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EU BORDER CONTROL MECHANISMS: PROTECTION OR VIOLATION OF HUMAN RIGHTS?

by *Elisabetta Lambiase**

SUMMARY: 1. Introduction. – 2. Some Critical Issues Concerning Schengen Information System and Visa Information System. – 3. Border Mechanisms in the Proposals of the EU Pact on Migration and Asylum: Eurodac and Screening Procedure. – 4. Conclusive Remarks.

1. Introduction

The requirement to strengthen control at the external borders of the European Union (EU) represents a consequence of the achievement of freedom of movement of persons within the Schengen Area, as, for the first time, was underlined in the Tampere Council of 1999. According to the Council, the abolition of internal border control would have lowered, automatically, the standards of security in the European Union's territory. It would have made the development of a consistent control of the external borders an indispensable prerogative, crystalizing the inextricable connection between abolition of control at the internal borders and the necessity to introduce strong control at the external borders. The pursuit of this outcome could be achieved only jointly, establishing a new method of border managing: integrated border managing. It means that the current European Border and Coast Guard, Frontex, is in charge to manage the situation at the EU external borders in coordination with Member States' authorities. The management of EU external borders is provided by the institution of several monitoring mechanisms, ensuring that the external borders are crossed only by those who comply with the requirements enshrined in art. 6 of Schengen Borders Code (SBC)¹. The entry conditions for third-country nationals consist in: i) the possession of a valid travel document issued within the previous ten days entitling the holder to cross the border; ii) the possession of a valid visa, if required; iii) the justification of the purpose and; iv) the possession of sufficient means of subsistence; v) to not be an individual for whom an alert has been issued in the Schengen Information System (SIS), nor considered to be a threat to public policy, international security, public health. Nevertheless, in compliance with international law, the requirement enshrined in the aforementioned article could be derogated on humanitarian grounds, on grounds of national interests, or because of international obligations², such as the principle of *non-*

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¹ Regulation (EU) 399/2019 of the European Parliament and of the Council *on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, of 9 March 2016, in OJ L 77, of 23 March 2016.

² Art. 6, para. 5, let. c) SBC.

refoulement. Therefore, border control mechanisms must be suitable to verify whether the person who is trying to cross the border is in possession of the entry conditions or is entitled to ask for asylum on humanitarian grounds. This paper aims to analyse some critical issues concerning the European Union border control mechanisms. Without any claim of exhaustiveness, several topics will be discussed. In the second section, the focus would be set on the Schengen Information System and Visa Information System and their criticality; whereas the recast of Eurodac system and the proposal of a new-entry screening will be shortly analysed in the third section and, finally, some conclusive remarks will be drawn.

2. Some Critical Issues Concerning Schengen Information System and Visa Information System

The most ancient mechanism is Schengen Information System, the currently in force legal text of which is Regulation (EU) 2018/1862, which shapes the Schengen Information System of second generation (SIS II). The general purpose of SIS “*shall be to ensure a high-level security within the area of freedom, security and justice*”³, this outcome is realized by the collection of data (name, surname, date of birth and other information) of persons who should be arrested for surrender or extradition purposes or sought to assist to a judicial procedure and other reasons of judicial importance. SIS II consists in the largest database used to guarantee security in the area without internal border controls, representing an essential tool for the application of the Schengen *acquis* and it constitutes one of the “*major compensatory measures*”⁴ contributing to the achievement of security purposes. Nevertheless, it seems that the system is largely used to control irregular migration, according to statistics. In 2020 the majority of the data collected regarded the third-country citizens who were rejected to entry and sojourn in the Schengen area⁵. This trend could be enforced by the recent decision to extend the field of application concerning the collectable data even regarding third-country citizens who have been subjected of a return decision⁶. This circumstance seems to represent the enforcement of the link between migration and criminal matters, widely discussed in literature⁷. Another system used to control and govern migrant influx as well as to guarantee security within Schengen area is the Visa Information System (VIS), which was gradually put in place in 2011⁸ and became fully operational in 2016⁹. The system’s purpose was enshrined in art. 2 of the Regulation (EC) 767/2008. In accordance with it, the VIS shall enhance the implementation of the common visa policy in order to facilitate the visa application procedure and to mitigate the *visa shopping*¹⁰ phenom. According to the EU law, visa

³ Art. 1 Regulation (EU) 2018/1862.

⁴ Recital 1 Regulation (EU) 2018/1862.

⁵ K. ZAFEIROPOULOS, Z. LOULONDI, N. MORFONIOS, *Digital Fortress Europe #1: The Ecosystem of European Biometric Monitoring and Surveillance Data*, in *European Data Journalism Network*, 28 April 2022, available at <www.europeandatajournalism.eu/eng/News/Data-news/Digital-Fortress-Europe-1-The-ecosystem-of-European-biometric-monitoring-and-surveillance-data>.

⁶ As enshrined in the art. 26 Regulation (EU) 2018/1862.

⁷ S. MARINAI, *La riforma del sistema di informazione visti: tra esigenze di sicurezza dello spazio Schengen e istanze di tutela dei richiedenti visto*, in *Diritto, Immigrazione e cittadinanza*, No. 3, 2022, 2022, p. 66 ff.

⁸ Regulation (EC) 767/2008 of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), of 9 July 2008, in OJ L 218, of 13 August 2008.

⁹ LOULONDI Z., MORFONIOS N., ZAFEIROPOULOS K., *op. cit.*

¹⁰ According to the doctrine, “visa shopping” consists in presenting several visa requests in different Member State. On the point: S. MARINAI, *op. cit.*

would not be required for all third-country citizens. Indeed, the system is based on the creation of two lists, *black and white*, where Third States with or without the visa obligation are identified. The lists' composition is based on different elements, that don't seem to respond to defined and objective criteria, which could emphasise a xenophobic and discriminatory policy¹¹. Following the common exigency to implement the coordination of the EU border mechanisms, the VIS has been subject to two new Regulations (EU) 2021/1133¹² and (EU) 2021/1134¹³. The outcome of the two Regulations is to extend the functions and the scope of application of the VIS. Notably, Regulation (EU) 2021/1134 extends the purposes of the VIS, encompassing the use of data even for irregular migration intents. Indeed, the mechanism will play a key role in contributing in the return process of third-country citizens who do not or do not anymore satisfy the entry conditions enshrined in art. 6 SBC¹⁴. In addition, in the new Regulation, the support for SIS activities is recognized, which at the same time could be unoffensive whatsoever, or could become threatening to human rights if collected data's quality would not be implemented. In fact, the problems referring to this topic are several, the legal data quality is a critical issue in a scenario of inter-operativity between VIS and SIS, due to the possibility of the creation of false positives, condition where a third-country citizen could be mistaken for a person reported in SIS¹⁵. This problem seems to be mitigated by the introduction of biometric data, which must be collected at the presentation of the visa request. Nevertheless, this inclusion could only represent a solution of the aforementioned criticality whereas new methods of creating algorithms are developed. In fact, the Fundamental Rights Agency individuated that the majority of the algorithms are based on white men images while the images of women or people of different ethnics are less presented in the formulation of the system¹⁶. This could arise discriminatory effects because the algorithm could more likely produce a false positive within these categories rather than within white men¹⁷.

3. Border Mechanisms in the Proposals of the EU Pact on Migration and Asylum: Eurodac and Screening Procedure

The above stated extension of the purposes for which EU border control mechanisms are established is a common practice of the EU institutions. It is enough to consider the process of the implementation of Eurodac. Indeed, the extension of the functions of Eurodac have been implemented again in proposals put forward by the Commission,

¹¹ *Ibid.*

¹² Regulation (EU) 2021/1133 of the European Parliament and of the Council *amending Regulations (EU) No 603/2013, (EU) 2016/794, (EU) 2018/1862, (EU) 2019/816 and (EU) 2019/818 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the Visa Information System*, of 7 July 2021, in OJ L 248, of 13 July 2021.

¹³ Regulation (EU) 2021/1134 of the European Parliament and of the Council *amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System*, of 7 July 2021, in OJ L 248, of 13 July 2021.

¹⁴ Art. 2, para. 2, let. c) Regulation (EU) 2021/1134.

¹⁵ S. MARINAL, *op. cit.*

¹⁶ Fundamental Rights Agency, *Facial Recognition Technology: Fundamental Rights Considerations in the Context of Law Enforcement*, Vienna, Publications Office, 2019.

¹⁷ N. VAVOULA, *Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism*, in *European Journal of Migration and Law*, No. 23, 2021, p. 111 ff.

process²⁴. The orientation of the European Commission to expand the functionality of EU border control mechanisms was again confirmed by a proposal put forward in 2016, which envisaged the amplification of Eurodac purposes. This Proposal ran ashore, nevertheless the content was represented in the New Pact on migration and asylum presented by the Commission in September 2020²⁵. The Proposal seeks to expand the scope of Eurodac by adding new categories of persons from whom data should be retrieved and stored, such as irregular migrant, also lowering the age of minor persons whose fingerprints (from 14 to 6 years old) will be stored. In addition, since the collecting authorities declared to have issues during the explication of the activities because third-country citizens have even gone to the extent of self-harming²⁶, in order to evade the fingerprint storing, the new Proposal introduces biometric facial data collection and, for the purpose of implementing and ensuring consistency with the Screening Regulation, the Commission considered necessary to include other data such as migrant's name, surname, country of origin. Therefore, these amendments lead to an expansion of the purposes of Eurodac, originally established to facilitate the application of the Dublin system. This operation could be able to produce consistent "*function creeps*"²⁷, since its scope is becoming widely different from the original one. Eurodac could turn into a massive surveillance tool for migrants, considering that the aim of the Proposal is also to better control secondary movement of migrants²⁸. Moreover, the introduction of biometric data in Eurodac activities could implement the violation of the principle of non-discrimination as already mentioned, whereas data quality would not be adjusted and, of course. The inter-operability of the systems could be another issue, since it could be able to strengthen the connection between migrants and criminality. In addition, another element shall be considered, migrants should be regarded as a vulnerable category and they should be addressed to specific protections, which don't seem to be accomplished in the Commission's Proposal. The concern has been expressed by several actors, such the EDPS, who expressed again his apprehensiveness for human rights protection, as data protection, privacy and right to a private life. In addition, the criticalities expressed led to the publication of a letter by Privacy Network, an Italian no-profit organization, in which the Civil Liberties, Justice and Home Affairs Commission is exhorted to vote against the new purposes of Eurodac, due to the threat to human rights that the recast of Eurodac Regulation could put in place²⁹. This scenario could be exacerbated considering another Commission's proposal, which tends to include a new practice in border surveillance, consisting in a *pre-entry screening* operation³⁰. This activity aims to accelerate external border control mechanisms and it consists in an initial verification of

²⁴ V. FERRARIS, *op. cit.*

²⁵ Amended proposal for a Regulation of the European Parliament and of the Council *on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or 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 Regulations (EU) 2018/1240 and (EU) 2019/818*, of 23 September 2020, COM/2020/614 final, 2016/0132(COD).

²⁶ I. SESANA, *Eurodac, la "sorveglianza di massa" per fermare le persone ai confini Ue*, in *Altraeconomia.it*, 1 November 2021, available at <www.altreconomia.it/eurodac-la-sorveglianza-di-massa-per-fermare-le-persone-ai-confini-ue/>.

²⁷ V. FERRARIS, *op. cit.*

²⁸ I. SESANA, *op. cit.*

²⁹ Privacy Network, *Votazione LIBE su rifusione EURODAC*, 11 December 2022.

³⁰ 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*, of 23 September 2020, COM/2020/612 final, 2020/0278(COD).

the health and mental conditions of the migrant, in order to individuate in which procedure the migrant should be submitted to. In cases where no vulnerabilities are to be found, the standard border procedure will be used. The criticality in this Proposal is that such verification shall be carried out in five days, that could lead to a systematic classification of vulnerability, that will not be able to encompass all the different situations experienced by migrants, potentially violating their right to seek asylum³¹. Moreover, art. 7 of the proposed Regulation envisages the creation of an Independent Mechanism for monitoring fundamental rights. This mechanism should ensure compliance with international and EU law during the screening process, such as right to access to the asylum procedure and the satisfaction of *non-refoulement* principle. Nevertheless, art. 7 confers to the mechanisms only functions related to the pre-entry screening procedure, instance that excludes its application to border procedure, even though it is a right-sensitive matter³². The proposed Regulation seems to underline the European tendency to reinforce securitization of the European Union territory, oftentimes reducing refugees and migrants' right to be protected.

4. Conclusive Remarks

The proposals summarised in this paper seem to represent the European institutions' tendency to the fortification of the European border regime, where ensuring security is the main outcome to pursue, lowering the protection standards of refugees and migrants' fundamental rights. This scenario is enclosed also in the willingness of the implementation of an inter-operability system, in which an undefined number of authorities is allowed to consult all the different databases. Such element could reinforce the need to strengthen data protection and others human rights³³. It is enough to consider that Frontex's programme, PeDRA, which consisted in the exchange of the sensitive data collected – such as genetic, political and religious belief, and sexual orientation data – between Europol and Frontex³⁴, has brought to the light the urgency of reinforcing EU ruling on data protection, in order to refrain from an instrumental and discriminatory use of data collected by authorities. To conclude, in this scenario it is hard to affirm that the EU border control mechanisms are fully protecting human rights, considering, firstly, the tendency of the European institutions to speed up the external border control in favour of security; secondly, that the EU urgency of include new technological methods to collect data doesn't seem be in balance with the necessity for their improvement. The criticalities are several and this context could be used to enhance the connection between migration and criminality, confirming that European Union's policy on migration is not fully adopting the humanitarian approach needed.

³¹ C. SCISSA, *Il nuovo Patto sulla migrazione e asilo dalla prospettiva della vulnerabilità: un'occasione mancata*, in *Freedom, Security and Justice: European Legal Studies*, No. 2, 2021, p. 351 ff.

³² M. STEFAN, R. CORTINOVIS, *Setting the Right Priorities: The New Pact on Migration and Asylum Addressing the Issue of Pushbacks at EU External Borders?*, in *Global Asylum Governance and the European Union's Role*, 25 November 2020, available at <www.asileproject.eu/setting-the-right-priorities-is-the-new-pact-on-migration-and-asylum-addressing-the-issue-of-pushbacks-at-eu-external-borders/>.

³³ V. FERRARIS, *op. cit.*

³⁴ For further information, see A. FOTIADIS, L. STAVINOHA, G. ZANDONINI, *EU's Frontex Tripped in Its Plan for "Intrusive" Surveillance of Migrants*, in *Balkaninsight*, 7 July 2022, available at <www.balkaninsight.com/2022/07/07/eus-frontex-tripped-in-plan-for-intrusive-surveillance-of-migrants/>.