

EU contribution to the Questionnaire on “pushback practices and their impact on the human rights of migrants”

Introduction

The European Union would like to thank the UN Special Rapporteur on the Human Rights of Migrants for his request to contribute to the questionnaire on “pushback practices and their impact on the human rights of migrants”. The contribution from the European Union was prepared in collaboration with several relevant EU services and follows the questionnaire’s structure.

EU’s contribution

- 1. Please provide information on any relevant legislation or policy in relation to the right to seek and enjoy asylum in your country, which guarantees that migrants including asylum seekers’ protection needs are examined individually, and they are not pushed back at the international border without access to this assessment and other relevant procedures. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.*

The current Common European Asylum System sets out common high standards and strong co-operation among the EU Member States to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply - although there is no mutual recognition of international protection status across the EU. The EU acquis includes a set of Directives and Regulations:

- The Asylum Procedures Directive, adopted by the European Parliament and Council in 2013 sets out common procedures for EU Member States for granting and withdrawing international protection. It provides people fleeing persecution or serious harm and applying for international protection in the EU, with a high level of safeguards in terms of appeals procedures and legal assistance/representation and requires Member States to put in place efficient asylum procedures.
- The Reception Conditions Directive, also adopted by the European Parliament and Council in 2013, aims at ensuring common standards for reception conditions throughout the Union. It ensures that applicants for international protection have access to housing, food, clothing, health care, education for minors and access to employment under certain conditions. It also ensures that detention is only applied as a measure of last resort.
- The Qualification Directive adopted by the European Parliament and Council in 2011 sets out minimum standards for granting refugee or subsidiary protection status to non-EU country nationals or stateless persons and sets out the rights afforded to persons who have been granted one of those statuses. They include the right to a residence permit, travel document, access to employment, access to education, social welfare, healthcare, access to accommodation, access to integration facilities, as well as specific provisions for children and vulnerable persons. The purpose of the

Qualification Directive is to harmonise the criteria by which Member States define who qualifies for international protection: either as a refugee, or as a beneficiary of subsidiary protection.

- The Dublin III Regulation adopted in 2013 sets out the criteria and mechanisms for determining the Member State responsible for examining an application for international protection. The criteria run, in hierarchical order, from family links with a Member State, to recent possession of a visa or residence permit in a Member State, to irregular entry into the EU. The Regulation also enhances the protection of asylum seekers during the process of establishing the Member State responsible, by ensuring that applicants are given information on the determination procedure, have the right to a personal interview, as well as a right to an effective remedy against a transfer decision in fact and in law. It also ensures that detention is only applied as a measure of last resort if there is a significant risk that the person will abscond in order to evade a transfer, based on an individual assessment.
- The New Pact on Migration and Asylum adopted in September 2020 aims at reforming the asylum system, by introducing more efficient, fairer and faster procedures throughout the process and putting in place a migration management system build on the principle of integrated policy-making and the principle of fair sharing of responsibility and solidarity. Building on previous Commission's proposals to reform the Common European Asylum System, the pact is composed of a series of legislative proposals which are now being discussed in the European Parliament and the Council, including the new **Regulation on Asylum and Migration Management**, the amended Asylum procedures Regulation, the amended Eurodac Regulation. In addition a Screening Regulation was also proposed which is now under discussion and forms part of the pre-entry phase foreseen in the Pact. As stated in the Communication accompanying the Pact, following the progress achieved by the co-legislators on the **Qualification Regulation**, which would further harmonise the criteria for granting international protection, as well as clarifying the rights and obligations of beneficiaries it should be quickly adopted. In addition the recast of the **Reception Conditions Directive**, which would bring more harmonised rules and improved reception conditions for asylum applicants, including earlier access to the labour market and better access to education for child migrants should also be adopted as quickly as possible.

2. *Please provide information on any existing good practices or measures taken (such as screening and referral mechanisms at borders) in your country to ensure that persons crossing international borders in mixed movements are protected according to international human rights law. Please indicate any specific measures aimed at reducing vulnerabilities of migrants, including by applying a human rights-based, gender- and disability-responsive, as well as age- and child-sensitive approach.*

The Schengen borders code (SBC) sets out the rules governing the crossing of the EU's external borders. According to the SBC, border control consists of border checks carried out at border crossing points and of border surveillance, which is carried out between the border crossing points in order to prevent and discourage people from circumventing border checks (see SBC Arts 8 and 13).

Article 7 SBC requires that border guards, in the performance of their duties (border checks and border surveillance), fully respect human dignity, in particular in cases involving vulnerable persons. Moreover, Article 3(b) states that the Regulation's provisions are to be applied without prejudice to the rights of refugees and persons

requesting international protection, in particular as regards the principle of non-refoulement.

Decisions under the SBC must be taken on an individual basis (SBC Art 4), implying that assessments must also be individual. Moreover, “humanitarian grounds” and “international obligations” can be relied upon by Member States’ border guards to allow entry into the territory (Article 6(5)(c) SBC), despite non-fulfilment of entry conditions.

On 23 September 2020, the Commission put forward the New Pact on Asylum and Migration, which sets out a comprehensive approach to European Union migration policies and aims to clarify and streamline the rules on dealing with third country nationals who are not authorised to enter or stay in the Union. The proposal introduces a pre-entry screening phase allowing national authorities at external borders, border crossing points or following disembarkation after a search and rescue operations to channel third country nationals to the appropriate (i.e., asylum or return) procedure.

The proposal provides that Member States should establish an independent monitoring mechanism to ensure the protection of the fundamental rights of the persons subject to the screening. This mechanism will be complementary to the governance and monitoring of the migratory situation provided for by the proposal for a new regulation on asylum and migration management. The Fundamental Rights Agency shall issue general guidance on the setting-up of such mechanism, including safeguards, and may, at the request of the Member States, provide support the developing of the monitoring mechanism for the protection of fundamental rights. The competent authorities may be assisted or supported in the performance of the screening by experts or liaison officers and teams deployed by the European Border and Coast Guard Agency and the EASO/European Union Agency for Asylum within the limits of their mandates.

3. Please provide information on existing restrictions or limitations in law and in practice in relation to the right to claim and seek asylum at international borders in your country (e.g., border controls, restricted access to territory) and elaborate the impact of these restrictions on the protection of the rights of migrants crossing international borders.

The Schengen Borders code states specifically that Member States “shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union (‘the Charter), relevant international law, including the Convention Relating to the Status of Refugees of 28 July 1951 (‘the Geneva Convention’), obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights.” In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis.

SBC Art 14¹ lays out the conditions under which entry may be refused but stipulates that these are without prejudice to the application of special provisions concerning the right of

¹ *Article 14. Refusal of entry.* 1. A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

2. Entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law. It shall take effect immediately. The substantiated decision stating the precise reasons for the refusal shall be given by means of a standard form, as set out in Annex V, Part B, filled in by the authority empowered by national law to refuse entry. The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision to refuse entry by means of that form.

3. Persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national

asylum and to international protection. Furthermore, entry may only be refused after a substantiated, reasoned decision and anyone refused entry has the right to appeal such decision in accordance with national law.

4. Please provide information on any concrete instances of pushbacks, including an analysis on the circumstances of the event.

The EU acquis requires Member States to grant access to asylum procedures to third-country nationals or stateless persons who want to apply for international protection, including those who present themselves at border crossing points or have been apprehended after/during irregular crossings of the external borders, as well as to respect the principle of non-refoulement.

The management board of the European Border and Coast Guard Agency (Frontex) established a working group to examine allegations of misconduct involving assets deployed by Union Member States near the Greek-Turkish border in the Aegean Sea during the second half of 2020. The group's preliminary report fully reviewed eight alleged pushback incidents (a number of others remain under examination) and found that none of these could be considered distress situations and that there was no evidence of third-country nationals being turned back in contravention of the principle of non-refoulement or that other violations of fundamental rights had taken place. The report identified some weaknesses of the incident reporting system and set out a number of recommendations to address this. The management board has called on Frontex's executive director to implement the working group's recommendations without delay. The final report of the Working Group is expected for March 2021.

5. Please indicate any specific challenges that your Government has encountered, in the context of the COVID-19 pandemic, on ensuring the human rights of migrants crossing international borders, either by land or by sea.

In the context of the COVID-19 pandemic the Commission, after consultation of the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (Frontex), issued in April 2020 guidelines on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement.

The Guidance provides EU Member States with practical suggestions on how to ensure continuity of procedures as much as possible while fully ensuring the protection of people's health and fundamental rights in line with the EU Charter of Fundamental Rights.

in accordance with national law shall also be given to the third-country national. Lodging such an appeal shall not have suspensive effect on a decision to refuse entry. Without prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry.

4. The border guards shall ensure that a third-country national refused entry does not enter the territory of the Member State concerned.

5. Member States shall collect statistics on the number of persons refused entry, the grounds for refusal, the nationality of the persons refused and the type of border (land, air or sea) at which they were refused entry. Member States shall transmit those statistics once a year to the Commission. The Commission shall publish every two years a compilation of the statistics provided by the Member States.

6. Detailed rules governing refusal of entry are given in Part A of Annex V.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R0562&from=EN>

At the same time, it recalls the fundamental principles that must continue to apply, so that access to the asylum procedure continues to the greatest extent possible during the COVID-19 pandemic. In particular, all applications for international protection must be registered and processed, even if with certain delays. Emergency and essential treatment of illness, including for COVID-19, must be ensured.

6. *Please indicate any challenges and/or obstacles faced by Governmental institutions or civil society organizations and individuals in protecting the human rights of migrants at international borders, including those in distress at sea and in situations where pushbacks or pullbacks are likely to take place.*

Since 2014, attempts to reach Europe on unseaworthy vessels have increased, with many lives lost at sea. This has prompted the EU, Member States, and private actors to significantly step up maritime search and rescue capacity in the Mediterranean.

Assisting those in distress at sea is a moral duty and an obligation under international law. While national authorities remain ultimately responsible for implementing the relevant rules under international law, search and rescue is also part of European integrated border management, implemented as a shared responsibility by Frontex and national authorities. Moreover, the disembarkation of migrants has a significant impact on asylum, migration and border management, in particular on coastal Member States.

It is therefore essential to establish a more coordinated and structured framework for cooperation in this field, in order to ensure rapid response in case of events at sea, maintain safety of navigation and ensure effective migration management.

As part of the new Pact on Migration and Asylum of 23 September 2020, the European Commission proposed a more coordinated EU approach to search and rescue in the Mediterranean sea, based on solidarity, which includes:

- a. A Recommendation addressed to Member States and aimed at fostering cooperation, between Member States and with other involved actors, in the field of search and rescue, with specific regard to operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities;
- b. the creation of a European contact group on search and rescue, composed of Member States, involving other relevant stakeholders (such as European agencies, international organizations and, as appropriate, NGOs and other private entities) and aimed at facilitating information exchange and dialogue on the implementation of the legal framework and the evolving practice of search and rescue, which is being set up and will hold its first meeting in the first quarter of 2021;
- c. Guidance aimed at clarifying that the EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence in the EU territory (the “Facilitators Package”) should not be interpreted in a way allowing the criminalisation of humanitarian activities mandated by law, including SAR activities carried out by non-state actors while complying with the relevant legal framework.

