

## The EU Screening Regulation Proposal and the Right to Asylum - Cementing Fortress Europe?

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### Abstract

This paper aims to offer a perspective on the 1951 Convention's aging process by exploring how it In September 2020, the European Commission adopted a New Pact on Migration and Asylum. Part of the legislative and non-legislative initiatives under the New Pact is a proposal for a Regulation on screening third country nationals at external borders. This paper is concerned with the compatibility of the new proposal with the right to asylum and how it responds to the notion of 'Fortress Europe'. The normative framework on the right to asylum is set out to test how it is reflected in the Screening Regulation proposal and its implications on the right to asylum. The paper finds that the proposed Screening Regulation is not compatible with the right to asylum. The findings also suggest policymakers intend to focus on securitisation efforts and legitimising extraordinary measures against migration and refugee flows in Europe, cementing Fortress Europe.

**Keywords** EU, Migration Pact, Screening Regulation, Fortress Europe, Right to asylum

# Contents

1.	Introduction	4
2.	Research framework	6
2.1	Methodological framework	6
2.2	Normative framework	6
2.2.1	International Human Rights Law	6
2.2.2	EU Law	7
2.3	Conceptual framework	7
3.	The New Pact	9
4.	The EU Screening Regulation Proposal	12
4.1	Overview	12
4.2	Intersections	13
4.2.1	Schengen Border Code	13
4.2.2	European agencies	13
4.2.3	Asylum Procedures Directive	14
4.2.4	Reception Conditions Directive	14
4.2.5	Return Directive	15
4.3	Critique	15
4.4	Summary	16
5.	The Right to Asylum and the EU Screening Regulation Proposal (SRP)	17
5.1	Fiction of non-entry	17
5.2	Safe third countries	18
5.3	Conceptual ambiguities	20
5.4	Monitoring mechanism	22
5.5	MS example: Hungary	23
6.	Conclusion	25
7.	Bibliography	27

## List of Acronyms and Abbreviations

APD	Asylum Procedure Directive
APR	Asylum Procedure Regulation proposal
Art	Article
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EUAA	European Union Agency for Asylum
EU	European Union
MS	Member State
MSs	Member States
New Pact	New Pact on Migration and Asylum
NGO	Non-Governmental Organisation
Para	Paragraph
RCD	Reception Conditions Directive
Refugee Convention	United Nations Convention relating to the Status of Refugees
SBC	Schengen Border Code
SRP	Screening Regulation Proposal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

# 1. Introduction

For a couple of years now, migration has seemed to be one of the hot topics in Europe. The height of the migration crisis in 2015<sup>1</sup>, humanitarian catastrophes such as the reception conditions in Greek camps<sup>2</sup>, the continued dying of migrants in the Mediterranean Sea<sup>3</sup> and the recent death of asylum seekers at the Polish and Belarusian borders<sup>4</sup> might be symptoms of a malfunctioning of the European migration and asylum system and show the need to renew the system.

In September 2020, the European Commission published a New Pact on Migration and Asylum (the New Pact)<sup>5</sup>. As part of the New Pact, the European Commission proposed a new Regulation introducing a screening of third country nationals at the Union's external borders<sup>6</sup>. This paper is concerned with the proposed screening Regulation (SRP) under the New Pact and its compatibility with the right to asylum.

The SRP aims to contribute to Europe's new approach on "migration and mixed flows by ensuring that the identity of the persons but also any health and security risks are quickly established"<sup>7</sup>. It will ultimately direct third-country nationals arriving at an EU external border to an asylum procedure, return or refusal of entry<sup>8</sup>.

Several questions have been raised on the SRP regarding its legality, practicability, and novelty<sup>9</sup>.

The overarching research question addressed in this paper asks: Is the SRP under the New Pact on Migration and Asylum compatible with the right to asylum?

Academics and scholars addressed the shortcomings of the Common European Asylum System (CEAS) and engaged widely in the criticism of the New Pact<sup>10</sup>. While the SRP has been subject to academic debate<sup>11</sup>, there has been no comprehensive depiction of the SRP and its compatibility with the right to asylum.

The New Pact and the proposal were adopted in September 2020. However, the subject is still very timely, given that the proposed regulatory changes are still under negotiations and have yet to be finalised<sup>12</sup>.

Furthermore, several stakeholders have responded to the call for feedback on the roadmap on the New Pact initiated by the European Commission<sup>13</sup>. In response to the consultation and public statements, Non-Governmental Organisations (NGOs) have already signalled scepticism over the SRP<sup>14</sup>.

1 European Council, 'EU Migration Policy' <<https://www.consilium.europa.eu/en/policies/eu-migration-policy/>> accessed 10 September 2021

2 Infomigrants, 'Moria Camp Is Burning Now. Can You Hear Me' <<https://www.infomigrants.net/en/post/27145/moria-camp-is-burning-now-can-you-hear-me>> accessed 10 September 2021

3 IOM, 'Migration within the Mediterranean' (2021) <<https://missingmigrants.iom.int/region/mediterranean>> accessed 9 October 2021

4 Aljazeera, 'After Four Found Dead, Poland Blames Belarus for Migrant Wave' (20 September 2021) <<https://www.aljazeera.com/news/2021/9/20/after-four-found-dead-poland-blames-belarus-for-migrant-wave>> accessed 9 October 2021 and Maria Wilczek, 'More Deaths as Migrants Continue to Push into Poland' (2021) <<https://www.politico.eu/article/poland-belarus-border-migrants-deaths-alexander-lukashenko/>> accessed 9 October 2021

5 European Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity' (2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 9 October 2021

6 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 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:612:FIN>> accessed 9 October 2021

7 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, (n6 above) 1

8 Ibid

9 Lyra Jakulevičienė, 'Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (27 October 2020) <<https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/>> accessed 27 February 2021

10 For example: Petra Bendel, Jean-Pierre Cassarino and Luisa Marin, Galina Cornelisse and Marcelle Reneman and Francesco Maiani

11 For example: Jean-Pierre Cassarino and Luisa Marin, Mariana Gkliati and Lyra Jakulevičienė

12 European Parliament, 'Legislative Train Schedule' <<https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-a-new-pact-on-migration-and-asylum>> accessed 9 October 2021

13 European Commission, 'New Pact on Migration and Asylum' (4 October 2020) <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12544-New-Pact-on-Migration-and-Asylum>> accessed 9 October 2021

14 ECRE, 'Joint Statement: The Pact on Migration and Asylum: To Provide a Fresh Start and Avoid Past Mistakes, Risky Elements Need to Be Addressed and Positive Aspects Need to Be Expanded' (6 October 2020) <<https://www.ecre.org/the-pact-on-migration-and-asylum-to-provide-a>>

NGOs have been engaging European policymakers regarding the revision of the CEAS widely during the past years<sup>15</sup>. In addition, the number of consultation responses and registered NGOs interested in asylum and migration policy show that further engagement can be expected<sup>16</sup>.

While proposed research can by no means develop an exhaustive reference on the subject, the results might be useful for NGOs aiming to advocate on the New Pact and the SRP particularly.

This paper is divided into six chapters. Following this introduction, chapter Two will give a brief overview of the framework of this paper, addressing the methodology as well as the conceptual and normative frameworks. Chapter Three will provide important contextual information regarding the New Pact. Chapter Four will offer a concise analysis of the SRP, locate it within existing and proposed laws under the CEAS and the New Pact, and engage in some of the criticism addressed by scholars. Chapter Five forms the central part of this paper. It will respond to the research question and provide a fundamental analysis and discussion of some of the arguments made by scholars. The remainder of the paper will provide a conclusion, summarising the main results, reflecting on the research question, looking at areas for further investigation and research and providing some recommendations.

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fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/> accessed 27 February 2021

15 Vincent Chetail, 'The Common European Asylum System: Bric-à-Brac or System?' in Philippe De Bruycker, Francesco Maiani and Vincent Chetail (eds), *Reforming the common European asylum system: the New European refugee law* (OUP 2016) 3

16 European Commission, 'Search the Register' <<https://ec.europa.eu/transparencyregister/public/consultation/reportControllerPager.do>> accessed 4 October 2020

## 2. Research framework

This chapter provides an overview of the methodological, normative, and conceptual framework of this paper. After briefly elaborating on the methodologies applied, it will introduce the normative framework stemming from International and European law. Finally, it will set out the conceptual framework on the notion of *Fortress Europe*.

### 2.1 Methodological framework

The research was performed via desk research. Sources for the desk research include International and European law on migration and asylum, relevant academic research, and reports, studies, and statements published by public and civil society institutions.

Legal analysis has been applied to test whether the SRP is compatible with the normative framework on the right to asylum to answer the main research question.

Finally, the negotiations on the SRP have not been concluded at the time of the finalisation of this paper. Therefore, the analysis in this paper is limited to the proposal of the Screening Regulation. Under the EU's ordinary legislative procedure, the SRP will be subject to readings and negotiations between the European Parliament and the Council<sup>17</sup>. This procedure may result in changes to the SRP, which may deem (parts of) the research and analysis irrelevant or necessary to review.

### 2.2 Normative framework

The right to asylum serves as the normative framework of this research. During this section, I will outline the right to asylum in International and European law.

The concept and meaning of asylum have been subject to debate for hundreds of years<sup>18</sup>. However, the "heart of the traditional institution of asylum"<sup>19</sup> has been defined by the Institute of International Law in 1950 as: "Asylum is the protection which a State grants on its territory or in some other place under the control of its organs to a person who comes to seek it"<sup>20</sup>. Likewise, asylum is a right of States to grant it and a human right of individuals<sup>21</sup>. Asylum also involves the protection against harm, including the violation of human rights and the provision of a solution<sup>22</sup>. It, therefore, covers a broader scope of persons than what has been defined as refugees<sup>23</sup>. Finally, the concept is well understood in International law, founded in established State practice and often also referred to as international protection<sup>24</sup>.

#### 2.2.1 International Human Rights Law

The non-binding 1948 Universal Declaration of Human Rights (UDHR) recognises the right *to seek and enjoy* asylum from persecution in other countries in Article 14(1)<sup>25</sup>. As all other rights laid out in the UDHR, they must be universally protected<sup>26</sup>. However, this is different from a right *to* asylum, which has not been established in any treaty<sup>27</sup>.

<sup>17</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13 art 294

<sup>18</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press Inc 2007) 355

<sup>19</sup> Ibid

<sup>20</sup> Ibid 356

<sup>21</sup> Maria-Teresa Gil-Bazo and Elspeth Guild, *The Right to Asylum* in Cathryn Costello, Michelle Foster and Jane McAdam eds, Oxford University Press Inc 2021).

<sup>22</sup> *The Refugee in International Law* (n18 above) 356

<sup>23</sup> *The Right to Asylum* (n21 above)

<sup>24</sup> Ibid

<sup>25</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 14(1)

<sup>26</sup> Ibid

<sup>27</sup> *Right to Asylum* (n21 above)

Nonetheless, the rights recognised in the UDHR are widely accepted, referenced in international and regional norms and build the foundation for the adoption of more than seventy human rights treaties and European legislation, as will be further explained below<sup>28</sup>.

### 2.2.2 EU Law

In Europe, the right to asylum is provided for the Charter of Fundamental Rights of the European Union (CFR): “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)”<sup>29</sup>. However, the right is limited insofar as it provides the right to apply for asylum rather than obtain it, which was derived from the right to seek asylum under the UDHR<sup>30</sup>.

Though, there is some uncertainty on the meaning of the right to asylum under the CFR. It is unclear whether it creates an independent right or refers to refugee status under the Refugee Convention<sup>31</sup>. It was also argued that it does not create any new obligations<sup>32</sup>.

While the Court of Justice of the European Union (CJEU) has yet to elaborate on the specifics of the right to asylum regarding Article 18 of the CFR, in *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, it was argued that “[the] fundamental right to asylum [...] follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States”<sup>33</sup>. Indeed, several European Union (EU) Member States (MSs) have enshrined the right to asylum in their constitutions, for example, Italy, Germany and Hungary<sup>34</sup>.

As mentioned above, asylum is also referred to as international protection. This term was established in the EU, referring to the protection granted to refugees and beneficiaries of so-called subsidiary protection by EU MSs<sup>35</sup>. Subsidiary protection can be provided to third-country nationals and stateless persons who do not qualify as a refugee<sup>36</sup>. The term first appeared in the so-called Qualification Directive, which provides standards for a uniform status for refugees and persons eligible for subsidiary protection<sup>37</sup>.

## 2.3 Conceptual framework

European asylum and migration policy has a long-standing agenda focusing on the limitation of arrivals of asylum seekers, restricting and criminalising their free movement inside the Schengen area, and boosting the numbers of enforced return decisions<sup>38</sup>. The EU and its MSs have developed policies that prevented an increasing number of third country nationals from entering the EU legally and safely<sup>39</sup>. Securitisation ef-

28 Universal Declaration of Human Rights (n25 above)

29 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 art

30 *The Refugee in International Law* (n18 above) 368

31 Iris Goldner Lang and Boldizsár Nagy, ‘External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement’ (2021) 17 European Constitutional Law Review 442 5

32 *The Common European Asylum System: Bric-à-Brac or System?* (n15 above) 3 21

33 Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-8531, Opinion of Mr Advocate General Poiares Maduro

34 *The Right to Asylum* (n21 above)

35 Ibid

36 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337

37 Evelien Brouwer et al, ‘The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum’ (European Parliament 2021) <<https://www.ceps.eu/ceps-publications/the-european-commissions-legislative-proposals-in-the-new-pact-on-migration-and-asylum/>> accessed 13 March 2022 art 15

38 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337 art 1

39 ‘The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum’ (n37 above)

39 Catherine Benoît, ‘Fortress Europe’s Far-Flung Borderlands: “Illegality” and the “Deportation Regime” in France’s Caribbean and Indian Ocean’ (2020) 15 220

forts accelerated and paved the way for European institutions to legitimise extraordinary measures against migration and refugee flows in Europe<sup>40</sup>. Some MSs have built new fences along their borders with neighbouring countries outside the EU<sup>41</sup> and pushed back people at their borders, which is a severe violation of the right to asylum<sup>42</sup>. These actions taken by European and MSs' policymakers and their agents to secure European borders are often referred to as building a *Fortress Europe* when describing the used methods<sup>43</sup>.

The New Pact is aiming to "build a system that manages and normalises migration for the long term, and which is fully grounded in European values and International law" by offering a "fresh start"<sup>44</sup>. Despite this, observing Europe's routine practice of pushbacks<sup>45</sup> and MSs claiming to aim for zero asylum seekers<sup>46</sup> and its potential implications on the right to asylum, it is reasonable to question whether the SRP is one of the final bricks to what is often referred to as '*Fortress Europe*'.

While this research is primarily a legal analysis of the SRP and its conformity with the right to asylum, this paper offers the opportunity to contextualise these findings. This layer will help assess to what extent the SRP lives up to the "fresh start" notion in the New Pact or instead adds to securitisation efforts and therefore cements *Fortress Europe*.

Having further elaborated on the methodologies used and the normative and conceptual framework of this paper, the foundations are set to further dive into the content of this research.

40 Foteini Asderaki and Eleftheria Markozani, *The Securitization of Migration and the 2015 Refugee Crisis: From Words to Actions* (A Tziampiris and F Asderaki eds, Springer 2021) 179

41 'The European Commission's Legislative Proposals in the New Pact on Migration and Asylum' (n37 above) 26

42 International Rescue Committee, 'The New Pact on Migration and Asylum: One Year on, a Fair and Humane Asylum System Is Needed More than Ever' (2021) <<https://eu.rescue.org/article/new-pact-migration-and-asylum-one-year-fair-and-humane-asylum-system-needed-more-ever>> accessed 9 October 2021

43 Katy Fallon, *When Words Make Fences: A Look Into How Words and Media Narratives Contribute to the Creation of a Fortress Europe* (Gabriele Jacobs and et al eds, Springer 2020) 88

44 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' (2020) <[https://ec.europa.eu/info/sites/default/files/1\\_en\\_act\\_part1\\_v7\\_1.pdf](https://ec.europa.eu/info/sites/default/files/1_en_act_part1_v7_1.pdf)> accessed 9 October 2021

45 Amnesty International, 'The Human Cost of Fortress Europe' (2014) <[https://reliefweb.int/sites/reliefweb.int/files/resources/EUR%20050012014\\_%20Fortress%20Europe\\_complete\\_web.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/EUR%20050012014_%20Fortress%20Europe_complete_web.pdf)> accessed 10 September 2021

46 Marion MacGregor, 'Denmark Aims for Zero Asylum Seekers' (25 January 2021) <<https://www.infomigrants.net/en/post/29842/denmark-aims-for-zero-asylum-seekers>> accessed 9 October 2021



### 3. The New Pact

In this chapter, I will briefly introduce the history of the CEAS as well as the New Pact and some criticism on it with a particular focus on the right to asylum. While the main focus of this research rests on the SRP, I suggest it is essential to reflect on some of the more high-level, systemic issues, given that the SRP is part of an overarching initiative – the New Pact on Migration and Asylum.

The TFEU is one of the two treaties forming the constitutional basis in the EU. It provides a common policy framework on asylum, and legislators have been tasked to set up a CEAS consisting of different protection statuses, standards, systems, and procedures<sup>47</sup>. It was established in 1999 and is governed by five instruments: the Asylum Procedure Directive (APD), the Reception Conditions Directive (RCD) and the Qualification Directive, and the European Union Agency for Asylum (EUAA)<sup>48</sup>. The EUAA replaces and succeeds the European Asylum Support Office (EASO)<sup>49</sup>.

There have been several attempts to reform the CEAS<sup>50</sup>, some of which resulted in recasting of existing legislation such as the RCP. However, the system remains ineffective, and efforts to improve in 2016 have instead reproduced and intensified the structural flaws, of which some legislative proposals and policies have questionable compatibility with international law<sup>51</sup>. Besides, not all reform proposals have been successfully concluded due to a blockage from the European Council<sup>52</sup>. According to the European Commission, also due to the lack in previous efforts to reform border and screening procedures<sup>53</sup>.

In July 2020, the EU MSs clarified that “a comprehensive approach to migration which combines more effective control of EU external borders”<sup>54</sup> is needed. And in September 2020, the European Commission adopted (EC) a New Pact<sup>55</sup>.

The New Pact follows up on several initiatives for which negotiations during the last reform have not been concluded, namely the recast Dublin Regulation and the Asylum Procedure Regulation<sup>56</sup>. The EC proposed “a fresh start on migration: building confidence through more effective procedures and striking a new balance between responsibility and solidarity”<sup>57</sup>.

The New Pact includes five legislative proposals, namely an amended proposal revising the Asylum Procedures Regulation (APR), an amended proposal changing the Eurodac Regulation, a proposal for a new Regulation on Asylum and Migration Management, a proposal for a new Crisis and force majeure Regulation, as well as the SRP<sup>58</sup>.

In addition, as part of the New Pact, the EC also published four non-legislative initiatives, that are recom-

47 Consolidated Version of the Treaty on European Union (n17 above) Formularbeginn  
Formularende  
art 78 (2)

48 European Commission, ‘Common European Asylum System’ (2021) <[https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system\\_en](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en)> accessed 9 October 2021

49 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L 468

50 Sergio Carrera, *Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum* in Sergio Carrera and Andrew Geddes (eds), *The EU pact on migration and asylum in light of the United Nations global compact on refugees* (OUP 2021) 2

51 *The Common European Asylum System: Bric-à-Brac or System?* (n15 above) 3

52 ‘Legislative Train Schedule’ (n12 above) 1

53 European Commission, ‘Speech by Vice-President Schinas on the New Pact on Migration and Asylum’ (2020) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1736](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1736)> accessed 9 October 2021

54 European Council, ‘Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions’ (European Council 2020)

55 ‘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’ (n45 above) 1

56 European Commission, ‘Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]’ (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2020:207:FIN>> accessed 13 March 2022

57 Ibid

58 ‘Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]’ (n57 above)

recommendations on a Migration Preparedness and Crisis Blueprint, a recommendation on Legal pathways to protection in the EU, a recommendation on Search and Rescue Operations by private vessels as well as guidance on the scope of the Facilitators Directive<sup>59</sup>.

One of the points the New Pact is aiming to address are the so-called mixed arrivals of persons, meaning a mix of persons with or without a need for international protection<sup>60</sup>. It has been pointed out that, while the number of irregular arrivals has decreased, the number of third-country nationals of countries with recognition rates below 25% has increased<sup>61</sup>. In the same vein, it was pointed out that the recognition rate of asylum seekers dropped to 30% in 2019, from 56% in 2016<sup>62</sup>. However, the statistics do not differentiate between different protection statuses, which has caused criticism in terms of providing a limited informative value<sup>63</sup>.

Critics have been vocal about the shortcomings, the extent to which the New Pact will provide for a new beginning of the European migration and asylum policy and who will benefit from it. Much of the commentary on the New Pact was published by scholars and organisations engaged in the political process, such as NGOs. Many have recognised the importance of the New Pact and welcomed it<sup>64</sup>.

However, many also voiced concerns, particularly on the notion of a “fresh start” and to what extent the New Pact lives up to that promise. For example, it was argued that the New Pact might rather be defending the status quo than renewing the CEAS or preventing humanitarian catastrophes such as observed in the Moria camp<sup>65</sup>. Yet, the communication on the New Pact did not make any identifiable suggestion on how the status quo is going to be improved besides providing some tweaks to please the negotiators<sup>66</sup>.

Furthermore, it was argued that some of the proposals take up ideas under discussion in 2018 already and aim to normalise some of the current state practices rather than introducing new ones<sup>67</sup>. However, there is general agreement that policies proposed in the New Pact follow security-centred measures and reflect the need to protect *Fortress Europe*<sup>68</sup>.

NGOs have raised strong concerns on the focus of increasing returns as an “overriding objective of the New Pact”<sup>69</sup>. In a similar vein, it was argued that the New Pact focuses on the downgrading of existing procedures and aspects regarding access to asylum and return<sup>70</sup>. However, despite this focus on return, MSs’ return systems are already incapable of dealing with the high numbers of return cases<sup>71</sup>. And it was stressed that while the New Pact has some positive elements, it will have significant negative consequences for migrants, local communities and the MSs overall<sup>72</sup>.

<sup>59</sup> ‘Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]’ (n57 above)

<sup>60</sup> ‘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’ (n45 above) 1

<sup>61</sup> ‘Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]’ (n57 above) 1

<sup>62</sup> Ibid

<sup>63</sup> ‘The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum’ (n37 above) 40

<sup>64</sup> For example: ECRE, Rasche and Walter-Franke

<sup>65</sup> Francesco Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’ (20 October 2020) <<https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>> accessed 9 October 2021

<sup>66</sup> Petra Bendel, 22. *Fresh Start Or False Start? The New Pact on Migration and Asylum* (Andrew Carrera Sergio and Geddes ed, European University Institute, Migration Policy Centre 2021) 252

<sup>67</sup> Giuseppe Campesi, *Normalising the ‘Hotspot Approach’: An Analysis of the Commission’s Most Recent Proposals* (Sergio Carrera, Deirdre Curtin and Andrew Geddes eds, CEPS 2020) 93

<sup>68</sup> Pierluigi Salvati, ‘The “Inward-Looking” Securitization of the EU External Migration Policy in the New Pact on Migration and Asylum: A Critical Appraisal from a Perspective of International Law with Reference to the Migration from Africa’ (2021) 2 308

<sup>69</sup> ‘Joint Statement: The Pact on Migration and Asylum: To Provide a Fresh Start and Avoid Past Mistakes, Risky Elements Need to Be Addressed and Positive Aspects Need to Be Expanded’ (n14 above)

<sup>70</sup> ‘The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum’ (n37 above) 45

<sup>71</sup> ‘Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]’ (n57 above) 1

<sup>72</sup> Ecorys, ‘The European’s New on Migration And Asylum’ (European Parliament 2021) <<https://www.europarl.europa.eu/RegData/>

Referring back to the notion of mixed movements, as described above, it was suggested that this connotation indicates people are unworthy of protection even though scholars have proven that this is not the case.<sup>73</sup> The closing of borders as well as further securitisation efforts have been referenced as priorities under the New Pact<sup>74</sup>. More generally, it was argued that the New Pact is blurring the line between migration management and providing protection, with a clear prioritisation towards migration management<sup>75</sup>.

More concretely, it was stressed that the New Pact might weaken access to or is incompliant with the right to asylum. The increased procedural harmonisation and links between asylum and return policies could weaken the right to asylum<sup>76</sup>. The previously mentioned focus on facilitating returns was also recognised as potentially undermining the right to asylum<sup>77</sup>. Furthermore, it was argued that some of the proposals under the New Pact make the obstacles asylum seekers face on their way to asylum more challenging to overcome and that there is a risk that the right to asylum is not guaranteed under the New Pact<sup>78</sup>.

Despite this criticism, one aspect of the New Pact was welcomed, namely the proposed creation of a fundamental rights mechanism under the SRP given the barriers to effective remedies and justice that individuals currently face at the European border<sup>79</sup>. However, many have called to extend the mechanism covering activities beyond the screening<sup>80</sup>. Emphasised as another relatively positive aspect was the combination of the appeal procedure for asylum and return decisions under the border procedure as it can have positive effects as it accelerates the decision-making process on asylum claims<sup>81</sup>.

While the New Pact is promising a “fresh start” and is indeed proposing several new legislative and non-legislative initiatives, the priorities and objectives in the New Pact suggest a high level of continuation of the existing political agenda<sup>82</sup>.

Over 20 years after the establishment of the CEAS, the adoption of the New Pact was widely welcomed. However, the expectations set by the EC for a “fresh start” on migration and asylum policy do not seem to be met according to scholars and organisations. On the contrary, the overall legislative and non-legislative package under the New Pact seems to substantiate some of the current practices and makes it partially even more difficult for asylum seekers to access their right to seek asylum. Given the intense focus on border management and return as well as a clear security-centred approach, the New Pact will also help to cement *Fortress Europe*.

etudes/STUD/2021/694210/EPRS\_STU(2021)694210\_EN.pdf> accessed 9 October 2021

73 Eleni Karageorgiou, ‘The New Pact on Migration and Asylum: Why Pragmatism Cannot Engender Solidarity’ (2020) 2

74 Mariana Gkliati, ‘No More Morias?’ (15 December 2020) <<https://crisismag.net/2020/12/15/no-more-morias/>> accessed 18 February 2021

75 Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum (n51 above) 7

76 Madalina Moraru, ‘The New Design of the EU’s Return System under the Pact on Asylum and Migration’ (14 January 2021) <<https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/>> accessed 9 October 2021

77 Daphne Panayotatos, ‘Undermining Protection in the EU: What Nine Trends Tell Us About The Proposed Pact on Migration and Asylum’ (2021) <<https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/60b6b84c945e4264957edcd7/1622587468915/Undermining+Protection+in+the+EU+--+What+Nine+Trends+Tells+Us+About+The+Proposed+Pact+on+Migration+and+Asylum+--+June+2%2C+2021+--+FINAL.pdf>> accessed 9 October 2021

78 Janine Silga and Catherine Warin, ‘The EU’s New Pact on Migration and Asylum: Efficiency at the Expense of Rights?’ (2020) 40 <<https://eulawlive.com/weekend-edition/weekend-edition-no40/>> accessed 9 October 2021

79 <sup>80</sup> Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum (n76 above) 17

80 Lucas Rasche and Marie Walter-Franke, ‘EU-Grenzverfahren: Eindeutig, Fair Und Schnell? Der „New Pact“ Im Check’ (17 December 2020) <<https://blog.fluchtforschung.net/eu-grenzverfahren-eindeutig-fair-und-schnell-der-new-pact-im-check/>> accessed 9 October 2021

81 ‘The New Design of the EU’s Return System under the Pact on Asylum and Migration’ (n77 above)

82 ‘The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum’ (n37 above) 46

## 4. The EU Screening Regulation Proposal

This chapter provides an outline of the SRP. More precisely, it will consider the intersections of the SRP with other legislative arrangements under the CEAS and engage in an overview of the criticism addressed in the literature. The chapter will build the foundations for the key analysis in chapter five, in which the SRP will be assessed in light of potential ramifications for the right to asylum.

### 4.1 Overview

As mentioned above, the SRP aims to contribute to the EU's new approach on "migration and mixed flows by ensuring that the identity of the persons but also any health and security risks are quickly established", ultimately directing third-country nationals arriving at an EU external border to an asylum procedure, return or refusal of entry<sup>83</sup>. The SRP is seen as a key tool to implement this approach<sup>84</sup>.

The purpose of the SRP is to strengthen the control mechanism addressing persons who are about to enter the Schengen area and their referral to the appropriate procedure<sup>85</sup>, either to return, refusal of entry or asylum procedures<sup>86</sup>. Moreover, the screening is supposed to help identify third-country nationals for international security reasons and health-related issues, as well as vulnerability checks to further define the appropriate procedure for these persons<sup>87</sup>.

The issuing of the de-briefing form will complete the screening process<sup>88</sup>. The form will contain information such as name, date and place of birth, sex, the initial indication of nationalities, countries of residence before arrival, whether the person made an application for international protection and information obtained on routes travelled<sup>89</sup>.

The screening process is supposed to take no longer than five days; unless a disproportionate number of arrivals occur; in that case, the time limit can be extended by an additional five days<sup>90</sup>.

The SRP applies to all third-country nationals who have been captured due to an unauthorised crossing of the external border of a Member State (MS) or disembarked in the territory of a MS after a search and rescue operation<sup>91</sup>. Furthermore, the scope of the SRP also includes persons who apply or have applied for international protection and do not fulfil the entry conditions as laid out by the Schengen Border Code (SBC)<sup>92</sup>.

Notably, the proposal also requests MSs to set up an independent monitoring mechanism that is supposed to secure compliance with European and International law with a particular reference to the grounds and duration of detention and fundamental rights as well as core principles such as *non-refoulement*<sup>93</sup>.

Finally, over a year after the adoption of the legislative proposal, negotiations have yet to be finalised. How-

<sup>83</sup> 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 (n6 above)

<sup>84</sup> Jens Vedsted-Hansen, *Admissibility, Border Procedures and Safe Country Notions* (Sergio Carrera and Andrew Geddes eds, European University Institute, Migration Policy Centre 2021) 171

<sup>85</sup> 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 (n6 above) 1

<sup>86</sup> *Ibid* art 14

<sup>87</sup> *Ibid* art 1

<sup>88</sup> 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 (n6 above) art 13

<sup>89</sup> *Ibid* art 13

<sup>90</sup> *Ibid* art 6(3)

<sup>91</sup> *Ibid* art 3(1)

<sup>92</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1 art 3(2 and 3)

<sup>93</sup> 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 (n6 above) art 7

ever, insights suggest that MSs have somewhat diverging views on the proposed regulation<sup>94</sup>. Given the responsibility that the proposal transfers to MSs located on the EU's external borders, this might not come as a surprise<sup>95</sup>.

## 4.2 Intersections

Numerous Regulations and Directives fall under the CEAS, which is proposed to be partially reformed with several legislations under the New Pact.

While the SRP aims to be consistent with other policies and to contribute to a comprehensive approach to migration<sup>96</sup>, the SRP has several touchpoints to existing Regulations and Directives under the CEAS, of which some are proposed to be revised.

This section will consider how the SRP fits in and might overlap with some of the existing legislative arrangements under the CEAS. The collection of biometric data during the screening, which falls under the Eurodac Regulation<sup>97</sup>, will not be further discussed in this section.

### 4.2.1 Schengen Border Code

The SBC<sup>98</sup> legislates several points touched upon by the SRP. For example, the SBC also covers identification, registration, and security checks<sup>99</sup>, issues of public health<sup>100</sup>, and vulnerability assessments<sup>101</sup> at the Union's borders. As mentioned above, vulnerability and health assessments are also covered to an extent under the SRP. Thus, some elements in the SRP overlap with what is already been legislated under the SBC.

Furthermore, the SBC allows refugees and persons seeking international protection to enter the Union with specific reference to *non-refoulement* as laid out in Article 3(b) SBC, as well as to the Union's asylum acquis, pointing out that a third-country national asking for international protection on MS territory shall be given access to the relevant MS procedure<sup>102</sup>. However, the EC has argued that the SBC does not provide sufficient guidance for border personnel regarding handling third-country nationals seeking international protection<sup>103</sup>.

As pointed out above, the SRP does not make the distinction between third country nationals seeking international protection and those seeking to enter for different purposes, which results in a conflict between these two Regulations. This has led to some criticism, which will be further reflected in the next section.

### 4.2.2 European agencies

The SRP recognises the role of European agencies, namely the European Border and Coast Guard Agency commonly known as Frontex, established under the European Border and Coast Guard Regulation as well as the EUAA. The SRP suggests implementing a mechanism similar to what has already been adopted in

94 Statewatch, 'EU: Tracking the Pact: Latest Council Recitals for the Proposed Screening Regulation Borders Detention EU' (21 May 2021) <<https://www.statewatch.org/news/2021/may/eu-tracking-the-pact-latest-council-recitals-for-the-proposed-screening-regulation/>> accessed 9 October 2021

95 *Fresh Start Or False Start? The New Pact on Migration and Asylum* (n67 above) 256

96 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 (n6 above)

97 Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a 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 Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180/1 art17

98 Regulation (EU) 2016/399 (n93 above)

99 *Ibid* art 8

100 *Ibid* art 6

101 *Ibid* art 7

102 *Ibid* Annex VI, 1.1.4.2.(a)

103 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 (n6 above)



the European Border and Coast Guard Regulation. Accordingly, MSs can call on European agencies to support their screening efforts at the border when experiencing disproportionate “inward mixed migratory flows”<sup>104</sup>. This has also been replicated in the SRP<sup>105</sup>. However, previous screening methods by European agencies have raised concerns<sup>106</sup>, and the overall appropriateness of their role has been questioned<sup>107</sup>.

While this support approach is currently limited to hotspots<sup>108</sup>, the SRP seems to normalise this procedure.

### 4.2.3 Asylum Procedures Directive

As mentioned above, one of the possible results from the screening is the referral to an asylum procedure. This procedure is regulated under the APD<sup>109</sup>, proposed to be repealed by a Regulation<sup>110</sup>.

The existing Directive and the proposed Regulation establish common procedures for granting and withdrawing international protection following Directive 2011/95/EU (Qualification Directive)<sup>111</sup>. In addition, the Qualification Directive sets standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and the protection content granted.

Article 41 of the proposed APR clarifies that the examinations of applications for international protection will follow the screening procedure as laid out by the SRP<sup>112</sup>. However, what remains unclear is who decides whether a person is eligible for an asylum procedure and when this decision is being made<sup>113</sup>.

Additionally, procedures set out in the APR shall follow the pre-entry screening procedure, which therefore lays the foundation for a potential accelerated application procedure<sup>114</sup>. Finally, the APR has added paragraphs to Articles 26 (Detention), 27 (Procedure in the event of withdrawal of the application) and 41 (Exceptions from the right to remain in case of subsequent applications) to ensure coherence with the SRP<sup>115</sup>.

### 4.2.4 Reception Conditions Directive

The Reception Conditions Directive (RCD)<sup>116</sup> lays down standards for the reception of applicants for international protection. It provides material reception conditions such as housing, food, clothing, and daily expenses<sup>117</sup> for all third-country nationals and stateless persons who apply for international protection in the Unions' territory<sup>118</sup>.

While the SRP points to reception centres as part of the budgetary implications in the legislative financial

<sup>104</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295 art 40

<sup>105</sup> 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 (n6 above) art 6 nr 7

<sup>106</sup> Chris Jones and Jane Kilpatrick, 'Frontex' (2020) <[https://migration-control.info/en/wiki/frontex/#\\_ftn19](https://migration-control.info/en/wiki/frontex/#_ftn19)> accessed 9 October 2021

<sup>107</sup> Aisha Maniar, '(Language) Policing at Europe's Borders' (23 June 2016) <<https://irr.org.uk/article/language-policing-at-europes-borders/>> accessed 9 October 2021

<sup>108</sup> Regulation (EU) 2019/1896 (n105 above) art 10

<sup>109</sup> Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2016] OJ L 180

<sup>110</sup> 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' (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN>> accessed 9 October 2021

<sup>111</sup> Directive 2013/32/EU (n110 above) art 1

<sup>112</sup> 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' (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN>> accessed 9 October 2021 art 41

<sup>113</sup> ECRE, 'ECRE Comments on the Amended Proposal for an Asylum Procedures Regulation COM(2020) 611' (December 2020) <<https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM-2020-611-2-December-2020.pdf>> accessed 9 October 2021

<sup>114</sup> Jens Vedsted-Hansen, 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (18 December 2020) <<https://eumigrationlawblog.eu/border-procedure-efficient-examination-or-restricted-access-to-protection/>> accessed 9 October 2021

<sup>115</sup> 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' (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN>> accessed 9 October 2021

<sup>116</sup> Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180

<sup>117</sup> Ibid art 2(g)

<sup>118</sup> Ibid art 3(1)

statement, there is no mention of general reception conditions in these centres. Furthermore, the SRP points out that the RCD only applies when the screening is closed<sup>119</sup>.

#### 4.2.5 Return Directive

Directive 2008/115/EC on common standards and procedures in the MSs for returning illegally staying third-country nationals applies to third-country nationals staying illegally on the territory of a MS<sup>120</sup> unless they are excluded due to a refusal of entry<sup>121</sup> or subject to return given criminal law sanctions or extraditions<sup>122</sup>.

The outcome of the screening as proposed by the SRP might also be a denial of entry, in which case the competent authorities shall apply the provisions of the Return Directive<sup>123</sup>. However, the Return Directive allows MSs not to apply the Return Directive to persons refused entry per Schengen Borders Code<sup>124</sup>. This potentially leaves persons screened under the SRP outside the scope of the Return Directive and potentially results in a gap of return support for persons affected.

### 4.3 Critique

The SRP has sparked some criticism. Scholars, advocacy groups and others have pointed to several flaws in the proposal, but there are also some positive aspects. This brief section gives an overview of the critical aspects highlighted in the literature and by engaged organisations.

Concerns have been voiced whether the SRP is a somewhat political rather than rational proposal, suggesting that border procedure might solve the EU's "migration crisis"<sup>125</sup>. While the number of people who have entered the EU irregularly have decreased since 2015, the number of applicants from countries with low recognition rates has increased<sup>126</sup>, which might speak to the intention of policy makers, aiming to avoid having to deal with costly asylum procedures from countries with low recognition rates and rather reject potential applicants immediately.

Furthermore, comparable measures, such as swift registration and identification, to what has been proposed by the SRP have been taken by some MSs in hot spots such as Greece and Italy already and failed to deliver tangible results in accelerating the border procedure<sup>127</sup>.

It was noted that the underlying assumption that protection needs can already be determined at the time of arrival at the Union's borders seems to be far off from the reality of examining an application for international protection and the ability of MSs to quickly and effectively force returns<sup>128</sup>. Numerous scholars have raised concerns about the proposal and the conduct of asylum procedures in the border context<sup>129</sup>.

Furthermore, it was argued that the screening procedure normalises the fusion between refugeehood and

<sup>119</sup> 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 (n6 above) Explanatory Memorandum

<sup>120</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 art 2(1)

<sup>121</sup> Ibid art 2(2a)

<sup>122</sup> Ibid art 2(2b)

<sup>123</sup> 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 (n6 above) art 14 nr 1

<sup>124</sup> Directive 2008/115/EC (n121 above) art 2(2)

<sup>125</sup> Galina Cornelisse and Marcelle Reneman, 'Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?' (2020) 26 181

<sup>126</sup> Costica Dumbrava, 'Screening of Third-Country Nationals at the EU External Borders' (European Parliament 2020) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659346/EPRS\\_BRI\(2020\)659346\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659346/EPRS_BRI(2020)659346_EN.pdf)> accessed 9 October 2021

<sup>127</sup> 'Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (n9 above)

<sup>128</sup> 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (n115 above) and *Normalising the 'Hotspot Approach': An Analysis of the Commission's Most Recent Proposals* (n68 above) 93

<sup>129</sup> For example: Jens Vedsted-Hansen, Lyra Jakulevičienė

irregularity<sup>130</sup>, producing an oversimplified categorisation of asylum seekers<sup>131</sup>. It was also stressed that the screening could build the foundation for collective expulsion<sup>132</sup>, which is prohibited under European<sup>133</sup> and International Law<sup>134</sup>.

Criticism also engages the potential shortcomings of the vulnerability assessment<sup>135</sup>. More generally, the Council of Bars and Law Societies of Europe point out that the foreseen time limit of 5 days for the screening procedure might be entirely artificial and overly optimistic, arguing that if a law cannot effectively apply in practice, which will be the case for the SRP, it will undermine the rule of law<sup>136</sup>. Similarly, on procedural irregularities regarding law-making such as an absence of an impact assessment<sup>137</sup>. Furthermore, it was argued that the proposal might entail a lack of access to an effective remedy<sup>138</sup> and the provision of accurate access to information about the right to seek asylum<sup>139</sup>. Numerous scholars have noted that they fear Moria-like situations, having persons encamped over a long period and argue the SRP has ample potential for this to happen<sup>140</sup>. It was also argued that the proposal risks having people get stuck in some sort of no man's land<sup>141</sup> or de facto border camps that likely involve detention<sup>142</sup>.

Finally, concepts such as the fiction of non-entry<sup>143</sup>, the notion of safe third countries and inadmissibility<sup>144</sup>, and the monitoring mechanism<sup>145</sup> as well as conceptual ambiguities<sup>146</sup> and their potential implications on the right to asylum have been widely debated. They will be further discussed in the next chapter.

#### 4.4 Summary

In summary, the key characteristics of the SRP have been pointed out during this section. First, it was clarified that some overlap with existing legislations under the CEAS occurs, such as with the SBC. Furthermore, the SRP seems to replicate what has already been adopted under the European Border and Coast Guard Regulation, albeit not limiting it to mass influx situations. Finally, by normalising a procedure that has been set out for hot spots, the SRP will add to the securitisation efforts and thereby helping to cement *Fortress Europe*.

<sup>130</sup> *Normalising the 'Hotspot Approach': An Analysis of the Commission's Most Recent Proposals* (n68 above) 93

<sup>131</sup> EU-Grenzverfahren: Eindeutig, Fair Und Schnell? Der „New Pact“ Im Check' (n81 above)

<sup>132</sup> Marco Stefan and Roberto Cortinovis, 'Setting the Right Priorities: Is the New Pact on Migration and Asylum Addressing the Issue of Pushbacks at EU External Borders?' (25 November 2020) <<https://www.asileproject.eu/setting-the-right-priorities-is-the-new-pact-on-migration-and-asylum-addressing-the-issue-of-pushbacks-at-eu-external-borders/>> accessed 9 October 2021

<sup>133</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 art 19 and Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto [1968] art 4

<sup>134</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 art 32

<sup>135</sup> 'Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?' (n126 above) 26 181

<sup>136</sup> Council of Bars and Law Societies of Europe (CCBE), 'New Pact on Migration and Asylum: CCBE Position on the Proposal for a Regulation a Screening of Third Country nationals at the External Borders' (2021) <[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/PD\\_STRAS/PDS\\_Position\\_papers/EN\\_PDS\\_20210414\\_CCBE-position-screening-procedure.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_STRAS/PDS_Position_papers/EN_PDS_20210414_CCBE-position-screening-procedure.pdf)> accessed 9 October 2021

<sup>137</sup> , 'Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?' (n126 above) 26 181

<sup>138</sup> *Normalising the 'Hotspot Approach': An Analysis of the Commission's Most Recent Proposals* (n68 above) 93

<sup>139</sup> UNHCR, 'Practical Considerations for Fair and Fast Border Procedures and Solidarity in the European Union' (2020) <<https://www.refworld.org/docid/5f8838974.html>> accessed 9 October 2021

<sup>140</sup> 'Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (n9 above)

<sup>141</sup> Jean-Pierre Cassarino and Luisa Marin, 'The New Pact on Migration and Asylum: Turning European Union Territory into a Non-Territory' (30 November 2020) <<http://eulawanalysis.blogspot.com/2020/11/the-new-pact-on-migration-and-asylum.html>> accessed 9 October 2021

<sup>142</sup> 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (n115 above)

<sup>143</sup> 'Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (n9 above)

<sup>144</sup> 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (n115 above) 1

<sup>145</sup> 'Setting the Right Priorities: Is the New Pact on Migration and Asylum Addressing the Issue of Pushbacks at EU External Borders?' (n135 above)

<sup>146</sup> ECRE, 'ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612' (2020) <<https://ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>> accessed 27 June 2021



## 5. The Right to Asylum and the EU Screening Regulation Proposal (SRP)

Building on the previous findings, this chapter forms the central part of this paper. It will respond to the main research question: *Is the SRP under the New Pact on Migration and Asylum compatible with the right to asylum?*

This chapter will follow up on some of the arguments made in the literature and provide further analysis. This includes four issues proposed under the SRP that might impact the right to asylum, appraised in the first four sections. Firstly, the fiction of non-entry. Secondly, safe third countries. Thirdly, conceptual ambiguities. Fourthly, the monitoring mechanism. Furthermore, the fifth section will shine a light on Hungary's current border practice and the potential learnings for the SRP.

### 5.1 Fiction of non-entry

This section will look at the fiction of non-entry. After introducing the concept as proposed in the SRP, the potential impact on the right to asylum will be analysed. Furthermore, this section provides an example of how the concept is already applied in practice. Finally, the findings will be summarised, and potential links to the concept of *Fortress Europe* will be discussed.

According to the SRP, persons undergoing screening are not authorised to enter the territory of a MS<sup>147</sup> unless they fulfil the entry conditions set out in the SBC<sup>148</sup>. Accordingly, the screening will take place "situated at or in proximity to the external border"<sup>149</sup>. However, MSs are also obliged to screen third-country nationals within their territory under specific circumstances<sup>150</sup>, which will be disregarded here since the SRP acknowledges the fact that the person concerned are indeed within the MS's territory.

While the screening is supposed to take place "at locations situated at or in proximity to the external borders"<sup>151</sup>, the person is not admitted to the EU – which creates the so-called fiction of non-entry. Most research and publications on the SRP suggest creating a fiction of non-entry whereby persons are de facto on European territory but legally have not been admitted to the Union's territory before the screening<sup>152</sup>. These 'anomalous zones' have been argued to be areas in which specific legal rules are suspended and therefore must be considered highly questionable<sup>153</sup>. The concept has also been described as a practice of de-territorialisation, resulting in a gap of accountability and liability on fundamental rights violations at the external borders of the EU<sup>154</sup>. However, there is wide agreement that this fiction of non-entry does not release the EU and its MSs from their fundamental rights obligations<sup>155</sup>.

The fiction of non-entry and its potential implication on the right to asylum has been widely debated<sup>156</sup>. It was argued that the concept is part of an overarching strategic goal to limit asylum seekers' and migrants' access to the territory, which ultimately limits their overall access to fundamental rights<sup>157</sup> such as the right to asylum under the CFR.

Furthermore, as pointed out above, under the Refugee Convention, States must grant individuals seeking

<sup>147</sup> 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 (n6 above) art 4(1)

<sup>148</sup> Ibid art 4(2)

<sup>149</sup> Ibid art 6(1)

<sup>150</sup> Ibid art 6(2)

<sup>151</sup> Ibid art 6 (1)

<sup>152</sup> 'Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (n9 above) 1

<sup>153</sup> *Normalising the 'Hotspot Approach': An Analysis of the Commission's Most Recent Proposals* (n68 above) 93

<sup>154</sup> *Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum* (n76 above) 1

<sup>155</sup> Ibid

<sup>156</sup> Ibid

<sup>157</sup> 'The New Pact on Migration and Asylum: Turning European Union Territory into a Non-Territory' (n144 above)

international protection access to the territory<sup>158</sup> and fair and efficient asylum procedures<sup>159</sup>. The United Nations High Commissioner for Refugees (UNHCR) is of the view “that the purpose, intent and meaning of Article 33(1) of the Refugee Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where they would be a risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas, or on the territory of another State<sup>160</sup>. Therefore, entry to the EU for individuals seeking international protection should not be restricted at all.

To conclude, the fiction of non-entry presumed for screenings at or in proximity to the external borders under the SRP does not result in a limitation to access to the right to asylum. Both the European asylum acquis and the international obligations covering persons seeking international protection apply during the screening when it is performed by EU institutions or MSs.

Therefore, the intention of creating a fiction of non-entry can only be a political one. By keeping people at the borders, risking that they get stuck in some no man’s land or transit zones, thereby potentially creating new hotspots with serious administrative and humanitarian shortcomings<sup>161</sup>. This responds directly to what has been elaborated on *Fortress Europe* and is a prime example sketching out the intention to focus on securitisation efforts by European policymakers and legitimising extraordinary measures against migration and refugee flows in Europe and therefore cementing *Fortress Europe*.

## 5.2 Safe third countries

The concept of safe third countries plays an essential role in the CEAS and bilateral agreements European institutions and MSs negotiate. However, scholars and advocates widely dispute the concept. During this section, I will explain what the concept entails and elaborate on some of the criticism. This will be followed by an assessment of how the concept relates to the SRP and its effect on the right to asylum. In the concluding section, the findings will be summarised and put into context with the notion of *Fortress Europe*.

The application of the safe third countries concept was initiated in the EU at the beginning of the 1990s and since then is being used in several legislative and non-legislative initiatives<sup>162</sup>. Today, the concept is, among other things, legislated in the APD<sup>163</sup>. Therein, MSs can consider asylum applications inadmissible if “a country which is not a MS is considered a safe third country for the applicant”<sup>164</sup>.

The concept can be applied to third countries that fulfil several requirements, such as ensuring that refugees are recognised according to the Refugee Convention, adhering to the prohibition of *non-refoulement* and discrimination as well as safeguarding no risk of serious harm<sup>165</sup>. Despite this guidance and criteria established, declarations of safe third countries do not always seem to be plausible<sup>166</sup>.

As a result of the concept of safe third countries in the APD, applications from asylum seekers who come from or have transferred through a safe third country will be deemed inadmissible<sup>167</sup>. The assumption is

158 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 31

159 UNHCR, ‘Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)’ (UNHCR 2001) paras 4,5

160 UNHCR, ‘Advisory Opinion on the Extraterritorial Application Of-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol’ (2007) <<https://www.unhcr.org/4d9486929.pdf>> accessed 9 October 2021

161 Daniel Thym, ‘European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the “New” Pact on Migration and Asylum’ (2020) <<https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/>> accessed 9 October 2021

162 Cathryn Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ 35

163 Directive 2013/32/EU (n110 above) art 38

164 Ibid art 33 2(c)

165 Ibid art 38

166 UNHCR, ‘UNHCR’s Position and Recommendations on the Safe Third Country Declaration by Greece’ (2 August 2021) <<https://www.unhcr.org/gr/en/22885-unhcrs-position-and-recommendations-on-the-safe-third-country-declaration-by-greece.html>> accessed 9 October 2021

167 Directive 2013/32/EU (n110 above) art 25

that the person considered could have found protection elsewhere but did not seek it<sup>168</sup>. In other words, the State whose protection is sought is denying this responsibility because they do not feel in charge of providing protection<sup>169</sup>.

However, the question of safety cannot be answered based on official criteria, such as the compliance with the Geneva Convention<sup>170</sup> only; assessments thereof need to be flexible<sup>171</sup>. In terms of procedure, it has been argued that the simple attribution of *safe* does lead to a disregard of the individual circumstances of the asylum seeker, which can deem a country unsafe, despite being generally considered safe<sup>172</sup>. Though, under the APD, an individual assessment must be initiated first before consideration of the third country can be applied<sup>173</sup>.

Scholars and courts have widely debated the concept and the declaration of certain countries as safe,<sup>174</sup> for example, Turkey<sup>175</sup>. Furthermore, it was argued that the concept is exploiting a legal gap between *non-refoulement* and protection, stemming from the fact that countries under the Geneva Convention are obligated to follow *non-refoulement*, but at the same time, have no provision to grant asylum to persons seeking international protection<sup>176</sup>. In addition, several scholars note that it can lead to unlawful returns and a high risk of *refoulement* and can be considered *arbitrary selection* that again likely leads to unlawful returns and embeds a high risk of *refoulement*<sup>177</sup>. It is widely accepted that the safe third country provisions can undermine the right to asylum<sup>178</sup>.

Additionally, despite the reference to *coming directly from a territory where their life or freedom was threatened*<sup>179</sup> in the non-penalisation clause of the Refugee Convention, there is no legal obligation for asylum seekers to seek protection in the first State in which effective protection might be available in international law and the -albeit limited- choice on where asylum seekers ask for protection for reasons of family reunification<sup>180</sup>.

Scholars argue that the power of categories such as the safe third countries will be determined in border procedures<sup>181</sup>. Furthermore, the concept will gain importance due to the SRP<sup>182</sup>.

However, the notion of 'safe third countries' has not been mentioned in the SRP. The standard de-briefing form suggests that either travel, previous protection applications or granted protection in third countries are of particular interest to the authorities<sup>183</sup>. Further, the proposal does require authorities to add "any elements which seem at first sight to be relevant to refer the third-country nationals concerned into the accelerated examination procedure or the border procedure" to the de-briefing form<sup>184</sup>. Thus, the SRP presents great potential to build the basis to consider applications inadmissible on a safe third country ground and serve as "a device for summary decisions concerning pre-examination return based on inadmissibility

168 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (n170 above) 39

169 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (n31 above) 1

170 Directive 2013/32/EU (n110 above) art 38 (1)

171 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)' (n167 above) para 14

172 Ibid paras 12-18

173 Directive 2013/33/EU (n117 above) art 36(1)

174 *The Refugee in International Law* (n18 above) 390

175 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (n115 above)

176

177 Refugee Rights, 'New Pact on Migration: An Exacerbation of Past Failures in Shiny New Packaging' (2020) <<https://refugee-rights.eu/2020/09/28/new-pact-on-migration-an-exacerbation-of-past-failures-in-shiny-new-packaging/>> accessed 9 October 2021

178 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (n170 above) 36

179 Convention Relating to the Status of Refugees (n166 above) art 31(1)

180 *The Refugee in International Law* (n18 above) 392

181 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (n31 above) 29

182 *Admissibility, Border Procedures and Safe Country Notions* (n85 above) 170

183 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 (n6 above) Annex

184 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 (n6 above) art 14(II)

grounds”<sup>185</sup>.

While the APD requires an individual assessment first, before assessing whether the third country is safe for the applicant<sup>186</sup>, the standard de-briefing form for the screening procedure does not suggest the collection of information of individual risks that could potentially inform an individual assessment<sup>187</sup>. However, the standard de-briefing form suggest to collect information on third countries where protection was sought or granted<sup>188</sup>.

While it has to be seen how the concept of safe third countries will be applied under the SRP in practice, the collection of data on third countries during the screening process could build the foundation to inform the screening procedure outcome, potentially leading to the denial of entry and return. This, in turn, would prevent asylum seekers from accessing their right to asylum.

### 5.3 Conceptual ambiguities

This section will look at some of the more conceptual ambiguities in the SRP and assess their impact on the right to asylum. This regards the categorisation of migrants and asylum seekers, delayed access to the asylum procedure and the resulting limitation to access fundamental rights, with specific reference to the right to asylum.

There is general agreement that the SRP creates different categories of migrants, namely migrants who have entered in an un-authorised manner, asylum seekers who entered without authorisation and persons disembarked following a search and rescue operation, which are therefore subject to different legal regimes<sup>189</sup>. It was argued that this would eliminate the fine line between persons seeking international protection and other migrants, which would result in substantial disadvantages to the access to fundamental rights of persons seeking international protection<sup>190</sup>. There is a growing body of support for this claim<sup>191</sup>. The issue stems from Articles 3 and 5 of the SRP, whereas persons seeking international protection are subject to the screening in the same fashion as other third-country nationals. However, International<sup>192</sup> and European law<sup>193</sup> requires special treatment for persons seeking international protection. This is also supported by the jurisprudence of the European Court of Human Rights<sup>194</sup> and set out in the SBC<sup>195</sup>.

Under the proposed APR, as soon as an application for international protection is made, the person concerned shall be considered an applicant for international protection<sup>196</sup>. Therefore, the person concerned will have access to specific rights, such as the right to remain in the country, the application has been lodged as well as the right to legal assistance<sup>197</sup>. Consequently, it was argued that equating those two groups as suggested in the SRP would result in delayed access to asylum procedures and respective safeguards as defined under the APD<sup>198</sup>.

<sup>185</sup> *Admissibility, Border Procedures and Safe Country Notions* (n85 above) 170

<sup>186</sup> Directive 2013/32/EU (n110 above) art 27(2)b

<sup>187</sup> 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 767/200, (n6 above) Annex

<sup>188</sup> 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 (n6 above) Annex

<sup>189</sup> ‘The New Pact on Migration and Asylum: Turning European Union Territory into a Non-Territory’ (n144 above)

<sup>190</sup> ‘Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders’ (n9 above)

<sup>191</sup> ‘Border Procedure: Efficient Examination or Restricted Access to Protection?’ (n115 above)

<sup>192</sup> Convention Relating to the Status of Refugees (-166 above) art 31

<sup>193</sup> Directive 2013/32/EU (n110 above)

<sup>194</sup> ‘Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders’ (n9 above)

<sup>195</sup> Regulation (EU) 2016/399 (n93 above) art 6(5)c

<sup>196</sup> 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’ (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN>> accessed 9 October 2021 art 25; Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2016] OJ L 180 art 2 (c)

<sup>197</sup> Directive 2013/32/EU (n110 above) arts 9, 14

<sup>198</sup> ‘ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612’ (n149 above)

Furthermore, the SRP foresees a time limit of five days to complete the screening, but exceptional circumstances can extend the time limit by another five days<sup>199</sup>. Critics have argued that this time limit will be insufficient, claiming border procedures usually take much longer<sup>200</sup>. While persons seeking protection can communicate their wish to do so during the screening procedure, the SRP does not allow for an immediate referral to asylum procedures before the conclusion of the screening.

Instead, the screening shall be applied despite an application to international protection<sup>201</sup>. Therefore, the screening process delays access to an asylum procedure and several rights under the APD as well as the RCD, such as freedom of movement and access to the labour market<sup>202</sup>. Moreover, the SRP points out that some of the fundamental rights, such as the prohibition of detention for the sole reason of being an applicant stemming from the APD<sup>203</sup>, apply only after the screening has been concluded<sup>204</sup>.

Another more practical issue is the provision of information on asylum applications. Under the APR, officials are expressly encouraged to ask whether individuals wish to receive international protection if they are in doubt<sup>205</sup>. However, this notion is not included in the SRP. This might either be a lack of policy coherence or shows an intention by policymakers to use the screening as a tool for quick returns rather than speeding up processes at the border, as pointed out in the proportionality assessment of the proposal<sup>206</sup>.

Finally, the APR does apply “to all applications for international protection made in the territory of the Member States, including at the external border, in the territorial sea or in the transit zones of the Member States”<sup>207</sup>. However, in the SRP, it was pointed out that Articles 26 and 27 of the APR, namely the registering applications, only apply after the screening<sup>208</sup> even though a person might have communicated their wish to apply for international protection - which makes them an applicant for international protection. This is incoherent with the APR as soon as the person concerned communicates their wish to apply for asylum during the screening. At the same time, this creates legal uncertainty due to a lack of policy coherence<sup>209</sup>.

Furthermore, it does put applicants for international protection at risk of detention and results in a refusal of access to specific fundamental and procedural rights, which they would have the right to access as proposed under the APR. For example, the right to an effective remedy and a fair trial<sup>210</sup>, which has been pointed out in *Hirsi Jamaa and Others v. Italy*, is a prerequisite for full access to the right to asylum<sup>211</sup>.

To recapitulate, the equation of migrants and asylum seekers during the screening process might delay access to the asylum procedures and can result in the limitation of access to fundamental rights. Overall, the SRP is set up incoherently with other legislations, notably the APD, and has stark effects on fundamental rights, including the right to asylum.

199 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 (n6 above) art 6(3)

200 ‘New Pact on Migration and Asylum: CCB E Position on the Proposal for a Regulation a Screening of Third Country nationals at the External Borders’ (n139 above)

201 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 (n6 above) art 3(1)

202 Directive 2013/33/EU (n117 above) arts 7(1), 15(1)

203 Ibid art 26 (1)

204 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 (n6 above) recital 16

205 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’ (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN>> accessed 9 October 2021 art 25

206 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 (n6 above)

207 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’ (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN>> accessed 9 October 2021 art 3(1)

208 Ibid recital 16

209 ‘ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612’ (n149 above)

210 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 art 47

211 *Hirsi Jamaa and Others v. Italy* Application no. 27765/09 (ECtHR, 23 February 2012) paras 185-186



## 5.4 Monitoring mechanism

The institution of independent fundamental rights monitoring mechanisms has received much attention more recently. The discussion on the establishment of such a mechanism in Greece has sparked a lively debate<sup>212</sup>. The SRP also sets out an obligation for MSs to establish an independent monitoring mechanism<sup>213</sup>.

During this section, I will discuss the proposed mechanism, some of the criticism addressed and how the mechanism could potentially be helpful to provide increased access to the right to asylum by helping to observe and eventually halt some of MSs' practices, which are resulting in a limitation to the right to asylum. The monitoring mechanism was proposed to respond to the widespread violations of fundamental rights at the European borders to ensure compliance with EU and International law during the screening process<sup>214</sup>.

Part of the violations at EU borders are illegal pushbacks<sup>215</sup>. The most recent examples show the dimension and level of cruelty of MS practises<sup>216</sup>. While there is no definition of pushbacks, they have been described as "various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied any individual assessment of their protection needs which may lead to a violation of the principle of *non-refoulement*"<sup>217</sup>.

It is also widely agreed that pushbacks violate the prohibition on collective expulsion under International<sup>218</sup> and European law<sup>219</sup>. Finally, pushbacks are a severe violation of the right to asylum and the principle of *non-refoulement*<sup>220</sup>. However, the monitoring mechanism is supposed to investigate all screening-related fundamental rights issues<sup>221</sup>.

There is comprehensive support for the proposed establishment of a fundamental rights monitoring mechanism<sup>222</sup>. However, views differ on how the mechanism can effectively address existing accountability gaps and violations of European and International Law<sup>223</sup>.

The SRP remains relatively vague on the function of the monitoring mechanism. However, it does require an investigation into potential violations of fundamental rights during the screening<sup>224</sup>. Additionally, the monitoring mechanism shall be installed at the MS level, with the opportunity to invite other organisations

212 Pol Afonso Fortuny and Sarantis Michalopoulos, 'Commission Asks Greece for Transparency on Pushbacks to Release Migration Funds' (2021) <<https://www.euractiv.com/section/justice-home-affairs/news/commission-asks-greece-for-transparency-on-pushbacks-to-release-migration-funds/>> accessed 9 October 2021

213 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 (n6 above) art 7

214 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 (n6 above) Explanatory Memorandum and recital 3

215 Parliamentary Assembly, 'Pushback Policies and Practice in Council of Europe Member States' (European Parliament 2019) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27728&lang=en#>> accessed 9 October 2021

216 Amanda Rivkin, 'Violent Migrant "pushbacks" at Croatian Border Exposed by Media' (7 October 2021) <<https://www.dw.com/en/violent-migrant-pushbacks-at-croatian-border-exposed-by-media/a-59433726>> accessed 9 October 2021

217 United Nations General Assembly, 'Report on Means to Address the Human Rights Impact of pushbacks of Migrants on Land and at Sea (A/HRC/47/30)' (2021) <<https://undocs.org/pdf?symbol=en/A/HRC/47/30>> accessed 9 October 2021

218 In the Refugee Convention, States have agreed that refugees may not be expelled if they are lawfully in the territory due to reasons of national security or public order. Furthermore, the decision to expel a refugee must be taken in accordance with the due process of law. In the case of expulsion, the person affected must be given a reasonable period of time to seek legal admission into another country, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33

219 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto [1968]

220 UNHCR, 'UNHCR's Recommendations for the Portuguese and Slovenian Presidencies of the Council of the European Union (EU)' (2021) <<https://www.refworld.org/docid/5ff4799d4.html>> accessed 9 October 2021

221 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 (n6 above) art 7

222 'Setting the Right Priorities: Is the New Pact on Migration and Asylum Addressing the Issue of Pushbacks at EU External Borders?' (n135 above) and 'ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612' (n149 above)

223 'Setting the Right Priorities: Is the New Pact on Migration and Asylum Addressing the Issue of Pushbacks at EU External Borders?' (n135 above)

224 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 (n6 above) art 7(1)

and bodies in the monitoring<sup>225</sup>. However, critics argue the mechanism could only take full effect when put under the patronage of independent institutions such as the EU Agency for Fundamental Rights<sup>226</sup>.

Further, it was claimed that it remains unclear whether and how the MSs which do not comply with the monitoring and reporting requirements would be sanctioned<sup>227</sup>. ECRE, for example, suggests that the mechanism should cover all border activities and be managed by an independent actor and that non-compliance must have consequences for MSs<sup>228</sup>.

However, the recent example from Greece, under which it is currently discussed to hold EU funding until such a monitoring mechanism is installed, might give some direction<sup>229</sup>. To inform the development of a monitoring mechanism in Greece, international bodies, among them UNHCR, have provided distinct recommendations for an independent and effective national border monitoring mechanism<sup>230</sup>. Therein, detailed recommendations are elaborated on, which go much further than what has been proposed in the SRP. For example, it was deemed important to guarantee operational autonomy, ensure coherence with existing monitoring systems and provide sufficient and sustainable funding<sup>231</sup>.

Despite the criticism and recommendations, the monitoring of fundamental rights is a positive development and could result in significant improvement of the accountability of EU MSs. With increased investigations and monitoring of all border activities, violations of fundamental rights could potentially decrease, which in turn would lead to better access to the right to asylum. Beyond that, while the monitoring mechanism offers a real chance to secure fundamental rights for persons seeking protection, it also provides the chance to prove that all MSs respect fundamental rights and the rule of law, cornerstones of the EU.

## 5.5 MS example: Hungary

Literature suggests that the EC has copied some ideas of Hungary for the New Pact, particularly the screening process and potential transit centres<sup>232</sup>. Though, similar practice to what has been proposed by the SRP has also been implemented in several other MSs, such as Italy and Greece<sup>233</sup>. However, parts of Hungary's border practice have already been tested in court. The judgement might offer some insights into the potential limitations of the proposed screening procedure under the SRP. This brief case study will shine a light on Hungary's practice, where it overlaps with the SRP and the decision by the Court of Justice of the European Union (CJEU).

In 2015, Hungary amended certain laws regarding mass influx as a response to the migration crisis<sup>234</sup>. As part of the law's implementation, transit zones were created at Hungary's land borders with Serbia, preventing asylum-seekers from entering the country and applying for protection<sup>235</sup>. Those who were able to enter the transit zones and issued applications for protection had experienced restrictions of fundamentals

225 Ibid art 7(2)

226 *Fresh Start Or False Start? The New Pact on Migration and Asylum* (n67 above) 257

227 'The European's New on Migration And Asylum' n73 above <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS\\_STU\(2021\)694210\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS_STU(2021)694210_EN.pdf)> accessed 9 October 2021 8

228 'ECRE Comments on the Commission Proposal for a Screening Regulation COM (2020) 612' (n149 above)

229 ECRE, 'Greece: Mitarakis Rejects Border Monitor Mechanism as New Reports of Abuse Emerge – Greek Facilities Empty Out While People Move Onwards' (1 October 2021) <<https://ecre.org/greece-mitarakis-rejects-border-monitor-mechanism-as-new-reports-of-abuse-emerge-greek-facilities-empty-out-while-people-move-onwards/>> accessed 9 October 2021

230 UNHCR, United Nations Human Rights and ENNHRI, 'Ten Points to Guide the Establishment of an Independent and Effective National Border Monitoring in Greece' (2021) <[https://www.unhcr.org/gr/wp-content/uploads/sites/10/2021/09/10-points\\_EN.pdf](https://www.unhcr.org/gr/wp-content/uploads/sites/10/2021/09/10-points_EN.pdf)> accessed 9 October 2021

231 Ibid

232 Sarah Progin-Theuerkauf, 'Defining the Boundaries of the Future European Asylum System with the Help of Hungary?' (2021) 6 7 <[https://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_EF\\_2021\\_I\\_001\\_Sarah\\_Progin-Theuerkauf\\_00446.pdf](https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2021_I_001_Sarah_Progin-Theuerkauf_00446.pdf)> accessed 9 October 2021

233 ECRE, 'Reception, detention and Restriction of movement at EU External Borders' (2021) <[https://eu.boell.org/sites/default/files/2021-07/ECRE%20e-paper%202021\\_FINAL\\_rev.pdf](https://eu.boell.org/sites/default/files/2021-07/ECRE%20e-paper%202021_FINAL_rev.pdf)> accessed 9 October 2021

234 'Defining the Boundaries of the Future European Asylum System with the Help of Hungary?' (n242 above) 6 7 <[https://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_EF\\_2021\\_I\\_001\\_Sarah\\_Progin-Theuerkauf\\_00446.pdf](https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2021_I_001_Sarah_Progin-Theuerkauf_00446.pdf)> accessed 9 October 2021

235 UNHCR, 'Hungary As a Country of Asylum' (2016) <<https://www.refworld.org/pdfid/57319d514.pdf>> accessed 9 October 2021 point 23

rights such as limitations to their freedom of movement or detention<sup>236</sup>. Furthermore, it was argued that Hungary's border procedure also breached the right to an effective remedy<sup>237</sup>.

As mentioned above, there are concerns that the SRP will replicate some of the flaws of the Hungarian system. Critics have stressed that the proposed screening procedures are fairly unclear, and detail is missing to eliminate these doubts as discussed in chapters 4 and 5 of this paper

In *Commission v Hungary*, the CJEU made repeatedly clear that procedures in Hungary, including transit zones at the border, must comply with fundamental rights standards such as the CFR<sup>238</sup>. Furthermore, in *FMS vs Others*, it was pointed out that keeping people at the border or transit centres can be considered detention<sup>239</sup>, which is not aligned with the fundamental rights of asylum seekers as pointed out above.

Further, the decision made by the CJEU on *Commission v Hungary* will potentially shape the SRP and possibly other parts of the New Pact<sup>240</sup>. Following the findings of the court, some of the red lines for the SRP should be established. For example, the court recalled that it is essential to grant access to the asylum procedure and that MSs shall not delay access without any sufficient reasoning<sup>241</sup>.

Further, the SRP would delay access to some of the rights guaranteed under the APD and the RCD as they can only be accessed when the screening is concluded<sup>242</sup>. Similarly, the court does refer to the ability to lodge an application for protection as soon as possible<sup>243</sup>. It has further been clarified that as soon as a third-country national is applying for international protection, the person must be considered an applicant under the APD and therefore receive access to the rights granted under the Directive<sup>244</sup>.

For the SRP, this means that as soon as a third country national is applying for protection, access to the rights provided under the APD must be guaranteed, which should not exclude Articles 26 and 27 of the proposed APR and the rights provided for in the RCD.

To conclude, while some of the more practical procedures have not been further elaborated under the SRP, the example of State practice from Hungary and the CJEU judgment provides valuable insight into the legal boundaries of the proposed screening procedure. Finally, looking at the overlap between the SRP and Hungary's current practice, the notion of providing a "fresh start" under the New Pact is highly questionable.

This section has formed the central part of this paper. It aimed to provide analysis to respond to the main research question: *Is the proposed screening regulation under the New Pact on Migration and Asylum compatible with the right to asylum?* Overall, it can be concluded that the SRP has the potential to undermine the right to asylum.

236 Ibid point 19

237 Boldizsár Nagy, 'A – Pyrrhic? – Victory Concerning Detention in Transit Zones and Procedural Rights: FMS & FMZ and the Legislation Adopted by Hungary in Its Wake' (15 June 2020) <<https://eumigrationlawblog.eu/a-pyrrhic-victory-concerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/>> accessed 9 October 2021

238 Case C808/18 *European Commission v Hungary* [2020] ECLI:EU:C:2020:1029 para 103

239 C924/19 PPU and C925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [2020] ECLI:EU:C:2020:367

240 'Defining the Boundaries of the Future European Asylum System with the Help of Hungary?' (n242 above) 67 <[https://www.european-papers.eu/en/system/files/pdf\\_version/EP\\_EF\\_2021\\_I\\_001\\_Sarah\\_Progin\\_Theuerkauf\\_00446.pdf](https://www.european-papers.eu/en/system/files/pdf_version/EP_EF_2021_I_001_Sarah_Progin_Theuerkauf_00446.pdf)> accessed 9 October 2021

241 *European Commission v Hungary* (n249 above) para 103

242 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 (n6 above)

243 *European Commission v Hungary* (n249 above) para 93

244 Ibid para 100



## 6. Conclusion

This paper was concerned with the SRP under the New Pact and its compatibility with the right to asylum. Thus, the overarching research question addressed in this paper asked: *Is the proposed screening Regulation under the New Pact on Migration and Asylum compatible with the right to asylum?* Furthermore, this research also considered how these findings respond and strengthen *Fortress Europe*, thereby *cementing* it.

By setting out the normative framework on the right to asylum and testing how it is reflected in the SRP and which implications the SRP might have on the right to asylum, I found that overall, the SRP is not compatible with the right to asylum.

At the introduction of the New Pact and the reflection on some of the criticism, it became clear that the legislative package seems to substantiate some of the current practice and will make it even more difficult for asylum seekers to access their right to asylum. The intense focus on securitisation, border management and return of the New Pact was also a forerunner on the SRP.

The detailed analysis of the SRP has shown that it overlaps with other legislations under the CEAS and even replicates and normalises procedures that have been initially set out for hot spots only, which results in making an exceptional measure a standard procedure. However, looking at the central part of the analysis focusing on the research question, I found that the SRP can undermine the right to asylum and, therefore, is not compatible with the right to asylum.

The critical issue with the most significant potential impact on the right to asylum is the equal categorisation of migrants and asylum seekers during the screening process. Due to this categorisation, access to the right to asylum for persons seeking international protection will be delayed and clearly undermines the right to asylum, at least for a certain amount of time. More generally, it became evident that the SRP is set up incoherently with other legislations under the CEAS, notably the APR, which has sheer effects on fundamental rights, including the right to asylum.

The concept analysis on safe third countries did not find an apparent undermining of the right to asylum. However, depending on how authorities use the concept and if the collection of information on third countries during the screening process will build the foundation to inform the screening procedure outcome, it would indeed prevent asylum seekers from accessing their right to asylum.

Further, while the analysis showed that the fiction of non-entry under the SRP does not undermine the right to asylum, it highlights the political intention behind the proposal.

Policymakers seem to hazard the consequences of creating new hotspots with serious administrative and humanitarian shortcomings. This responds directly to what has been elaborated on the *Fortress Europe* and is a prime example of sketching out the intention to focus on securitisation efforts by European policymakers and legitimising extraordinary measures against migration and refugee flows in Europe and therefore cementing *Fortress Europe*.

On a more positive note, the proposed monitoring mechanism could lead to better access to the right to asylum if implemented in a meaningful way. With increased investigations and monitoring of all border activities, violations of fundamental rights, such as pushbacks, could potentially decrease, which in turn would lead to better access to the right to asylum.

Finally, the MS example from Hungary and the CJEU judgment thereof have shown that screening and borders procedures are sensitive issues that need clear legal boundaries. The example also showed the shortcomings of providing a “fresh start” under the New Pact.

To summarise, the SRP does undermine the right to asylum, and I also found that the overarching intention of the screening proposal is indeed to cement *Fortress Europe*.

Building on these findings, there are a few recommendations, policymakers should take into consideration when further developing and negotiating the SRP. Firstly, and overall, communication should reflect the content and ambition. Notions such as a “fresh start” must be grounded in innovative policy proposals in

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line with fundamental rights, not partially based on MS practice that has already been tested in courts. Secondly, engage in fact-based policymaking and consider impact assessments to inform the policy agenda and proposals.

Further, concepts such as the fiction of non-entry have no legal implications but potentially create new hotspots and should be avoided. Similarly, safe third countries are hugely debated and should not inform screening procedures outcomes. Additionally, the screening procedure must end as soon as a person communicates its wish to apply for international protection and from that moment must receive all rights awarded to applicants for international protection. Finally, the suggestions on the monitoring mechanism voiced by scholars, international organisations and NGOs should be considered as the mechanism holds a vast potential to avoid violations of fundamental rights.

While the SRP and other initiatives under the New Pact are still under negotiations, future research should follow up on this paper and analyse the final Screening Regulation and its potential implications on the right to asylum.

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