ADMiGOV

Advancing Alternative Migration Governance

Final Report on Entry

Deliverable 1.4

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Publication information

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Acknowledgments

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ACRONYMS

CCV   Community Code on Visas

ECRIS-TCN   European Criminal Information System for third-country nationals

EEA   European Economic Area

EES   Entry-Exit System

eu-LISA   European Union Agency for the operational management of large-scale information systems in the area of freedom, security and justice

ETIAS   European Travel Information and Authorisation System

SBC   Schengen Borders Code

SIS   Schengen Information System

TCN   Third-country national

TFEU   Treaty on the Functioning of the European Union

UNOHCHR   United Nations Office of the High Commissioner for Human Rights

1. Introduction

This deliverable is the final report for ADMIGOV WP1 on entry governance. It synthesizes the findings of WP1 research (Section 2). On this basis, it provides an evaluation of current EU policies and practices of entry governance and outlines a first set of suggestions for potential criteria and indicators for designing 'good governance' measures with regard to entry (Section 3). The development of such criteria and indicators is a key objective of ADMIGOV, to take place over the course of the project. The remainder of this introduction will provide an overview of the research that was conducted in WP1, its starting point and questions.

WP1 research started from a shared understanding of entry, also outlined in ADMIGOV's initial description, as access to the territory of states.[1] This understanding was further specified in the course of WP1's work, which focused on entry as access to the territory of the Member States of the European Union for third country nationals (TCNs), that is for persons who are not citizens of an EU or EEA/Schengen state. WP1 researchers also developed a common working understanding of entry *governance* as the development and implementation of rules and procedures (i.e. norms, including administrative, legal and procedural norms and the way they are put into effect by operational actors), as well as technical systems, governing decisions on the eligibility of persons soliciting access to the territory of an EU or EEA/Schengen state.

Building on these shared understandings of both entry and governance, the research conducted in WP1 is presented in three deliverables. D.1.1. (Koopmans and Beilfuss, 2019) provides an institutional and legal mapping of the EU provisions governing regular entry, including areas that remain within the remit of national authorities, as well as analysis of said provisions over time. D.1.2. (Jeandesboz et al., 2020) offers a bottom-up perspective on EU entry governance, focusing on operational actors at external border crossing points across the three types of EU external borders, air, land and sea. D.1.2. further develops an analysis of how the formal provisions mapped in D.1.1. interact with informal practices at external borders points of entry, as well as of the interactions between concerns with regular and irregular entry of third country nationals. D.1.3. (Lemberg-Pedersen et al., 2020), finally, examines the political economy of entry governance, with a focus on the role of private commercial actors in the formulation, implementation and conduct of EU entry governance.

The background and context to WP1 research, as with the rest of the ADMIGOV project, are recent efforts to formulate guidelines for forward-looking migration and international protection policies, embodied in the international context by the 2016 New York Declaration for Refugees and Migrants as well as the 2018 United Nations Global Compact for Migration and Global Compact for Refugees. All three documents outline principles and prospects for more equitable, safer and legal pathways for migrants and persons seeking international protection. As stated, it is the eventual goal of ADMIGOV to design criteria and indicators for

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[1] For shared understandings of migration governance as such, see ADMIGOV deliverable D7.1 (Pasetti, 2019: 14).

'good migration governance' against this 'evaluative benchmark' (Czaika and de Haas,2013: 503). However, the notion that such governance can, has and is likely to fail (Anderson, 2016; Castles, 2004, 2017), that the boundary between migration and 'non-migration' governance is blurred and that the effects and effectiveness of migration governance are subject to controversy among its actors as well as students (Czaika and de Haas, 2013), are also part of the understanding of migration governance in ADMIGOV. In the case of entry governance, the assumption that seems to have informed migration policy measures in European states since the 1980s is that the access of foreigners to their territory, whatever the purpose and including in the context of access to international protection, can and must be controlled and restricted (e.g. Düvell, 2006: 7-8). In the European Union framework, the outlook of entry governance, migration and international protection measures has been affected by the fact that Schengen (prior to its incorporation in EU law), the 'third pillar' and their successor the area of freedom, security and justice were actively shaped (Bigo, 1996) and 'venue-shopped' by home affairs ministries and enforcement-minded authorities (Guiraudon, 2000). The result, as WP1 investigations into the 'law of entry' show, is that the harmonisation of border and migration enforcement measures has moved 'ahead' of other areas ('ahead' here means that more specific rules with direct effect, including operational rules, have been adopted) all the while leaving a significant margin for appreciation and discretion to national authorities in charge of governing the entry of third-country nationals.[2]

A last note is required, finally, on how the present deliverable should be read. It is less a standalone report than a companion to the three research reports prepared by the ADMIGOV WP1 team. It provides an overview of findings, in particular, but does not necessarily go into all the specifics or repeat the evidence supporting the results generated over the course of the work package. Likewise, the report does not repeat methodological considerations, which are discussed in each WP1 submission over the last year. It is on these three reports that the section on evaluation and suggestions for criteria and indicators is based. Readers are therefore invited to consult the relevant reports as they make their way through the following pages.

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[2] It is therefore not the case, then, that a 'control gap' (e.g. Cornelius et al., 2004; Bonjour, 2011) has manifested with the involvement of transnational arenas such as the EU when it comes to entry governance

2. Entry governance: findings

This section provides a synthetic account of the findings on entry governance in the EU generated through ADMIGOV WP1 research. For readability's sake, these findings are presented here under three headings. The 'law of entry governance' (2.1.) concerns findings related to WP1's mapping of the EU's legal framework on the access of TCNs to the territory of EU and Schengen states (Koopmans and Beilfuss, 2019). The 'political economy of entry governance' (2.2.) highlights key findings from WP1's analysis, found in deliverable D.1.3. (Lemberg-Pedersen et al., 2020) of the interplay between public and private authorities in the formulation, implementation and conduct of EU entry governance measures. Finally, the section on 'operational practices of entry governance' (2.3.) stresses important results of 'bottom-up' case studies on operational practices of entry governance in the context of air, land and sea borders, found in deliverable D.1.2 (Jeandesboz et al., 2020).

2.1.   The law of entry governance

WP1 research on the 'law of entry' mapped the EU's legal framework for the access of TCNs to the territory of EU and Schengen states.[3] States have a sovereign right to determine who can be admitted to their territory, which is widely acknowledged including in the New York Declaration for Refugees and Migrants. This right is nonetheless subject to their international obligations, and in the case of EU and Schengen states, to the obligations they have subscribed to as members of the European Union and/or Schengen area. The EU institutional-legal landscape regarding entry, however, is itself fragmented, to the extent that it is not possible to speak of a single entry regime in the sense of a single set of rules that would prescribe how different categories of TCNs are admitted on the territory of Member States. WP1 research has identified at least four lines that fragment the landscape of EU entry governance.

A first line of fragmentation in EU entry governance originates, from a legal perspective, in the division of competences established in the Treaty on the Functioning of the European Union (TFEU) between policies on checks at the external borders and the common visa policy (Article 77 TFEU) and the development of a common immigration policy (Article 79). There are on the one hand common EU entry procedures, including entry conditions and the grounds on which entry can be refused, and common rules on the issuance of short-stay visas, found in the Regulations establishing the Schengen Borders Code (SBC) and Community Code on Visas (CCV), respectively. On the other hand, rules governing family migration and entry for employment purposes, set by Directives, leave more leeway to Member State because they require transposition. Although international protection is dealt with in the context of ADMIGOV WP4 and 5, the same can be argued about the Common European Asylum System

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[3] Unless specified otherwise, the following draws on Koopmans and Beilfuss, 2019.

(CEAS) where the Dublin and Eurodac Regulations set overarching rules on how to determine the Member State responsible for examining an application for international protection, while Member States enjoy within limits a wider margin for manoeuvre with regard the grounds on which international protection can be granted (Qualification Directive), procedures for granting and withdrawing international protection (Procedures Directive), for setting reception conditions including detention (Reception Directive). Put differently, Member States have to apply common, harmonised rules with regard to checks at the external borders and short-stay visas, and set their own rules within coordinated frameworks for the admission of TCNs for residence, long stays, family and employment purposes, as well as international protection.

Besides the distribution and distinction between rules set through directly applicable EU law and rules requiring national transposition, a second line of fragmentation identified in WP1 research is found within frameworks setting common rules, specifically within the SBC and CCV. While national authorities of the Member States must apply the same procedures on border checks and the same procedures for examining, issuing or refusing short-stay visas, they legally retain a notable margin of appreciation and discretion within the parameters set by the EU law of entry. This discretionary margin is found, for instance, in the lists of supporting documents that Member State consulates can require from Schengen visa applicants, and in the lack of specification in the CCV as to what the assessment of the 'risks' posed by an applicant with regard irregular migration should consist of. The implication is that visa applicants are likely to encounter different requirements from one country to the other, and from one Member State consulate to the other within the same third country. Likewise, the SBC leaves a discretionary margin to national authorities as regards the documents that TCNs can be asked to provide at border crossing points to prove for instance that they have the necessary means of subsistence in their possession, or the purpose of their travel. Likewise, national authorities retain a margin for manoeuvre in deciding that a TCN seeking entry constitutes a 'threat' to public policy, internal security or the international relations of a Member State, or simply who among these persons will have to go through further scrutiny (second-line checks). This effectively means that the practice of border checks may, and does, differ depending on the Member State of entry and potentially on the specific point of entry.

A third line of fragmentation concerns EU rules in the field of immigration policy, with a focus on family and economic migration. ADMIGOV WP1 research finds that the framework governing entry for family purposes effectively consists of three distinct regimes, depending on the status of the entry sponsor, including nationality (EU or non-EU citizen), establishment history ('mobile' versus 'non-mobile' EU citizens), as well as the purpose of stay in the EU for TCNs (refugees, students or workers). This line of fragmentation is further amplified when national legislation transposing the Citizens' Rights and Family Reunification Directives is taken into account. Member States retain significant legislative discretion, which effectively leads to distinct set of rules and practices, for instance regarding the substance of applications or procedural considerations such as the assessment of accommodation needs or of the proofs required to establish the existence of a family relationship, raising questions as to whether pathways to legal family migration are indeed safe and realistic. In the field of

economic migration, likewise, the Single Permit Directive and the four Immigration Directives for specific categories of third-country nationals (Intra-Corporate Transfers, Students and Researchers, Blue Card and Seasonal Workers) adopted between 2009 and 2016 are found to constitute an important step towards increased coordination between Member State policies. However, this coordination framework again leaves a significant margin for manoeuvre to national authorities, including the possibility to operate parallel national schemes. Questions remain here as to the legal and safe pathways afforded under EU rules to low-skilled migrants who are not seasonal workers, where rules remain strictly national, despite the introduction of the right to equal treatment under the Single Permit Directive.

A fourth line of fragmentation, which surfaces through ADMIGOV's D.1.1. discussion of recent legislative developments related to entry governance concerns the uneven development of enforcement measures on the one hand and of measures establishing legal and safe pathways for third country nationals to access the territory of the EU. It is well understood that the focus on enforcement has been a matter of 'enthusiasm' in EU policies from the onset, involving the combination of competences in the field of borders and visas and in the field of policing and criminal law of the former third pillar (Peers et al., 2012: 6). The relevant measures examined in ADMIGOV WP1 research concern the establishment or modification of EU information systems focusing particularly on short-stay travellers and visitors, including the establishment of an EU Entry/Exit System (EES), European Travel Information and Authorisation System (ETIAS), European Criminal Information System for third-country nationals (ECRIS-TCN), modifications to the Schengen Information System (SIS), Eurodac and Visa Information System (VIS), and the enabling of interoperability between them. These measures enhance the scrutiny and requirements for TCNs seeking entry to the territory of EU and Schengen states, including for (Schengen) visa-exempt travellers who will have their biographic and biometric data processed in the EES and who will now be expected to apply for a travel authorisation (albeit with lighter requirements than the visa procedure) prior to their journey once ETIAS becomes operational. They associate more closely border and migration enforcement measures with law-enforcement measures, by establishing the conditions for law-enforcement access to the personal data of TCN entering the EU and Schengen area. They also enable further assessment of these persons for law enforcement rather than exclusively for border and migration enforcement purposes, for instance (in the case of ETIAS) by allowing for automated checks against 'risk' criteria (ETIAS screening rules) and watchlists (ETIAS watchlist).

Overall, then, the legal-institutional mapping of EU entry governance calls into question the notion that there is an overarching EU entry regime and highlights that the fragmented landscape of EU entry governance produces, rather, a multiplicity of regimes. This finding serves as a stepping stone for further analyses conducted through ADMIGOV WP1 research, regarding the political economy of entry governance, on the one hand, and operational practices of entry governance, on the other.

2.2.   The political economy of entry governance

WP1 research has further focused on the political economy of entry governance, including to improve our understanding of how the intensely technological orientation of recent EU measures on border and migration enforcement has developed. While states formally retain the right to determine who can be admitted to their territory, the conditions under which persons are admitted are shaped by a plurality of processes and actors. As highlighted above, the most developed as well as the most recent EU measures related to entry governance are focused on border and migration enforcement, and the latter have in particular placed emphasis on the establishment or modification of EU information systems which affect or are likely to affect the conditions under which TCNs can access the territory of EU and Schengen states. WP1 research, in this context, highlights the role played by interactions between private commercial and public actors in the development of these policy orientations and measures.[4]

It is now well understood that migration governance, including entry governance, involves private commercial actors, an involvement variously characterised in terms of 'commercialisation', 'externalisation' or 'privatisation' or addressed through the notion of migration 'industries' (e.g. Golash-Boza, 2009; Lemberg-Pedersen, 2018; Nyberg Soerensen and Gammeltoft-Hansen, 2013). WP1 research shows the diversity and pervasiveness of this involvement. Through the cases of interoperable EU databases, like VIS, SIS and EES, and space-based, networked surveillance pursued under the EUROSUR project, WP1 research details what is in fact the intensification and proliferation of public private interactions concerning Union entry governance infrastructures. It argues that this has accelerated a drive towards the securitization and militarization of European border control. Through a methodology involving the construction of several databases, and multi-sourced desk research into the actors, networks and instruments underpinning EU border control, the deliverable link these tendencies to the conjunction between EU institutions and private actors from the European security and defence sector. It examines the various lobbying strategies and forums effectuated by actors on the market for EU border control, and how it connects to industrial ambitions of widening and standardized of future markets. It argues that the blurring of public and private interests has transformed many aspects of EU border control into increasingly profitable sites for multisectoral market interventions. Much of this development has been engineered in specialized and closed forums, such as expert workshops, task forces, technical studies, pilots, or advisory groups and technological platforms steering not just policies, but also the formulation of research and development priorities of funding programmes, like the FP7 and Horizon2020.

Accordingly, the deliverable identifies several R&D projects and framework contracts pertaining to interoperable border databases and the EUROSUR project, which have been awarded a number of the same big security and defence companies in Europe. These actors, the deliverable argues, are involved in EU border infrastructures on the levels of strategy,

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[4] Unless specified otherwise, the following draws on Lemberg-Pedersen, 2020.

planning, advisory input and technical expertise, but also as product suppliers for the « end users », that is the EU or national agencies and bodies tasked with border control. The different levels on which vested interests affect policy-making on EU entry is further illustrated when considering the financial dynamics underpinning the conglomerate actors involved in border control, through shareholding, grants, loans and credits. It argues that the strategic and operational influence on border-making yielded by global finance is an understuded aspect of the militarization of EU borders, and suggests paths to remedy this. From within a framework of forward-looking and sustainable policy based on the respect of fundamental rights and democratic transparency, the deliverable details how this development leads to technological and political lock-in effects. These make it diffulcult for policy-makers to question or reverse the functionality of the EU borders as well as the norms embedded within infrastructures such as the VIS, SIS, EES or EUROSUR systems. These dynamics pose serious challenges not just to the democratic legitimacy and transparency of the EU's multileved entry governance, but also to the balance struck between short-sighted, vested interests, and the forward-looking, long-term ambitions in Union migration politics.

2.3.   **Operational practices of entry governance**

ADMIGOV WP1 researchers have examined operational practices of entry governance in three different operational contexts, corresponding to the three 'types' of borders that TCNs have to cross in order to access the territory of EU and Schengen states – air borders, land borders and sea borders. Case studies involved entry by air at Brussels National Airport (BNA, Belgium), entry by land at the Terespol/Brześć border crossing (Poland/Belarus)x and entry by sea on the island of Lesvos (Greece). The objective was to determine the degree of, and reasons for, divergence between the law of entry and entry operations, as well as to provide a 'bottom-up' perspective on how entry is governed in the EU.[5] The research built on insights generated by WP1 research on the law of entry, and in particular on the insight that EU legal frameworks afforded a significant operational margin of appreciation and discretion to national authorities. The following will outline transversal findings rather than discuss entry governance at each 'type' of border separately.

The first finding is that entry across all three types of borders is a disaggregated process rather than a singular moment and entry governance practices are diffused across multiple sites rather than concentrated in a single (entry) point. TCN travellers encounter operational practices related to entry governance prior to the moment when they physically depart from the territory of a state and after they have physically arrived onto the territory of another. This is the case for all persons who require some kind of authorisation prior to their journey (which, with the introduction of ETIAS, will mean every TCN seeking entry to the EU). It is particularly exacerbated for entry by air, where the implementation of carrier sanction regimes mean that airlines both forward the personal data of passengers prior to and upon

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[5] Unless specified otherwise, the following draws on Jeandesboz et al., 2020.

departure, and perform document and identity checks several times before travellers even reach their aircraft – with at each stage the possibility of refusing transportation to passengers who are deemed to be improperly documented.

Entry governance also extends until after travellers have physically arrived 'at' the border – a moment that is from an operational perspective difficult to identify clearly. In the case of Lesvos, for instance, there are no international waters between Greek and Turkish territorial waters. The moment of access to Greek territory can involve one of at least three situations: interception or rescue at sea by public authorities, rescue at sea by commercial vessels or private embarkations, or disembarkation ashore without interception or rescue at sea, but at no point are persons actually found 'at' the border. In the case of entry by air, the notion that the border is found when and where travellers arrive at airport border controls is a legal fiction, given that most airports are located within the territory of states. For instance, Brussels Airport is the most important entry point on the Belgian segment of the EU's external air border but located 12 kilometres from Brussels and in the central region of Belgium. The operational extent of entry governance is equally uneven and difficult to identify. Depending on the site of entry and circumstances of arrival, third country nationals will spend more or less time entering the territory of EU and Schengen states. At formal border check points, entry can either happen under ninety seconds, or take several hours if first-line officers consider that a person's compliance with entry requirements requires further scrutiny, i.e. a second-line check. For persons who arrive at external borders and communicate their intention to apply for international protection, entry can also take months, provided that their application receives a favourable outcome or that national asylum authorities exhaust the delay for arriving to a decision. In these cases, operational entry governance will encompasses practices of detention (in the case of Brussels Airport) and/or geographical restriction (in the case of Lesvos), but can also mean more or less immediate pushbacks (in the case of the Terespol/Brześć border crossing).

The second finding is that entry not always granted or denied through a single decision. In this sense, the emphasis on decisions in legislation such as the Schengen Borders Code[6] is somewhat misleading from an operational perspective. With variations depending on the type of borders and circumstances of arrival, operational entry governance practices involve the constant sorting and channelling of third-country nationals depending on multiple assessments, performed by a variety of operational actors, of their status (e.g. travellers deemed properly documented or improperly documented, deemed to have clear or unclear travel reasons, or deemed to present a low or high risk for migration, public order or national security reasons, or considered more or less vulnerable because of their age, gender, nationality, health condition, and so on). What is at stake in operational practices of entry

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[6] Which, for instance, highlights that in order to comply with the international obligations of the Member States as well as general principles of Union law, all 'decisions under this Regulation shall be taken on an individual basis' (Article 4), or that entry 'may only be refused by a substantiated decision […] taken by an authority empowered by national law' (Article 14). See 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), OJ L 77/1, 23.3.2016.

governance, then, is not simply whether a person should be allowed to access the territory of a state or not, but in which categories and channels this person should be placed in the process. What differentiates operational settings in this instance, is how many such assessments are involved, the logic according to which they are performed and their concrete execution, how they relate to one another, and by whom they are performed. We will come back to this observation in the evaluation section below, but the outcome of all three case studies is for instance that the role of border guard/police officers in the context of entry governance is crucial, not just or not necessarily only because they take decisions on admitting or refusing admission to a person, but also because the information they gather and report impacts other procedures that TCNs may be involved in, in particular applications for international protection.

Thirdly, research on the operational side of entry governance was able to confirm and expand on the notion that entry governance involves chains of actors operating across formal governance 'levels', which was one of the premises of WP1 work and ADMIGOV more generally. What can be added here is that entry governance also concerns interactions between actors across governmental/non-governmental, public/private, commercial/non-profit boundaries, as well as across sectors of activity such as border and migration enforcement/law-enforcement or public health/migration/asylum. The 'blurriness' of fora where entry governance is shaped identified in research on the political economy of entry can also be found on the operational side: when border guard/police officers act as the first recipients of asylum claims while also screening arriving travellers in relation to law enforcement matters, or when private transportation service providers, in particular air carriers, work together, not just alongside, border and migration enforcement services to perform document and identity checks on persons travelling to the EU and Schengen area. The point is not simply that the operational side of entry governance is a plural process - that many agencies, bodies, companies, institutions, organisations, or services are involved - but that this plurality entails overlaps and conflicts of authority. These can be over minute issues (which service should control or have access to which information, for instance) or over major concerns (e.g. should border guard/police be in charge of receiving applications for international protection at the border? Should persons arriving at the border and who do not meet entry conditions be systematically detained and/or deported?). They do, however, impact the degree to which access to the territory is safe and orderly for third-country nationals, particularly when the outcomes they are confronted from include detention and deportation.

Researching the operational side of entry governance, fourthly, raises questions about the normative architecture of entry governance. The study of operational practices demonstrates, on the one hand, that said practices can and do diverge from the rules found in the EU's law of entry – among others, for instance, the commitment to the principle of non-refoulement found in Article 4 SBC. While such divergences are neither surprising nor previously undocumented, as shown in the literature discussed through ADMIGOV WP1 reports, the research also calls into question the very possibility of characterising the sets of norms involved in entry governance as entry 'regimes'. The discussion has particularly been

developed in relation to entry by air, where EU rules established in the Schengen Borders Code become entangled with rules on the regulation of international civil aviation, commercial practices such as the transportation contracts passed between commercial airlines and passengers and their terms of service, and local arrangements in the form of memoranda of understanding between airlines and national border and migration enforcement authorities. These uneven, multi-scalar normative entanglements have long been found, and continue to, challenge the international obligations of EU and Schengen states, particularly with regard the question of international protection.

A final observation on the findings of WP1 research into operational practices of entry governance concerns the focus on and deployment of further technological add-ons to border checks. This was an area that was originally emphasised as of central importance to entry governance in ADMIGOV's initial objectives, and work on the law and political economy of entry has shown that such developments have been a matter of considerable legislative and policy focus in recent years. Operationally, however, this concern and efforts to deploy additional devices – from automated border gates to access to new information systems and so on – appear to be unevenly distributed across contexts. This is a matter that surfaces most significantly in the context of entry by air, and even in that context, it is of lesser significance than legislative and policy activities may lead us to believe. It is worth noting that some of the key measures adopted in recent years are yet to be implemented (EES, ETIAS) while those that have are in some cases facing legal challenges that make their future uncertain.[7] Further monitoring will certainly be required at subsequent stages of ADMIGOV to complement these observations.

3. Entry governance: evaluation and sustainability

The discussion now turns to evaluating the implications of WP1 research findings for developing alternative, 'good governance' measures in the field of migration (3.1.). This will lead to suggestions for potential criteria and indicators for sustainable, forward-looking entry governance (3.2.).

3.1.   Evaluation

In what follows the report highlights the issues characterizing EU entry governance that were identified over the course of ADMIGOV WP1 research.

A first group of issues derives from research on the law of entry, as complemented by research on operational practices and concerns the fragmented and entangled legal landscape of entry

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[7] Chiefly the EU PNR Directive, which, despite the fact that it is not a border or migration enforcement measure, springs up repeatedly in discussions about entry governance.

governance. Existing provisions for legal access to the territory of EU and Schengen states are unevenly distributed, giving priority to common rules on border and migration enforcement and establishing grounds for harmonisation of national rules for relatively specific groups of third country nationals deemed to be desirable. It therefore exemplifies the issue with entry governance outlined in the introduction of this final report, namely the control-oriented leaning of measures related to the access of third-country nationals to the territory of EU and Schengen states. Because it leaves, to various degrees, significant margins of appreciation and discretion to national authorities furthermore, fragmentation also leads to potentially unequal treatment and a lack of legal certainty as to conditions, expectations to meet and procedures to follow for third-country nationals.

Another aspect of fragmentation identified through the cross-discussion of research on the legal-institutional features of entry governance and operational practices is the entangled outlook of the law of entry. Entry governance is shaped by entanglements between norms developed at different scales as well as along different temporalities, to address different issues, and with different concerns. While it might make sense, for instance, to involve air carriers in checking passengers' travel documents prior to departure from the point of view of the international regulation of civil aviation (with the expectation that this involvement will 'facilitate' entry formalities for passengers), such a practice has long been found to jeopardise the possibility for persons to effectively apply for international protection. It may also be construed as contradicting with EU rules such as Article 8(1) SBC which specifies that cross-border movements at external borders are subject to checks 'by border guards.' The law of entry, in this regard, is less hierarchical than it is interactive, and therefore less predictable and certain for persons subject to it.

A second group of issues concerns the actors of entry governance. That migration (entry) governance involves a variety of actors that have at times contradictory interests and conflicting priorities (which can lead to difficulties and frictions in coordination) is not unsurprising given the accumulated evidence available in the literature. What comes across in all three operational case studies, however, is the degree to which these actors operate in a state of organisational flux and relative instability. In all three cases, operational contexts have been affected not just or mainly by changes in patterns of cross-border movements of persons, but also by rapid and regular legislative and institutional change. Such changes are not necessarily related to migration- or international protection-specific rules and procedures, but can also involve other cognate domains (e.g. regulations and rules on police forces, on access to health services, etc). They are not necessarily about rules and procedures, but also about resources, whether financial, institutional or material. This can mean that actors are not able to perform as they should, but also that there are incentives to devise workarounds and piecemeal solutions, that can eventually have an impact on how safely and predictably third-country nationals can cross the external borders of the EU.

A third group of issues identified in WP1 research concerns the effects that operational arrangements for entry governance have on the conditions experienced by TCNs when seeking access to the territory of EU and Schengen states. We find, across the board, that

operational practices of entry governance jeopardise the fundamental rights of third country nationals. Such challenges are unevenly distributed and vary in intensity, but entry governance – to be confirmed in subsequent ADMIGOV research – is for instance where third-country nationals seem to be the most exposed to detention and expedited pushbacks or deportation in the EU context. This is in particular due to the fact that operationally, entry is found to be a disaggregated, dislocated process rather than a point in space and time. Existing operational practices of entry governance fracture the link between territory and the exercise of authority. Border and migration enforcement authorities are able to perform entry checks extraterritorially, through visa regimes, carrier sanctions or the processing of the personal data of travellers. They are also able to hold persons 'at the border', that is off the legal territory of the state, despite the fact that they have already physically arrived. [8] The practice is well known, and has been characterised by the European Court of Human Rights (ECtHR), following the position of the Belgian government, as a 'legal fiction'[9] in the case of entry by air, but similar situations can be found in other operational cases. The point here is not that entry should never be denied and that states do not have the right to deny entry, but that being refused entry should also occur in predictable ways that are legally certain and do not interfere with fundamental rights.

Some of the issues outlined in WP1's evaluation of entry governance so far will be familiar to students of migration and migration governance. While pre-existing knowledge has been complemented and expanded on, these issues have been documented and evidenced before. As the three WP1 reports outline, they have also been challenged, in particular through contests brought in front of courts. In sum, these are for the most part 'known' issues, although WP1 research has shown that we should not start from the assumption that this knowledge is readily available to actors.[10] This suggests that producing evidence of issues and knowledge on migration and international protection cannot be naively endorsed as the way toward 'good' migration governance, and that they are also part of the issues (possibly a 'meta' issue) to be considered. That evidence and knowledge are an issue manifests itself in two ways. First, WP1 research has documented multiple instances where available data (including statistical data) is either unavailable, ambiguous or contradictory[11], and information is either dispersed, unreadily available, confidential or simply absent. Second, we need to acknowledge, along with the literature, that (research) evidence and knowledge is only one of the many components that inform decisions about migration governance and that the notion that policy should be 'evidence-based' is misleadingly straightforward (Baldwin-Edwards et al., 2019: 2147-2148). Migration governance, as other areas of public policy, is the site of multiple and at times conflicting knowledge claims that may be mobilised to constitute

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[8] See in particular the discussion on Reception and identification centres and geographical restriction in Chapter 5 (entry by sea) of ADMIGOV deliverable D.1.2.

[9] *Riad and Idiab v. Belgium*, nos 29787/03 and 29810/03 (ECHR 24 January 2008), §.19, see also Chapter 3 of ADMIGOV deliverable D.1.2.

[10] See e.g. in the case of entry by air (deliverable D.1.2., chapter 3), detention and deportation in Belgium, the fact that over the last fifteen years no less than three commissions have been established by the relevant minister to map detention and deportation actors and practices.

[11] Which is a matter that has been well documented over the last decade, including in EU funded research (e.g. Clandestino, 2009; Singleton, 2016).

distinct 'policy narratives' – claims about the problems that public policy should address, claims about the causes of said problem, claims about the effects of policy (Boswell et al., 2011). That academic and expert knowledge is used for a given policy measure does not make that measure 'evidence-based', as knowledge can be used for other purposes – to legitimise a policy actor, or to substantiate its preferences, among others (Boswell, 2009). This issue – of evidence and knowledge and their uses – needs in turn to be taken into consideration when reflecting upon possible criteria and indicators for a forward-looking and sustainable entry governance, which are discussed next.

3.2. Criteria and indicators for sustainable entry

Which criteria and indicators for developing sustainable and forward-looking entry governance should be taken into consideration on the basis of WP1 research so far? It remains to be seen, at this stage in ADMIGOV research, whether it is possible to identify and formulate such criteria and indicators for each of the phases and contexts of migration governance that the project is organised around. In other words, the question of whether there should be 'entry-specific' criteria and indicators (alongside 'exit-specific', 'circular migration-specific', and so on) is a discussion that ADMIGOV will be considering throughout the run of the project. For these reasons, what follows are typically work-in-progress rather than definitive suggestions.

Discussing criteria and indicators for entry governance also requires a caveat, which is that a number of issues identified and questions raised by WP1 research arise because existing rules are insufficiently or inadequately applied, or not applied at all.[12] In several instances, this entails that the fundamental rights of TCNs are jeopardised, despite the fact that most of the measures we have discussed in the context of entry governance include an explicit commitment to upholding such rights. Issues run from basic quality of legislation issues (typically, an inadequate transposition of EU law into national law), to administrative and organisational issues, whereby national authorities do not either have the capacity, the resources, or the incentives, to apply existing rules. These observations raise crucial questions regarding what 'forward-looking' migration governance should consist of. The background and context to the submission of the ADMIGOV project, as partially outlined in this deliverable's introduction, are the events that unfolded in 2015 and were characterised as a 'migration crisis', and the subsequent adoption of the New York Declaration and the Global Compacts for Refugees and Migration. Yet, as many have suggested, these events and the persons concerned did not come out of nowhere. Not only is there a history and longstanding practice to the association between 'crisis' and 'migration' (e.g. Lindley, 2014; New Keywords Collective, 2016), but the 2015 'crisis', in particular, was arguably policy-made in the first place, a result of assumptions informing policy, of measures adopted or not adopted, used or

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[12] For instance, the provision in Article 8 of the Reception Directive banning the systematic detention of persons for the sole reason that they have applied for international protection, which is circumvented in border procedures for persons who are deemed not to meet entry conditions. As mentioned in the case study on entry by air and in the case of Belgium, until 1987, persons who introduced an application for asylum at the border were authorised to enter.

left unused (e.g. Ineli-Ciger, 2016), of the categories used to think about migration governance, and so on (e.g. Crawley and Skleparis, 2017; Crawley et al., 2017; Scipioni, 2018). In part, then, it can be argued that no additional criteria or indicators are required, except for the fact (which should normally already be taken into account, at least in the legislative work of EU institutions, through impact assessments) that 1) no additional measure should be introduced before ensuring whether the problem it seeks to address derives from the insufficient or inadequate application of existing measures and rules and 2) all measures regarding entry should include, beyond general commitments to upholding fundamental rights, clear provisions and guidelines on these fundamental rights are enforced operationally by EU bodies and national authorities alike. This raises the question of whether ADMIGOV work should include the development of criteria and indicators aimed at policymaking practices themselves, which as of late seem to have been particularly characterised by urgency and a focus on enforcement and restriction, rather than with concerns for long-term effects and fundamental rights.

A first criterion and related indicator concerns the role of border guard/police at the border, and specifically in the context of second-line checks. Second-line checks are where information is gathered and an administrative record is constituted in order to determine whether a person should be allowed access to the territory or refused entry. In the cases examined by WP1 research, border guard/police officers are the only service present during this process (occasionally assisted by an interpreter), despite the fact that they are not systematically competent to take a formal decision to refuse entry. It should be a harmonised matter at EU level that a representative of the authority competent to deny entry be present and have a face-to-face interaction with the person being scrutinised before such a decision is made, so that it is not exclusively based on information provided by border guard/police services. This would typically be necessary in the case of the 'nationality procedure' used by Greek police on Lesvos to decide on the initial detention of applicants for international protection based on the notion that some persons should be detained because they hold a nationality with a low recognition rate; or in the case of the Belgian procedure, to ensure that a representative of the relevant body (the Immigration Office) is present at the airport rather than taking a decision at a distance. Another indicator to consider here would be the degree of oversight from an independent authority (i.e. which does not answer to the same hierarchy as police forces and is not under the authority of the same minister(s)) that is foreseen in measures related to entry governance. These considerations could be built into two broader ADMIGOV indicators. The first could be an 'oversight' indicator with specific measurements on the degree to which independent authorities are involved in monitoring migration governance measures, the degree of autonomy and centrality of enforcement (border, migration and law-enforcement) services in migration procedures, among other possibilities. The second could be a 'detention indicator' measuring among other aspects the degree to which a measure implies or is conducive to the systematic detention of third-country nationals, as well as the way in which detention decisions are taken.

A second criterion and related indicator, which should be further refined and discussed in the context of ADMIGOV WP3 (Exit governance), concerns the articulation between entry and deportation. It appears to be common practice, at least in the case of entry by air and entry by sea, that persons who are held 'at the border' and including persons who signal their intention to introduce an application for international protection, are immediately served

with a deportation order, which is suspended while their case is being considered. In the case of (Polish) entry by land, this seems to involve the case of persons being pushed back multiple times. This 'deportation by default' setting is not required by EU law, and appears unnecessary, particularly in cases when persons are already confined either to a detention facility or a specific geographical area. A stricter distinction between entry and exit, included forced exit, should be established in order to ensure that entry processes remain safe for third-country nationals. This could lead to the development of a 'deportation indicator' that would measure the extent to which a measure may facilitate or systematise deportation of third-country nationals, possibly with specific consideration of the extent to which this affects persons who apply to international protection.

Another criterion and indicator should certainly concern the implication of private actors in entry governance. The enrolment of carriers, in particular air carriers, in pre-emptive border and migration enforcement nowadays attracts less attention than it did in the late 1980s and 1990s (except when it comes to deportation) when carrier sanction regimes were strengthened. Designing forward-looking (entry) migration governance would require, in this respect:

- Minimally, that the extent of carriers' involvement be made a matter of public record in the EU. This involves two considerations:

    o That national authorities systematically make public (ideally and if national legislation allows for it, publish in national official gazettes) the arrangements they have entered into with carriers, and specifically the memoranda of understanding (MoU), when they exist, concluded border and/or migration services and transportation service providers;

    o That national authorities publish statistics, and ideally that Eurostat be allowed to compile EU-level statistics, on the involvement of carriers in preventing third country nationals from travelling to an EU or Schengen state, similarly to what is already available for other migration enforcement legislations. This in turn speaks to a broader question about data, evidence and knowledge that is discussed further below.

- More ambitiously, that EU rules are established as to what can and cannot be required from carriers by national authorities through MoUs, making sure in the process that any potential conflict with international rules (e.g. Chicago Convention in the case of air carriers) as well as international obligations of Member States with regard international protection and fundamental rights are addressed.

Beyond the specific matter of carriers, and as also outlined in the analysis of the political economy of entry, the implication of private commercial actors in entry governance and other aspects of migration governance is undoubtedly a matter of concern. It is also attracting attention outside of migration-focused institutions and organisations. The role of private actors, and in particular of private military and security companies in immigration and border management, for instance, is to be the focus of one of the two thematic reports of the Working group on the use of mercenaries of the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) for 2020, for which the Working group is

currently operating a call for submissions (UNOHCHR, 2020). While their role varies from one national context to the other, it is often not a passive one. Private commercial actors perform document and identity checks on third-country nationals (and on EU and EEA citizens) and stop persons from accessing the territory of EU and Schengen states, they process the personal electronic data of visa applicants or passengers, implement and maintain information systems, own and/or run detention facilities, participate in forced and voluntary removals, and so on. As shown in the case of carriers, their involvement raises questions in terms of accountability and rights.[13] While determining when and how to rely on private contractors in specific operational contexts is a matter for competent national authorities to determine, a criterion to be considered would be that EU measures in the field of (entry) migration governance include clear provisions as to how, when and with what limits private actors should be involved, and determining lines of accountability. This could lead, in turn, to a 'privatisation' indicator measuring among others the degree to which a measure involves commercial actors, how the involvement of these commercial actors is governed, the degree to which the measure foresees provisions for accountability and redress.

A further criterion/indicator to be considered, building on the discussion on the role of private commercial actors, concerns the 'diffused' shape of EU external borders, their spatial and temporal disaggregation, and the issues that this can lead to. There are two dimensions to diffusion in the context of entry checks: the fact that such checks are performed extraterritorially and ahead of the moment when a third-country national effectively arrives on the territory of an EU or Schengen state, and that entry checks are diffused to actors other than border and migration enforcement authorities, commercial, non-governmental but also state bodies and services. This is the case for instance when consular authorities are expected to perform immigration risk assessments for applicants, but also when medical professionals, for instance, make decisions about the vulnerability of persons held at the border (as the Lesvos case study discusses), effectively affecting their entry prospects. We could consider building, in the context of ADMIGOV work, a 'diffusion indicator' that would measure the degree of dispersion in operational decision-making about entry and other dimensions of migration governance, in order to account for this feature.

A last criterion and indicator that should be considered in the context of exit and other facets of migration governance concerns data, evidence and knowledge. As discussed previously, there are two aspects to this concern: the availability, accessibility as well as accuracy and reliability of data including statistical data on patterns of entry, and the uses of data, evidence and knowledge. It is difficult at this time to consider how the second aspect can become a matter of indicators, but the first aspect is more tractable in this regard. In the specific context of entry governance, a general criterion should be that any measure considered or adopted must include reporting obligations for EU bodies and Member States on the impact of the measure on third-country nationals. If the measure involve administrative decisions that affect how and whether TCNs access the territory of EU and Schengen states, reporting obligations should require that information on decisions taken and decisions enforced are

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[13] As well as for cooperation between national authorities, see for instance the recent controversy over the British government's alleged unlawful cloning of the Schengen Information System, some copies of which were held by private contractors. The practice was originally reported on in 2018 (Nielsen, 2018).

communicated and made available. These could be some of the dimensions to compose a 'reporting indicator' that could be used to assess migration governance measures.

4. Conclusion

This report has provided a summary of ADMIGOV WP1 research on entry governance, focusing on the law of entry, the political economy of entry and the operational practices of entry governance. In so doing, this research contributes to a better understanding of why (entry) migration governance 'fails', or at least does not meet for the time being the evaluative benchmark of safe and legal passage. The legal-institutional mapping of EU entry governance performed as part of the examination of the law of entry calls into question the notion that there is an overarching EU entry regime and highlights that the fragmented landscape of EU entry governance produces, rather, a multiplicity of regimes. Additional research on norms, regulations and rules governing entry performed as part of the study of the operational practices of entry governance further outlines that our understanding of this legal-institutional landscape in terms of regimes should be problematised, as it appears that entry governance is shaped rather by messier normative entanglements operating across different scales of governance. Research on the political economy of entry governance show that the conditions that third-country nationals have to meet and experience while seeking access to the territory of EU and Schengen states are shaped by a plurality of actors. The emphasis here is on the role of commercial and industrial for-profit actors and the ways in which their involvement supports measures enacting 'high-tech' practices of entry governance, that do not necessarily correspond to the operational situation and needs on the ground. Indeed, research into the operational practices of entry governance finds that questions related to technology play a part in said practices, the overarching feature of entry governance is its spatial and temporal disaggregation. This feature is both sustained by and constitutive of the enrolment of a plurality of actors with diverging and conflicting interests and priorities regarding entry governance.

The report has further developed a preliminary discussion on the evaluation of EU (entry) migration governance and on possible criteria and indicators for sustainable and forward-looking measures in this domain. Using the prospect of safe and legal pathways to access the territory of EU and Schengen states as a benchmark, the report has outlined three groups of issues related to the fragmented legal landscape of entry governance, the plurality of actors involved operating in a context of organisational flux, and the disaggregated and dislocated outlook of entry operational practices. All three groups of issues impact, arguably with varying intensity and severity, the possibility for third-country nationals to access or be denied access to the territory of EU and Schengen states in legally certain, predictable ways and without interference with their fundamental rights. The evaluation also touched on the 'meta-issue' of evidence and knowledge in migration governance, highlighting the fact that providing evidence of and generating knowledge about (entry) migration governance and its issues and limits does not, in itself, constitute a guarantee that measures adopted on this basis will necessarily be 'forward-looking' or sustainable.

Lastly, and on the basis of WP1 research on and evaluation of entry governance, the report outlined the following indicators be picked up and discussed in the next stages of the ADMIGOV project, namely:

▪ An **Oversight** indicator with specific measurements on the degree to which independent authorities are involved in monitoring migration governance measures, the degree of autonomy and centrality of enforcement (border, migration and law-enforcement) services in migration procedures, among other possibilities;

▪ a **Detention** indicator measuring among other aspects the degree to which a measure implies or is conducive to the systematic detention of third-country nationals, as well as the way in which detention decisions are taken;

▪ a **Privatisation** indicator measuring among others the degree to which a measure involves commercial actors, how the involvement of these commercial actors is governed, the degree to which the measure foresees provisions for accountability and redress;

▪ A **Diffusion** indicator that would measure the degree of disaggregation and dislocation in operational decision-making about entry and other dimensions of migration governance;

▪ A **Reporting** indicator measuring the degree to which a migration governance measure ensures availability, accessibility as well as accuracy and reliability of data including statistical data (here, on patterns of entry).

These suggestions are meant as a first step toward the end goal of the ADMIGOV project as a whole. Among the open-ended questions that the consortium should consider in the remaining three years of collective work are whether indicators should be stage-specific (that is specific to entry, exit and so on) or should encompass transversal issues identified by different research teams. Looking at the list above, it could be argued that almost all suggested indicators could apply to other aspects of migration governance researched in ADMIGOV. Another important matter concerns cases where the issue at hand is not that further, forward-looking or otherwise, migration governance measures are required but that existing provisions should simply be applied better, or applied *tout court*. This is arguably not only a feature of migration governance, but of policymaking in general, particularly when it takes place in a context of intense controversy and political tensions over its subject matter. While EU and national responses to the so-called 'migration crisis' has been to race ahead, there might also be relevance in looking back in this regard, and undergo reparative, rather than forward-looking, steps.

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