internal Market Bill</i> e la circolazione delle persone nelle future relazioni UE/UK	558

**NON-REFOULEMENT E DIVIETO DI ESPULSIONI COLLETTIVE
DINANZI ALLA CORTE EUROPEA DEI DIRITTI DELL'UOMO
E AL COMITATO ONU SUI DIRITTI UMANI**

ALESSANDRO BUFALINI, Tra visti umanitari e respingimenti alla frontiera: si può ancora cercare asilo in Europa?	570
ANNA FAZZINI, La sentenza <i>N.D. e N.T.</i> e il divieto di espulsioni collettive: una prova di equilibrismo tra flessibilità, restrizioni e più di una contraddizione	576
GIULIA SANTOMAURO, La controversa decisione della Corte Edu nel caso <i>N.D. e N.T. c. Spagna</i> sul divieto di espulsioni collettive: il diritto di avere diritti a rischio per i richiedenti asilo?	585
ALESSANDRO BUFALINI, Ancora a margine del caso <i>N.D. e N.T. c. Spagna</i> : la retorica dell'invasione si fa largo a Strasburgo?	593
VALENTINA FAGGIANI, Da <i>N.D. e N.T.</i> a <i>M.K. e altri</i> : la progressiva configurazione del divieto di "espulsione collettiva" e delle sue eccezioni nei contesti di violazione sistemica	597
ALESSANDRO BUFALINI, L'insostenibile incertezza sul contenuto degli obblighi degli Stati derivanti dal divieto di espulsioni collettive	605
MIRKO FORTI, Pericolo di ritorsioni per l'orientamento sessuale per individui sottoposti a procedura di allontanamento e l'art. 3 CEDU quale strumento di tutela	614
MICHELA CASTIGLIONE, La decisione del Comitato ONU dei diritti umani nel caso <i>Teitiota c. Nuova Zelanda</i> . Dal divieto di respingimento dei migranti ambientali verso il riconoscimento della categoria dei rifugiati ambientali?	622

IL TRATTENIMENTO DELLO STRANIERO

LORENZO BERNARDINI, La detenzione amministrativa degli stranieri: analisi statistica del fenomeno	631
ELENA VALENTINI, Detenzione amministrativa e custodia cautelare in carcere: intersezioni, somiglianze, inaccettabili differenze	640
GUIDO SAVIO, Le misure alternative al trattenimento amministrativo dei migranti in attesa di espulsione	649
MICHELA TUOZZO, Detenzione amministrativa e <i>best practice</i> dalla Spagna	655
MICHELA CASTIGLIONE, La (il)legittimità della detenzione negli <i>hotspot</i> greci	664
FRANCESCO LUIGI GATTA, Diritti al confine e il confine dei diritti: La Corte Edu si esprime sulle politiche di controllo frontaliero dell'Ungheria (Parte I – espulsione e art. 3 CEDU)	672

FRANCESCO LUIGI GATTA, Diritti al confine e il confine dei diritti: (Parte II – detenzione e art. 5 CEDU)	680
LUISA MARIN, La Corte di Giustizia riporta le ‘zone di transito’ ungheresi dentro il perimetro del diritto (europeo) e dei diritti (fondamentali)	688
FRANCESCO LUIGI GATTA, Chi vuole un terrorista? La detenzione dello straniero in vista dell’espulsione viola la CEDU in assenza di una prospettiva realistica di concretizzare il suo allontanamento dallo Stato	698

IL SOCCORSO IN MARE

MASSIMO STARITA, Dovere di soccorso in mare, diritto internazionale e cause di esclusione dell’illiceità penale	706
FRANCESCA DE MARINIS, Il caso <i>Alan Kurdi</i> : tra obblighi internazionali di salvataggio in mare e profili di diritto penale interno	714
ELEONORA FRASCA, Navigare in acque trasparenti: i documenti sulle attività di ricerca e salvataggio in mare di Frontex intorbiditi dall’eccezione di sicurezza pubblica	726
FRANCESCA CANCELLARO, Caso <i>Vos Thalassa</i> : una discutibile pronuncia della Corte d’Appello di Palermo sui rapporti tra legittima difesa e non-refoulement	731

THE 2020 PROPOSALS FOR PRE-ENTRY SCREENING
AND AMENDED BORDER PROCEDURES:
A SYSTEM OF REVOLVING DOORS TO ENTER
(AND LEAVE) EUROPE?

Luisa Marin*

SUMMARY: 1. Externalization policies in 2020: where is the European territory? – 2. The proposal for a pre-entry screening regulation: strengthening the Europe of borders and confinement? – 3. The proposal for new border procedures: a system of revolving doors to enter (and leave) the EU? – 4. Conclusions: a ‘lower density’ European territory?

1. *Externalization policies in 2020: where is the European territory?*

In spite of a Commission’s rhetoric stressing the novel elements¹ of the Pact on Migration and Asylum (hereinafter: the Pact),² there are good reasons to argue that the Pact develops and consolidates, among others, the existing trends on externalization policies of migration control.³ Furthermore, it tries to create new avenues for a ‘smarter’ system of management of immigration, by additionally controlling access to the European territory of third country nationals (TCNs), and by creating different categories of migrants,

* Marie Curie Fellow, European University Institute, Florence. Luisa Marin acknowledges funding from the European Union’s Horizon 2020 research and innovation programme, Marie Skłodowska-Curie grant agreement No 891762. The views expressed here do not engage the funding institution.

¹ EUROPEAN COMMISSION, Press Release: A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, 23.9.2020.

² EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM (2020) 609 final, 23.9.2020.

³ Cf D. THYM, ‘European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the ‘New’ Pact on Migration and Asylum’, in EU Immigration and Asylum Law and Policy blog, 28.9.2020. On externalization, see M. CREMONA, J. MONAR, S. POLI, *The External Dimension of the Area of Freedom, Security and Justice*, Bruxelles, 2011; E. GUILD, S. CARRERA, T. BALZACQ, *The Changing Dynamics of Security in an Enlarged European Union*, CEPS Challenge Programme, Research Paper n° 12, 2008.

which are then subject to different legal regimes which find application in the European territory.

The consolidation of existing trends concerns the externalization of migration management practices, resort to technologies in developing migration control systems (further development of Eurodac, completion of the path toward full interoperability between IT systems), and also the strengthening of the role of the European executive level, via increased joint management involving European agencies: these are all policies that find in the Pact a strengthening.

This brief will focus on externalization (practices), a concept which is finding a new declination in the Pact: indeed, the Pact and several of the measures proposed, read together, are aiming at ‘disentangling’ the territory of the EU, from a set of rights which are related with the presence of the migrant or of the asylum seeker on the territory of a state of the EU, and from the relation between territory and access to a jurisdiction, which is necessary to enforce rights which otherwise remain on paper.

Interestingly, this process of separation between territory, on one side, and a system of law which guarantees rights and access to a jurisdiction, functional to enforce those rights, takes place not outside, but within the EU: this is the new declination of externalization which one can find in the measures proposed in the Pact, namely with the proposal for a Screening Regulation and the amended proposal for a Procedure Regulation.⁴ It is no accident that other commentators have interpreted it as a consolidation of ‘fortress Europe’⁵. In other words, this externalization process takes place within the EU and aims at making the external borders more effective also for the TNCs who are already in the territory of the EU.

⁴ Respectively, EUROPEAN COMMISSION, 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 (hereinafter: Proposal Screening Regulation), COM (2020) 612 final, 23.9.2020; EUROPEAN COMMISSION, 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 (hereinafter: Amended Proposal Procedure Regulation), COM (2020) 611 final, 23.9.2020.

⁵ F. Spinelli, Fortress Europe raises the drawbridge, Voxeurop, 7.10.2020.

2. *The proposal for a pre-entry screening regulation: strengthening the Europe of borders and confinement?*

A first instrument which is having a pivotal role in the consolidation of the externalization trend is the proposed Regulation for a screening of third country nationals (hereinafter: Proposal Screening Regulation), which will be applicable to migrants crossing the external borders without authorization. The aim of the screening is to ‘accelerate the process of determining the status of a person and what type of procedure should apply’.⁶ More precisely, the screening ‘should help ensure that the third country nationals concerned are referred to the appropriate procedures at the earliest stage possible’ and also to avoid absconding after entrance in the territory in order to reach a different state than the one of arrival.⁷ The screening should contribute as well to curb secondary movements, which is a policy target highly relevant for many northern and central European states.

In the new design, the screening procedure becomes the ‘standard’ for all TNCs who crossed the border in irregular manner, also for persons who are disembarked following a SAR operation, and for those who apply for international protection at the external border crossing points or in transit zones; with the screening Regulation, all these categories of persons shall not be allowed to enter the territory of the state during the screening.⁸

Consequently, different categories of migrants, including asylum seekers which are by definition vulnerable persons, are to be kept in locations situated at or in proximity to the external borders, for a time (up to 5 days, which can become 10 at maximum), defined in the Regulation, but which must be respected by national administrations. There is here an implicit equation between all these categories, and the common denominator of this operation is that all these persons have crossed the border in an unauthorized manner.

It is yet unclear how the situation of migrants during the screening is to be organized in practical terms, transit zones, hotspot or others, and if this can qualify as detention, in legal terms. The Court of Justice has ruled recently on Hungarian transit zones,⁹ by deciding that Rösztke transit zone qualified as ‘detention’, and it can be argued that the parameters clarified in

⁶ EUROPEAN COMMISSION, The New Pact, COM (2020) 609, p. 4.

⁷ Proposal Screening Regulation, COM (2020) 612 final, recital 8, p. 17.

⁸ Proposal Screening Regulation, COM (2020) 612 final, Art. 3 and 4.

⁹ CJEU (Grand Chamber), Judgment of 14 May 2020, F.M.S. et al. c., C-924/19 PPU & C-925/19 PPU, ECLI:EU:C:2020:367.

that decision could find application also to the case of migrants during the screening phase. If the situation of TCNs during the screening can be considered detention, which is then the legal basis? The Reception Conditions Directive or the Return Directive? If the national administrations will struggle to meet the tight deadlines provided for the screening system, these questions will become more urgent, next to the very practical issue of the actual accommodation for this procedure, which in general does not allow for access to the territory.

On the one side, Article 14(7) provides a guarantee, indicating that the screening should end also if the checks are not completed within the deadlines; on the other side, the remaining question is: to which procedure is the applicant sent and how is then the next phase determined? The relevant procedure following the screening here seems to be determined in a very approximate way, and this begs the question on the extent to which rights can be protected in this context. Furthermore, the right to have access to a lawyer is not provided for in the screening phase. Given the relevance of this screening phase, also fundamental rights should be monitored, and the mechanism put in place at Article 7, leaves much to the discretion of the Member States, and the involvement of the Fundamental Rights Agency, with guidance and support upon request of the Member State, can be too little to ensure fundamental rights are not jeopardized by national administrations.

This screening phase, which has the purpose to make sure, among others, that states 'do their job' as to collecting information and consequently feeding the EU information systems, might therefore have important effects on the merits of the individual case, since border procedures are to be seen as fast-track, time is limited, and procedural guarantees are also sacrificed in this context. In the case the screening ends with a refusal of entry, there is a substantive effect of the screening, which is conducted without legal assistance and without access to a legal remedy. And if this is not a decision in itself, but it ends up in a de-briefing form, this form might give substance to the next stage of the procedure, which, in the case of asylum, should be an individualized and accurate assessment of one's individual circumstances.

Overall, it should be stressed that the screening itself does not end up in a formal decision, it nevertheless represents an important phase since it defines what comes after, i.e., the type of procedure following the screening. It must be observed therefore, that the respect of some procedural rights is of paramount importance; the same applies for communication: it is important that communication in a language TCNs can understand is effective, since

the screening might end in a de-briefing form, where one or more nationalities are indicated. Considering that one of the options is the refusal of entry (Art. 14(1) screening proposal; confirmed by the recital 40 of the Proposal Procedure Regulation, as amended in 2020), and the others are either access to asylum or expulsion, one should require that the screening provides for procedural guarantees.

Furthermore, the screening should point to any element which might be relevant to refer the TCNs into the accelerated examination procedure or the border procedure. In other words, the screening must indicate in the de-briefing form the options that protect asylum applicants less than others.¹⁰ It does not operate in the other way: a TCN who has applied for asylum and comes from a country with a high recognition rate is not excluded from the screening.¹¹

The legislation creates therefore avenues for disentangling, splitting the relation between physical presence of an asylum applicant on a territory implies a set of laws and fundamental rights associated to it, namely a protective legal order, access to rights and to a jurisdiction enforcing those rights. It creates a sort of 'lighter' legal order, a lower density system, which facilitates the exit of the applicant from the territory of the EU, creating a shift from a Europe of rights to the Europe of borders, confinement and expulsions.

3. *The proposal for new border procedures: a system of revolving doors to enter (and leave) the EU?*

Another crucial piece in this process of establishing a stronger border fence and streamline procedures at the border, creating a 'seamless link between asylum and return', in the words of the Commission, is constituted by the reform of the border procedures, with an amendment of the 2016 proposal for the Regulation procedure (hereinafter: Amended Proposal Procedure Regulation).¹²

Though border procedures are already present in the current Regulation of 2013, they are now developed into a "border procedure for asylum and

¹⁰ Proposal Screening Regulation, COM (2020) 612 final, Art. 14(3).

¹¹ See L. JAKULEVIČIENĖ, 'Re-decoration of existing practices? Proposed screening procedures at the EU external borders', in EU Immigration and Asylum Law and Policy blog, 27.10.2020.

¹² Amended Proposal Procedure Regulation, COM (2020) 611.

return”, and a more developed accelerated procedure, which, next to the normal asylum procedure, comes after the screening phase.

The new border procedure becomes obligatory (according to Art. 41(3) of the Amended Proposal Procedure Regulation) for applicants who arrive irregularly at the external border or after disembarkation and another of these grounds apply:

- they represent a risk to national security or public order;
- the applicant has provided false information or documents or by withholding relevant information or document;
- the applicant comes from a TC for which the share of positive decision in the total number of asylum decisions is below 20 percent.

This last criterion is especially problematic, since it transcends the criterion of the safe third country and it undermines the principle that every asylum application requires a complex and individualized assessment of the particular personal circumstances of the applicant, by introducing presumptive elements in a procedure which gives less guarantees.

During the border procedure, the TCN is not granted access to the EU. The expansion of the new border procedures poses also the problem of the organization of the facilities necessary for the new procedures, which must be a location at or close to the external borders: in other words, where migrants are apprehended or disembarked.

Tellingly enough, the Commission describes as guarantees in the asylum border procedure all the situations in which the border procedure shall not be applied,¹³ for example, because the necessary support cannot be provided or for medical reasons, or where the ‘conditions for detention (...) cannot be met and the border procedure cannot be applied without detention’.¹⁴

Also, here the question remains on how to qualify their stay during the procedure, because the Commission aims at limiting resort to detention. The situation could be considered *de facto* a detention, and its compatibility with the criteria laid down by the Court of Justice in the Hungarian transit zones case is questionable.¹⁵

Another aspect which must be analyzed is the system of guarantees after the decision in a border procedure. If an application is rejected in an asylum border procedure, the “return procedure” applies immediately. Member

¹³ Amended Proposal Procedure Regulation, COM (2020) 611, p. 14-15.

¹⁴ Amended Proposal Procedure Regulation, COM (2020) 611, p. 15.

¹⁵ CJEU (Grand Chamber), Judgment of 14 May 2020, F.M.S. et al. c., C-924/19 PPU & C-925/19 PPU, ECLI:EU:C:2020:367.

States must limit to one instance the right to effective remedy against the decision, as posited in Article 53(9). The right to an effective remedy is therefore limited, according to Art. 53 of the Proposed Regulation, and the right to remain, a 'light' right to remain one could say, is also narrowly constructed, in the case of border procedures, to the first remedy against the negative decision (Art. 54(3) read together with Art. 54(4) and 54(5)). Furthermore, EU law allows Member States to limit the right to remain in case of subsequent applications and provides that there is no right to remain in the case of subsequent appeals (Art. 54(6) and (7)). More in general, this proposal extends the circumstances where the applicant does not have an automatic right to remain and this represents an aspect which affects significantly and in a factual manner the capacity to challenge a negative decision in a border procedure.

Overall, it can be argued that the asylum border procedure is a procedure where guarantees are limited, because the *access* to the jurisdiction is taking place in fast-track procedures, and access to legal remedies is also reduced to the very minimum. Access to the territory of the Member State is therefore deprived of its typical meaning, in the sense that it does not imply access to a system which is protecting rights with procedures which offer guarantees and are, therefore, also time-consuming. Here, efficiency should govern a process where the access to a jurisdiction is lighter, is 'less dense' than otherwise. To conclude, this externalization of migration control policies takes place 'inside' the European territory, and it aims at prolonging the effects of containment policies because they make access to the EU territory less meaningful, in legal terms: the presence of the person in the territory of the EU does not entail full access to the rights related to the presence on the territory.

4. *Conclusions: a 'lower density' European territory?*

This brief reflection has highlighted a trend which is taking shape in the Pact and in some of the measures proposed by the Commission in its 2020 package of reforms. It has been shown that the proposals for a pre-entry screening and the 2020 amended proposal for enhanced border procedures are creating something we could label as a 'lower density' European territory, because the new procedures and arrangements have the purpose of restricting and limiting access to rights and to jurisdiction. This would happen on the territory of a Member State, but in a place at or close to the external

borders, with a view to confining migration and third country nationals to an area where the territory of a state, and therefore, the European territory, is less ... 'territorial' than it should be: legally speaking, it is a 'lower density' territory.

The "seamless link between asylum and return" the Commission aims to create with the new border procedures can be described as a system of revolving doors through which the third country national can enter or leave immediately the EU, depending on how the established fast-track system qualifies her situation.

However, as Cassarino has shown in his blogpost of November 2020,¹⁶ readmission agreements or even arrangements might turn out not being the solution, since third countries have also their own self-interests and their domestic politics. The return sponsorship is certainly an effort in taking non-frontline Member States out of their privileged position, according to the Dublin criteria; however, it is not clear that the system will work, nor in the direction of effectively carrying out returns, nor in the direction of enforcing relocations. Considering that the relocation system designed with 2015 Decisions was not successful, one can really warn that the principle of solidarity must be taken seriously within the EU, at least for the implications that an unfair and unbalanced European asylum system can have on Schengen.¹⁷

¹⁶ CASSARINO, J.P., *Readmission, visa policy and the "return sponsorship" puzzle in the new Pact on migration and asylum*, ADIM Blog, November 2020.

¹⁷ L. MARIN, *Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law*, in *European Journal of Migration and Law*, 2020, pp. 60-81.