ASGI

ASGI Policy Paper on the Amendment Procedure Regulation

In this document we present the main **criticalities** emerging from the proposed *Regulation introducing a common procedure for the recognition of international protection in the Union*, as well as our **recommendations** to guarantee the rights of migrants and international asylum seekers

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1. Introduction

In presenting the European Pact on Migration and Asylum on 23 September 2020, the European Commission simultaneously relaunched the proposal for a "***Regulation introducing a common procedure for the recognition of international protection in the Union and repealing Directive 2013/32/EU***".

A version of the Procedures Regulation was drafted in 2016 in the context of the CEAS reform process[1]. The Commission has now made a number of specific changes that essentially focus on **accelerated procedures, border procedures and remedies available to asylum seekers[2].**

Several aspects in the 2016 Proposal had already prompted ASGI to **take a critical stance in relation to the reform and suggest a number of changes deemed necessary to avoid the radical distortion of the asylum system[3].** The new amendments build on previous critical elements (such as accelerated procedures and the shift over an evaluation on the applications' admissibility) and introduce further subversive points.

ASGI believes that some of the novelties violate a number of fundamental principles and rights encompassed by international law (e.g. the Geneva Convention), European Union law (and in particular the Charter of Fundamental Rights) and the Italian Constitution. Reference can be made, in particular, **to the principle of jurisdiction and competence, the principle of *non-refoulement*, the right to asylum and the right to personal freedom.**

This document briefly highlights aspects of these proposals that are considered irreconcilable with the rights listed above and is structured as follows: we will initially recall the main critical issues already raised in relation to the 2016 proposal; the individual proposals made in 2020 will then be analyzed, indicating the most serious violations of the rights indicated and, lastly, suggested amendments to individual regulations.

[1] In 2016, the European Commission proposed changes to the shared European asylum system with a package of reforms involving the main legislative instruments governing the matter. **None of the legislative proposals put forward in 2016 has seen the light**, to date, mainly because of the differences between the positions of the Parliament and the Council, as well as differences between Member States.

[2] The Commission did not consider it necessary to make far-reaching changes to the entire Regulation, since the negotiations on the initial 2016 proposal had already progressed within the routine legislative process: in 2018, the LIBE Commission of the European Parliament adopted a position at the first reading which proposed a number of amendments to the text.

[3] See, for instance, https://www.asgi.it/wp-content/uploads/2021/10/Att_Procedure_Regulation.pdf (in English) and https://www.asgi.it/regolamento-procedure-ue-paese-sicuro/#_ftn1 (only Italian).

2. The Amended Asylum Procedure Regulation: content and critical issues

The proposal to amend the Procedures Regulation presented on 23 September 2020 suggests that the European Commission essentially wanted to introduce a "*seamless procedure*" which includes preliminary checks at the border, examination of asylum applications and possible return procedures. The objective pursued by the Commission is therefore to bring border management, asylum and return policies within the scope of a single legal framework[4].

ASGI believes that such an approach is incompatible with the right of asylum as governed by the Geneva Convention, Article 18 of the EU Charter of Fundamental Rights and Article 10 of the Italian Constitution. Assessments relating to non-entry and return policies must be implemented at an independent level that is also legally distinct from assessments concerning the recognition of international protection. The existence of mixed flows **cannot exempt competent authorities from carrying out detailed and individual examination of individual personal situations**. The general approach followed by the Commission, as the basis for individual proposals, is therefore entirely unacceptable. Against this background, the individual articles amended by the Commission and their most critical aspects will be examined in detail below, starting with the regulations that give rise to the greatest concern.

2.1. Accelerated procedures and asylum and return border procedures (Articles 40, 41 and 41 bis)

The changes proposed by the Commission to Article 40 for accelerated procedures and Articles 41 and 41 bis, which redesign border procedures in overall terms, are examined here. These procedures reflect another of the Commission's core objectives: **containment of applicants for international protection at external borders**.

The procedure referred to in Article 41 seems likely to be **applicable to a potentially large number of asylum applications[5]**. Decisions taken at the border would involve both the admissibility of an application (in enacting the concepts of safe third country and country of first asylum) and all cases in which an accelerated procedure is applicable. The latter are being expanded: changes to **Article 40** effectively seek to include, among asylum applications subject

[4] This approach is based on the fact that so-called "mixed flows" have apparently increased in recent years so that the percentages of people who are unlikely to receive international protection in the EU would also increase. In truth, the data the Commission relied on only refer to the first stage of the procedure and do not take into account the recognitions awarded on appeal. In any case, the data that the EC considers neutral is actually far from neutral: the rates of recognition of protection largely depend on the procedures applied, as well as the policies and prejudices that underlie the work of competent authorities.

[5] Member States could indeed exploit this when a request is made in a transit or border area, if the person was stopped in connection with an unauthorized crossing of an external border or if arrival in the territory took place following SAR or relocation operations.

to the accelerated procedure, those presented by applicants for protection **from countries where the international protection recognition rate is less than 20%** (item 1, letter i). In this case, Member States would have **obligation on Member States to examine applications at the border**[6].

Moreover, article 41 provides for a fiction of non-entry on the territory of the Union and states that "**during examination of applications in the border procedure, applicants must be kept at the border or in its vicinity or in the transit areas in places that Member States must notify to the Commission".** Since applicants are forbidden to enter the territory, it is likely that detention may be extended to all asylum seekers who are at or near borders. **The maximum duration of the procedure, which may coincide with the detention of applicants, is 12 weeks.**

The border procedure **may also concern, without any limitation, minors over 12 years old with families**, while it would be extended to unaccompanied foreign minors and accompanied minors under the age of 12 **only in exceptional cases[7].**

Following the border asylum procedure, a corresponding return procedure may also be applied: this also takes place at the border and is based on "fictional" non-entry. Article 41 bis was inserted in the context, as already mentioned several times, of unifying asylum and return procedures and making them more efficient: **it can be applied to asylum seekers whose application, examined pursuant to Article 41, was rejected[8]**.

It is envisaged that if the applicant is detained during the application analysis procedure, **detention may continue in order to prevent entry by the foreign citizen and to prepare return**. On the other hand, if the application analysis procedure is not carried out with detention, **it is possible to detain the foreign citizen if there is a risk of absconding** (according to the definition contained in the proposed review of the Return Directive), in the event that the applicant takes action to prevent or hinder the implementation of the return order or poses a risk to public security, public order or national security.

[6] The other cases in which the procedure is mandatory are those where: (i) the applicant misled the authorities by presenting false information or documents or by omitting pertinent information or documents relating to identity or citizenship which may have adversely affected the decision; and (ii) the applicant may, for serious reasons, be regarded as a danger to the national security or public order of the Member States.

[7] That is, when these are considered a risk to national security or public order. Further exceptions to the mandatory procedure concern cases where it is evident from the outset that re-admission of applicants is unlikely to be successful in the event of a negative response to the application itself.

[8] The return procedure is always implemented at the border or other places in the vicinity, but if there is not enough space, Member States can transfer asylum seekers to facilities inside the territory itself.

Criticalities

ASGI believes that if this rule were adopted, it would violate several fundamental principles and rights envisaged in international, European and Italian law.

Firstly, **the introduction of "fictional" non-entry seems to be incompatible with general principles of jurisdiction** and the responsibility of the State to protect the fundamental rights of human beings[1]. The asylum and return procedures are both apparently intended to take place in a "non-place", since the applicant for protection would not have access to the territory but remain in a "free zone" at the border. In reality, from a legal point of view, **the jurisdiction of the State cannot be arbitrarily excluded when an area, albeit on a border, over which the same State has effective control** is concerned. These conclusions have already been extensively stated and restated, with reference to airport transit areas, by the ruling for *Amuur v. France*[1]: the same principle is undoubtedly applicable to border areas where asylum and repatriation procedures would take place. This implies, therefore, that Member States could not absolve themselves from upholding international, European and national standards concerning respect for fundamental rights. This is also confirmed by Article 51 of the EU Charter of Fundamental Rights, whereby the Charter applies whenever the State implements EU law (as in this case). Basically, **there is no doubt that these people are to all intents and purposes in EU territory** and that, consequently, all the rights envisaged by the Charter, by secondary legislation and by domestic laws of Member States are fully applicable. Inasmuch, Article 2 item 1 of Italian Legislative Decree no. 286/98, which implements Articles 2 and 3 of the Italian Constitution, expressly envisages that all foreign citizens must enjoy the protection of their fundamental rights at the border. However, the **"fiction" of extra-territoriality - inconsistent from a legal point of view - is very worrying from a political point of view**: that is, it seems that the Commission is not content with promoting outsourcing of the right of asylum to third countries but also wishes to create additional "anomalous" spaces at the Union's borders.

Secondly, both the asylum procedure and the return procedure at the border may result in a **violation of the right to freedom of the person, as protected by Article 5 of the European Convention, Article 6 of the Charter of Fundamental Rights and Article 13 of the Italian Constitution**. In fact, in applying a fiction of extra-territoriality, it is claimed that asylum seekers are to all intents and purposes not in EU territory and therefore the State can detain them in order to decide on their entry into the territory[1].

Application of these new procedures would essentially create a short circuit circumventing the otherwise exceptional nature of detention.
They would be implemented in a **context of generalized deprivation of freedom, in contrast with the principles whereby detention should be an exceptional, non-arbitrary, necessary and proportionate measure.**
On the contrary, detention of migrants would become the cornerstone for asylum and return procedures, thereby indiscriminately criminalizing people seeking protection and sacrificing their basic rights, including personal freedom.

Furthermore, the changes to the accelerated procedures and the border asylum procedure would violate the right of asylum, protected by the Geneva Convention, by Article 18 of the Charter and Article 10 of the Italian Constitution: this **right would be thoroughly distorted.** Applications will not be examined on merit in accordance with an individual assessment of circumstances but only on the basis of elements pertaining to the nationality of persons applying for protection, or their passage from a third country. From this point of view, the extension of the accelerated procedure to applicants from countries with low rates of recognition of international protection is particularly critical. This is a new aspect that hinges on the **"safe country of origin" concept as a requirement for the application of accelerated procedures** and exasperates the concept by **shifting protection from the characteristic individual dimension to a collective dimension**, associated with the statistical presumption of security for the majority of citizens from a given country.
At the same time, carrying out border procedures implies that **assistance, protection and protection of the social rights of applicants will be denied** - as the case of Greece has shown so strikingly - and that **procedural rights will be significantly compressed, such as those concerning legal assistance and effective remedy**. The right to asylum would in fact be implemented in a situation of effective isolation, and so quickly that the possibility of being recognized as entitled to protection becomes a merely abstract concept.

Lastly, the Commission's proposals contrast distinctly with the best interests of children, as envisaged by the Convention on Children's Rights as implemented in Italy by Law 47/2017. **In accordance with Italian domestic law, minors cannot be detained under any circumstances and must immediately be taken in charge by the competent authorities.** The prohibition of detention should apply to asylum and return procedures alike - in the light of the fact that minors can be sent back to their country of origin only if it is demonstrated, following investigations conducted by a judicial body, that this solution is in the best interests of the child.

2.2. Unification of decisions rejecting the asylum application and return (Article 35 bis)

In the context of a “seamless asylum and return procedures", the new Article 35 bis in the Regulation defines that Member States must issue the asylum and return decisions in the same document or, if presented in separate documents, at the same time, when the application is rejected because of inadmissibility, groundlessness, manifest groundlessness or explicit or implicit withdrawal. Article 53 (analysed below) in turn establishes that the rejection decisions for the above-mentioned reasons must be challenged before the same court, within the same procedure and with the same terms as the return decisions.

Critical aspects

The proposal raises numerous critical issues as regards respect of the fundamental rights of foreign citizens seeking asylum, especially in relation to the right to effective recourse and the principle of *non-refoulement*.

An initial problematic aspect concerns the obligation of **unifying two distinct procedures, with different conditions and legal foundations, within a single decision.** This practice would be extended to all Member States, including those, such as Italy, that have in place very different procedures. As already pointed out, decisions concerning asylum and return involve political choices and separate regulatory regimes: envisaging their mandatory unification would affect the competences of those entities responsible for recognizing international protection which - for example in the Italian legal system - are distinct and independent from the authorities competent in matters of repatriation and expulsion.

In addition, the Commission's approach seems to promote the idea that, for foreigners arriving in European territory, **the only possible alternative to recognition of international protection is return. This is obviously not the case**: mention need only be made of victims of trafficking or exploitation, for whom EU law precisely and expressly contemplates the possibility of access to a residence permit. Then there are cases where, on the basis of **considerations related to the principle of non-refoulement, the right to private and family life, the right to health or other humanitarian aspects,** States may also recognize additional forms of protection. If, on the one hand, it is undeniable that (even with the adoption of the Procedures Regulation) States will retain autonomy as regards recognizing these alternative forms of protection, on the other hand it should be noted that this possibility is not mentioned in Article 35 bis, and that the unification of asylum and return procedures **in any case may can make alternative regularization methods much more complex and inaccessible**.

It must be taken into account that **the adoption of a single measure** (or two contextual measures) **would take place - according to the Commission's plan - in border contexts**, since applications destined to be judged inadmissible and unfounded would be examined here. It is evident that in such situations the right to defence, legal assistance and support from civil society would most likely become non-existent, with the consequence that applicants for protection could well be given expulsion orders without having received complete information in a manner appropriate to their situation. There consequently seems to be a high risk that in practice foreign citizens would not be assured the right to effective recourse which would therefore violate a fundamental principle recognized and protected by the Charter of Fundamental Rights of the European Union in Article 47, by the European Convention on Human Rights in Article 13 and the Italian Constitution in Article 24.

This is a particular concern in relation to the rejection of an asylum application for inadmissibility, which may be based on mere transit from a safe third country: in such cases, **there is a very high risk that the danger of chain refoulement is not effectively and fully**

assessed, neither in the asylum application stage nor in the return stage. The failure to assess the principle of non-refoulement in the context of a "seamless" asylum and return procedure was deemed incompatible with EU law by the Court of Justice of the European Union, with reference to the conduct of Hungarian authorities (judgement of 14 May 2020, *FMS v. Hungary*). Nevertheless, Hungary is not the only country where this is happening: for example, it was reported in Greece that, on the basis of the EU-Turkey agreement, numerous Syrian asylum seekers received rejections of their request for asylum in application of the notion of a safe third country and, once sent back to Turkey, were then deported to Syria.

2.3. Limitations of the right to an effective remedy (Articles 53-54)

The new aspects introduced in 2020 saw the Commission also entirely **rewrite the rules concerning effective remedy and the suspensive nature of appeals.** The amendments must be read in conjunction with previous articles, since they essentially affect the time frame for presenting the appeal and how to exercise the right to an effective remedy for the border procedure.

In particular, it is envisaged that applicants for protection have the right to an effective remedy before an adverse judge: (a) the decision rejecting the application for inadmissibility; (b) the decision rejecting the application for groundlessness, for the purposes of refugee status and subsidiary protection alike; c) the decision to reject the application for implicit withdrawal; (d) the decision to withdraw international protection; (e) the decision for return.

In order to simplify asylum and return procedures at the border, however, it is defined that refusal decisions **can be appealed only at one level of judgement** and amendments to the governance of suspensions also tend to move in the same direction.

It is in fact established that **applicants do not automatically have the right to remain in the territory in the event of rejection for unfoundedness or manifest unfoundedness** if, at the time when the decision is taken, circumstances giving rise to accelerated procedures or cases subject to the border procedure are met; in cases of inadmissibility by country of first asylum and repeated application without new elements; implicit withdrawal of the application; repeated application rejected as unfounded or manifestly unfounded.

In such cases, the applicant has at least five days from notification of the decision to ask the judge for the right to remain in the territory. During this period, applicants may remain in the territory, as well as during the wait period for the judge's decision. However, **in the event of a repeated application, Member States may decide to derogate from this right** if the appeal was made for the sole purpose of delaying or preventing the execution of a return decision. Lastly, an applicant who makes another appeal against a first or second level decision does not have the right to remain, except for the possibility that a court may allow the applicant to remain at the request of the applicant or ex officio.

Critical aspects

The limitations introduced, with reference to the uniqueness of the level of judgement and with respect to the timing proposed and the absence of a suspensive effect, in the vast majority of cases **may conflict with the right to an effective remedy, pursuant to Article 13 ECHR and 47 Charter, as well as the right to defence protected by Article 24 of the Italian Constitution.**

The combination of detaining the applicant at the border and reducing the time limits for the appeal will make it impossible for lawyers to contact persons applying for protection and obtain all the necessary and indispensable information to lodge appropriate appeals. Furthermore, given the material conditions deriving from confinement at the border, assurances regarding the presence of interpreters and mediators as well as access to appropriate information in a language and in a manner understandable by the applicant seem to be quite insufficient. Moreover, **the right to remain in the territory is an essential component of the right to an effective remedy**: in no case can the applicant be expected to be expelled before a decision on suspension is taken. It would actually be appropriate to envisage that effective suspension is automatic, at least during the first level of judgement: only in this way would the right to defence and the right to be heard be fully assured.

The new aspects also seem not to take fundamental assurances into account that ought to be upheld even when accelerated procedures are applied in order to analyze applications. Reference is primarily made to **assurances envisaged to protect minors, such as consideration of their best interests at each stage of the procedure.** In practice, this consideration is made possible only by providing information and listening to minors in every stage of the procedure with methods appropriate to their age and degree of maturity, as required in Italy by Law 47/2017.

3. The position and recommendations of ASGI

ASGI believes that the amendments proposed by the European Commission in 2020, together with the more critical formulations of the Procedures Regulation adopted in 2016, may definitively distort the international protection system in the European Union, voiding it of substance, and pave the way for a model of generalized detention of asylum seekers. It is therefore deemed necessary to change its content substantially and repeal some of the more serious modifications. ASGI therefore believes that the following information must be provided:

A) Border asylum procedure (Article 41)

ASGI believes that the application of the border procedure, as currently formulated, is incompatible with the needs for protection and safeguarding asylum seekers. The most serious aspects concern the fiction of extra-territoriality, generalized detention and its extension to a large number of cases. Inasmuch, the following changes are proposed:

- reference to the "fiction" of non-entry and the ban on access to the territory should be deleted from the text of the Regulation;
- a provision should be included concerning the ban on detention - unless in exceptional cases - and the application of reception measures to migrants at external borders in compliance with Reception Directive standards and as indicated by the EU Court of Justice in the judgement of the *FMS* case;
- the procedure should remain only as an option, be of an exceptional nature and comply with the fundamental principles and assurances defined in the Regulation;
- in particular, it may only be applied to decisions concerning the admissibility of the application and to applications presented by asylum seekers from a safe country of origin, only when the pertinent articles of the Regulation (Articles 40, 44, 45) are modified by incorporating the notes already formulated by ASGI;
- this procedure could be maintained only for a limited time and in any case for no more than 4 weeks: if this term is exceeded, persons applying for protection must be admitted into the territory;
- in any case, when regulating the asylum procedure at the border, a general ban should be introduced on its application to unaccompanied minors, accompanied minors and members of their families, as well as vulnerable groups (even if vulnerabilities emerge subsequently).

B) Border return procedure (Article 41)

ASGI opposes the introduction of a rule governing a return procedure in the context of the international protection procedure regulation. Inasmuch, ASGI suggests that this rule should be repealed.

C) Meeting of decisions and right to effective remedy (Article 35 *bis*, 53 and 54)

ASGI proposes the repeal of article 35 *bis* as regards the unification of decisions to reject asylum application and return. In any case, the proposal is to retain only the possibility of adopting two separate contextual measures, instead of one.
It is also proposed that the terms within which the appeal envisaged by Directive 2013/32/EU can be made are "reasonable" and, in any case, no less than 15 days for decisions concerning admissibility or manifest groundlessness, and no less than 30 days in the remaining cases.
Lastly, it is suggested as a general rule that the automatic suspensive effect of appeals should be envisaged. In any case, if this does not arise, it should be possible to take the suspension decision ex officio and at the request of a party and the applicant for protection is always authorized to remain in the territory until the adoption of the decision of the authority on the authorization to stay, when the appeal does not have automatic suspensive effect.
Lastly, it is proposed that in the course of all procedures - be they accelerated or routine, including those that may even take place at the border - rights of access to defence and legal assistance, translation of documents and the presence of an interpreter, and listening to the person (an essential assurance in the event that procedures involve minors) must be assured.
With specific reference to cases where a suspensive effect of the appeal is not envisaged, the applicant must have necessary interpreting and legal assistance, as well as sufficient time, to prepare the application for suspension. If these assurances are not upheld, the routine procedure should automatically apply, even with reference to the applicant's right to remain in the territory.