

AN ANALYSIS OF THE FICTION OF NON-ENTRY AS APPEARS IN THE SCREENING REGULATION

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The Screening Regulation (COM/2020/612 final) constitutes an important legislative proposal as part of the European Commission's 2020 New Pact on Migration and Asylum (hereafter, the Pact). The Pact ostensibly seeks to provide a “comprehensive approach” to supranational asylum governance including borders, the asylum system, return policies, internal movement in the Schengen area, and external cooperation on asylum and migration. The Screening Regulation contributes to this comprehensive approach by providing a uniform procedure for rapidly identifying those in need of international protection or return. Central to the legal operation of the Screening Regulation is the fiction of non-entry. The purpose of this commentary is to provide clarity on the fiction of non-entry as it relates to the Screening Regulation.

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SCREENING REGULATION

The Screening Regulation is a migration control mechanism which establishes a pre-entry screening phase preceding state-level border procedures. The purpose of the regulation is to more rapidly direct third-country nationals towards the appropriate migration procedure.¹ Persons who arrive at the EU border via irregular routes or who are apprehended within a Member State are subject to identity checks, health and safety checks, an initial assessment of vulnerabilities, and registration of biometric data through Eurodac. Applications for humanitarian protection must be made during the screening process and in accordance with the Asylum Procedure Regulation, with information collected during the screening process to form part of the asylum seeker's protection application or return justification (Article 14(2)). Such screenings are to take place at the external borders of the EU where possible, but also apply to dedicated transit zones and processing centres within Member States. Third-country nationals may be held for a maximum of 5 days during the screening process, with an additional 5-day extension possible in a situation of increased arrivals (Article 6(3)). At the conclusion of the screening process, third-country nationals are issued with a debriefing form (Article 13) and are referred to the competent authorities to complete their relocation, return, or process their asylum claim (Article 14). Third-country nationals are only allowed to enter the Member State once they have fulfilled the entry conditions set out in Article 6 of Regulation (EU) 2016/399.

The Screening Regulation also includes a proposed fundamental rights border monitoring mechanism to be set up by each individual Member State (Article 7). The onus is therefore placed on the Member States to provide for an independent monitoring mechanism, with the EU-level Fundamental Rights Agency issuing general guidance for setting up such mechanisms and their independent functioning.

FICTION OF NON-ENTRY

Central to the Screening Regulation is the legal principle of the fiction of non-entry. The fiction of non-entry is a legal fiction in which states claim that the arrival of a third-country national only occurs once she has been legally approved to enter the state by authorised border officers, regardless of her physical presence in the territory. Such legal fictions are often used by states in so-called transit zones at ports of entry. However, their use among many EU Member States has expanded to include territory within Member States beyond ports of entry.

The purpose of the fiction of non-entry is to provide a liminal legal space to facilitate the checking and processing of migrant documentation. The liminal nature of this space implies that states claim to possess no obligation to provide rights to incoming migrants that they usually would provide once the migrant has legally arrived in the state. Not to be confused with formal rightlessness, the fiction of non-entry instead creates a legal space where states claim greater power to control migrant mobility and rights access. Within these spaces, migrants are obligated to remain in closed or limited zones, are subjected to increased monitoring, and lack access to full judicial review. This can exclude migrants from accessing rights, legal processes and procedures, and institutions in the host country. As such, migrant movements in these areas can be controlled by governments, as well as migrant access to goods and services. These liminal spaces also allow for easier deportation. The fiction of non-entry is therefore a migration control mechanism which manages migrant mobility through the limiting of migrant rights to movement, privacy, and judicial review.

The fiction of non-entry is especially powerful in the context of asylum governance. According to the 1951 Convention Relating to the Status of Refugees (hereafter, the Convention), states only possess a responsibility

1. ECRE, 'ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612' (2020), 18 December 2020, available at: <https://ecre.org/ecre-comments-on-the-commission-proposal-for-a-screening-regulation-com-2020-612/>, 6.

to provide humanitarian protection to those fleeing a well-founded fear of persecution who have crossed an international border, even if that person does not possess a valid travel visa. The Convention refers here to a legal border, not necessarily a physical border. As such, the fiction of non-entry provides a legal justification for extending the legal border in such a way that asylum seekers cannot cross it. This effectively distances states from the obligation to allow an asylum seeker to apply for asylum and prevents states from being held accountable to the principle of non-*refoulement*. The purpose of the fiction of non-entry in asylum governance is thus to externalise state responsibilities to provide those seeking asylum with the possibility to apply for asylum. The fiction of non-entry also acts as an instrument of control in asylum governance which strips asylum seekers of their rights and increases state control over asylum seeker mobility and access to resources.

FICTION OF NON-ENTRY IN MEMBER STATE ASYLUM GOVERNANCE

The fiction of non-entry is used by all member states of the EU in a non-asylum context in transit zones at ports of entry. However, member states are also increasingly using the fiction of non-entry to manage asylum seeker arrivals. Indeed, Austria, Belgium, France, Germany, Spain, Greece, Hungary, and Portugal consider persons who apply for asylum at their borders or transit zones not to have formally entered their territory.² In Germany, for example, transit zones were originally codified in the 1997 Residency Act (Section 13) and were limited to airports. However, in 2018, the German government extended the fiction of non-entry to include land crossings. According to the Residency Act and the 2018 German government's interpretation of the law, transit zones are not confined to a set area, but rather are linked to the process of legal status determination. The transit zone could therefore extend as far into Germany as the migrant travels and remains valid until the immigration status of the migrant is determined by border patrol and immigration authorities.³ This includes if the migrant is taken to an asylum seeker processing centre and could last as long as 18 months. If the individual is deemed to have entered Germany via irregular channels, then she would be sent back to the first EU state in which she arrived (in accordance with the Dublin Regulation). If the EU state lies within the Schengen Zone, then the asylum seeker would be returned as if she had never entered the Schengen Zone, therefore ensuring that she must pass through immigration control upon arrival in the EU state. This means that the transit zone, and by extension Germany's border, has not only become flexible enough to extend into Germany, but also across other EU member states. In France, the fiction of non-entry has also been extended beyond the boundaries of transit zones. In 2017, the French border police detained newly arrived asylum seekers in a "temporary detention zone" along the Italian border without formally admitting the migrants into France.⁴ The fiction of non-entry has also been applied by Greece⁵ and Spain⁶ to migrant boat pushbacks at sea.⁷

JURISPRUDENCE RELATED TO FICTION OF NON-ENTRY

In some cases, the ECtHR has upheld the sovereignty of member states and their right to use the fiction of non-entry to prevent unauthorised entry into a country. In *Saadi v. United Kingdom*, for example, the ECtHR found it lawful for the UK to have treated the applicant as not having entered British territory although the applicant had been physically present in British territory for multiple days. Domestic case law often also supports the fiction of non-entry in asylum governance. For example, the Belgian Council of State dismissed arguments suggesting that airport transit zones form part of the state territory and migrants actually enter Belgian territory upon arrival even without the necessary documents for legal entry.⁸

However, not all court cases have upheld state actions justified under the fiction of non-entry. For example, in *Hirsi Jamaa and Others v. Italy*, the ECtHR found that Italian authorities had unlawfully intercepted 23 Somali and Eritrean nationals travelling by boat and returned them to Libya. The ECtHR concluded that the applicants were within the jurisdiction of Italy for the purposes of Article 1 of the Convention. Therefore, Italy

2. AIDA, 'Boundaries of liberty: Asylum and de facto detention in Europe' (2017), European Council on Refugees and Exiles, available at: <https://asylumineurope.org/wp-content/uploads/2020/11/boundariesliberty.pdf>, 17.

3. Kelly Soderstrom, 'Flexible borders: The fiction of non-entry and asylum seekers in Germany' (2019) CONREP Blog, 17 July 2019, available at: <https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/flexible-borders>.

4. AIDA, Boundaries of liberty: Asylum and de facto detention in Europe, 18.

5. AIDA, Country Report Greece, 2017 Update, March 2018, available at: <https://bit.ly/2G5vKP2>, 120-121.

6. AIDA, Country Report Spain, 2017 Update, March 2018, available at: <https://bit.ly/2plANDI>, 53.

7. AIDA, Boundaries of liberty: Asylum and de facto detention in Europe, 18.

8. *Ibid*, 18.

could not evade its responsibilities under the Convention although the applicants had not physically crossed into Italian territory. Further, in Germany between 2018 and 2019, the German government's expanded use of the fiction of non-entry led to 38 people automatically returned to Greece. In a 2019 case, the Administrative Court of Munich found in a summary proceeding⁹ that Germany was in breach of its obligations under EU law following the return of an Afghan asylum seeker to Greece. The court doubted the existence and legality of a so-called "Pre-Dublin procedure" used by German Federal Police officers to justify the detention and expulsion of the asylum seeker and argued that the procedure could not adequately ensure the protection of the applicant's rights under the Dublin Regulation. The court held that Germany's actions risked *refoulement* since the applicant was denied the opportunity to re-launch his asylum application in Greece and likely faced return to Afghanistan.¹⁰ In both the ECtHR and Administrative Court of Munich cases, the courts' findings counter claims that the fiction of non-entry implies that states have no responsibility for guaranteeing the migrant's rights. As long as the migrants remained under jurisdiction while in transit zones, either in detention or in other externalised zones, state responsibilities to protect human rights are engaged.

It should be noted that in the pending case of *H.T. v. Germany and Greece*, the ECtHR is set to examine *inter alia* the interception and return of a third country national from Germany to Greece on the basis of an Administrative Arrangement between the two countries. The Court has communicated the case with several questions to Germany, including on the compatibility of the applicant's return with Article 3 of the Convention in view of the immediate removal, the lack of assessment and the absence of individual guarantees regarding his situation in Greece upon return. A question on whether the applicant was afforded an effective remedy to challenge the removal will also be addressed. The Court's judgment will further clarify the relationship of such fictions of non-entry/automatic return schemes with the Convention guarantees.

SCREENING REGULATION – AN EXTENSION OF THE FICTION OF NON-ENTRY

The Screening Regulation is ultimately the implementation of a supranational transit zone based in the fiction of non-entry. The fiction of non-entry underlying the Regulation is enshrined in Article 4(1). According to the Regulation, "during the screening, the persons referred to in Article 3, paragraphs 1 and 2 shall not be authorised to enter the territory of a Member State" (Article 4(1)). Third-country nationals are therefore held in a liminal legal space in which they are physically but not legally present until they have passed through the screening procedure. This also applies to third-country nationals apprehended within EU Member State territory who escaped external border controls. In such cases, the fiction of non-entry is tied to the process rather than the territorial border.

Similar to the use of the fiction of non-entry by Member States, the Screening Regulation creates a liminal legal space where rights provisions for asylum seekers are restricted. For example, asylum seeker movements are heavily restricted while a migrant is undergoing screening. Despite assurances in the regulation that human rights will be protected by Member States through independent monitoring mechanisms, the restricted access to asylum and abbreviated asylum processes risk *refoulement*.

Further, the use of the fiction of non-entry in the Regulation restricts asylum seeker access to formal asylum procedures. Because the asylum seeker has not legally crossed a territorial border, the host Member State may claim no obligation to provide access to such formal procedures. Therefore, guarantees for submitting an application for humanitarian protection at the border following entry via the Regulation may not always be present (e.g. *M.K. and Others v. Poland*; *M.A. and Others v. Lithuania*). Although the screening process in the Regulation results in a debriefing document and procedure referral rather than official asylum decision, the document may impact official asylum proceedings or even result in unlawful return.¹¹

9. See Eilbeschluss-VG-München_8.8.2019-2.pdf (proasyl.de).

10. EDAL, Germany: Administrative Court of Munich finds German-Greek Administrative Agreement violates European law and orders return of applicant from Greece, August 2019, available at: <https://bit.ly/3QYqklq>.

11. Lyra Jakulevičienė, L. 'Re-decoration of existing practices? Proposed screening procedures at the EU external borders.' (2020) EU Immigration and Asylum Law and Policy, 27 October 2020, available at: <https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/#more-3081>.

IMPLICATIONS OF ADOPTING THE SCREENING REGULATION

The Screening Regulation constitutes an attempt by the Commission to externalise asylum governance in the EU by creating a transit zone at the supranational level based on the fiction of non-entry. This extension of the fiction of non-entry creates further barriers to protection for asylum seekers, which may run counter Article 6(5) (c) of the Schengen Borders Code and Article 31 of the Convention declaring that asylum seekers have the right to seek asylum regardless of their legal status or method of arrival in a host country.

The legal liminal space created by the fiction of non-entry in the Regulation facilitates systematic and extended detention.¹² The Regulation allows states to detain asylum seekers during the screening process. This is in addition to mobility restrictions which asylum seekers may face once they have officially commenced the asylum application process within the host country. Such extended accommodation under detention conditions and mobility restrictions can have a detrimental effect on the mental health¹³ of asylum seekers and risks depriving detainees of fundamental safeguards to their human rights. Although previous ECtHR decisions challenge the extent to which the fiction of non-entry may be used to justify detention (e.g. *Amuur v. France*), adoption of the Regulation would facilitate such extraterritorial detention practices.

The use of the fiction of non-entry to create an additional transit zone in the Screening Regulation also lengthens asylum pathways, thereby prolonging asylum processing times. Persons channeled into the asylum procedure are subjected to an initial assessment of their claim through the Asylum Procedure Regulation.¹⁴ This procedure is separate from and supplementary to Member State asylum procedures, thereby creating a double asylum system in which asylum applications are assessed according to varying criteria through more complex bureaucratic systems. The extended asylum process also creates multiple chances for detention and return, thereby threatening asylum seeker rights and *refoulement*.

The fiction of non-entry in the Screening Regulation also provides an opportunity for Member States to further externalise their responsibility sharing obligations. Through assertions that asylum seekers have not legally arrived on their territory, Member States may claim that they do not possess humanitarian protection obligations towards asylum seekers.

Further, given the legal liminal space created by the fiction of non-entry, it is difficult to ensure that just and humane asylum procedures are being employed by Member States in their screening practices. Although an independent mechanism to monitor “respect for fundamental rights during the screening” is included in the Regulation, this is poorly defined and may not be robust or granular enough to identify breaches of human rights within transit zones. The mechanism is confined to the screening process and is not intended to deal with violations at the border in general. This further suggests that the mechanism is a proverbial figleaf which allows Member States to claim that the screening takes place “in full compliance with fundamental rights” despite the fiction of non-entry clearly undermining such Member State compliance with human rights.

Extensions of the fiction of non-entry principle to construct a supranational transit zone represent an increased fluidity of EU and Member State borders. Rather than being determined by traditional territorial boundaries, borders become defined by individual legal determinations. Arrivals are no longer objectively determinable based upon physical presence, but rather result from a subjective legal determination at the discretion of screening officers. This shift in focus from objective to subjective determination obscures when asylum seekers can lodge an application and gain access to rights usually afforded to those seeking humanitarian protection. The shift in focus also increases the power of individual border patrol and screening officers at the EU’s external borders to determine arrival and subsequent ability of individuals to apply for asylum protections. Rushed, abbreviated, and inaccurate application assessment risks *refoulement* of asylum seekers and strips asylum seekers of their agency within the asylum application process.

12. ECRE, ‘Reception, detention and restriction of movement at EU external borders’. (2020) available at: https://eu.boell.org/sites/default/files/2021-07/ECRE%20e-paper%202021_FINAL_rev.pdf.

13. Katy Robjant, Rita Hassan, & Cornelius Katona, C, ‘Mental health implication of detaining asylum seekers: Systematic review’. (2018) 194 *The British Journal of Psychiatry* 4, doi:10.1192/bjp.bp.108.053223.

14. Galina Cornelisse, ‘The Pact and detention: An empty promise of ‘certainty, clarity and decent conditions’. (2021) *EU Immigration and Asylum Law and Policy*. 6 January 2021, available at: <https://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/>.

KEY ARGUMENTS:

- » **The Screening Regulation** is a legislative measure proposed as part of the New Pact on Migration and Asylum. The regulation would put into place a uniform pre-entry screening procedure applicable to all third-country nationals who arrive at an external border without fulfilling regular entry conditions. The screening consists of a health and vulnerability check, an identity check, registration of biometric data, and a security check.
- » **The fiction of non-entry** is a legally contested claim by states in which a third-country national can physically arrive in a country's territory but does not legally arrive until she has been granted entry by an authorised border officer. Transit zones, such as those found in airports, are the most common use by states of the fiction of non-entry. The fiction of non-entry creates a liminal legal space where states exert control by restricting access to rights for third-country nationals. In the context of asylum, the fiction of non-entry inhibits asylum seekers' mobility, access to rights and asylum procedures, and risks *refoulement*.
- » The Screening Regulation is ultimately the implementation of a **supranational transit zone** based in the fiction of non-entry. Asylum seekers must declare their application for asylum during the screening process, with the debriefing document provided to the asylum seeker at the conclusion of the process constituting a part of the asylum seeker's protection application or justification for return.
- » The inclusion of another level of transit zone and additional screening at the supranational level further **decreases asylum seeker agency** in the process of seeking asylum by lengthening asylum pathways and curtailing their full access to a just and humane asylum procedure.