# EUROPEAN
# **POLICY**BRIEF

**UNSAFE PATHWAYS: CHALLENGES AND ISSUES IN EU ENTRY GOVERNANCE**

This policy brief outlines research conducted during the first year of AdMiGov on the rules, policies and operational practices that govern the access of third-country nationals (TCN) to the territory of EU and Schengen states (entry governance). It argues that legally, policy-wise and operationally, existing and upcoming EU measures regarding entry governance privilege a control and enforcement perspective. This outlook, in turn, challenges the possibility for the EU and the Member States to meet the political commitment to orderly, safe and legal pathways for migrants and refugees.

**FEBRUARY 2020**

## EXECUTIVE SUMMARY

This brief discusses how EU measures regarding the access of third-country nationals (TCN) to the territory of EU and Schengen states (EU entry governance) stand in respect to the commitment to equitable, orderly, safe and legal pathways comprised in the 2018 UN Global Compact for Migration and on Refugees and Sustainable Development Goals of Agenda 2030 (SDG 10.7). Research conducted in the *Advancing Alternative Migration Governance* project (AdMiGov) on the law of entry and the political economy of entry governance:

- Finds a highly fragmented landscape of EU rules and procedures leading to multiple, insufficiently joint-up, entry regimes;

- Finds that at present the focus of the most harmonised EU measures concerns border and migration enforcement rather than orderly, safe and legal pathways;

- Finds that EU entry governance policymaking takes place in blurred fora, where commercial and industry actors are afforded a leading role in shaping and implementing EU measures and large conglomerates from the security, defence, aerospace and biometrics industries dominate.

AdMiGov research on patterns and operational practices of entry:

- Finds that the quality and reliability of data on and knowledge about patterns of access to the territory is low;

- Questions whether the focus on border and migration enforcement should be the priority given the available evidence on the respective importance of regular and irregular entries, despite a generally ;

- Finds that access to the territory of EU and Schengen states is a disaggregated process where operational practices are diffused across multiples sites rather than concentrated at a single moment and point of entry;

- Finds that entry is not granted or denied through a single decision or by a single actor but that entry governance involves the repeated sorting and channelling of TCN based on multiple assessments of risk, threat and vulnerability;

- Relatedly, finds that entry measures involve multiple actors rather than a single public authority, who all shape the access prospects of TCN, including private carriers, whose involvement has been repeatedly questioned in relation to the observance of the principle of *non-refoulement*;

- Finds that, as a result, operational practices of entry governance jeopardise the fundamental rights of TCN across the board, as entry contexts are when and where they are particularly exposed to legal uncertainty, detention, deportation or pushback.

On the basis of these findings and analyses, we recommend the following:

- On data and knowledge concerning entry governance, we recommend establishing a common methodology and data/information sources for Eurostat and Frontex on entry governance matters, in addition to a further modification to Regulation (EC) No 862/2007 currently under revision);

- To address the diffused shape of EU external borders and the disaggregated outlook of entry governance, that existing and forthcoming EU measures in this field are assessed on the basis of the following criteria:

    o A **reporting criterion** assessing the degree to which EU measures include reporting obligations for EU bodies and national authorities and the extensiveness of this reporting;

    o A **diffusion criterion** evaluating in particular the degree to which existing or foreseen measures envisage the performance of extraterritorial entry checks and actors beyond the competent national authorities foreseen in the Schengen Borders Code;

    o A **privatisation criterion** evaluating the degree to which the involvement of private commercial actors is foreseen in EU measures, how these third parties can be held accountable for their actions and the means of redress available to TCNs in this respect

The *Advancing Alternative Migration Governance* project (AdMiGov) aims to develop proposals, criteria and indicators for alternative migration governance measures that take seriously the political commitment outlined in the 2018 UN Global Compact for Migration and on Refugees (hereafter GCM and GCR) to the establishment of equitable, safe, orderly and legal pathways for migrants and persons seeking international protection. These are also found in the Sustainable Development Goals of Agenda 2030, in particular SDG 10.7 and the commitment to "facilitate orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies."

In order to inform ongoing and upcoming debates on EU migration governance, this policy brief outlines research conducted during the first year of AdMiGov on the rules, policies and operational practices that govern the access of third-country nationals (TCN) to the territory of EU and Schengen states (entry governance). To what extent do these conditions meet the political commitment to, as well as the principles and prospects for, orderly, safe and legal pathways for migrants and refugees found in the GCM, GCR and SDG? Are these conditions consistent for different categories of travellers and visitors and at different segments of the EU external borders? Do they ensure effective respect for fundamental rights, and offer legal certainty and stable expectations as to how and why persons can be admitted or refused entry at the external borders?

These questions remain controversial for the EU and the Member States, despite major reforms to border management since 2013. It is fair to say, in particular, that these measures have failed to bring about a sustainable system for upholding international protection standards and providing predictable, safe and legal pathways to migrants, while privileging a control and enforcement perspective on border and migration management. Politically and policy-wise, this outlook expresses itself through a "holding-the-line" mindset, as illustrated by the EU's response to recent developments at the land border between Greece and Turkey, which puts into question the capacity of the EU and its Member States to uphold their international commitments and may well be unsustainable in the medium to long term. As the European Commission readies itself to propose a "New Pact on Migration and Asylum", these questions are likely to feature importantly in the policy and public debate on the governance of international protection and migration in the EU in coming years.

## POLICY IMPLICATIONS AND RECOMMENDATIONS

AdMiGov research on EU entry governance highlights the following issues and findings that are of relevance in the policy discussion on safe, orderly and legal pathways to Europe.

A first overarching issue concerns the emphasis placed in EU measures for entry governance on border and migration enforcement, that is on control-oriented measures aimed at curbing irregular entry. The evidence on which EU policy- and law-making on migration governance relies, such as statistics on entry provided by Eurostat and Frontex, all point to the fact that **irregular entry is a relatively limited concern when placed in relation with regular entry**. At their highest over the last decade, in 2015, reported detections of irregular entry (including detections of irregular entry at EU external border checkpoints) amounted for instance to **just over 0,7 percent of overall entries**. Reported refusals of entry, which indicate the number of persons who do not meet one or several entry conditions listed in the Schengen Borders Code (SBC) are equally relatively low compared to overall entries. **Refusals of entry amount to between 0,05 percent (Frontex data) and 0,1 percent (Eurostat data) of overall entries in 2015** for instance. Concerns with irregular entry is furthermore unevenly distributed between the Member States. Over the last decade, **detections of irregular entry have been the highest at sea borders** in the Mediterranean, markedly overtaking detections at land borders from 2013 onward, while **more persons have been refused entry over the last decade at land**

**borders than at either or both air and sea borders**. These figures should, furthermore, be taken as rough estimates (see AdMiGov deliverable D1.2. for a fuller discussion). This points to an important issue in EU entry governance on the quality, methodology and reliability of EU data on migration and migration enforcement, which has been regularly questioned over the last decade and occasionally proved controversial. These limits notwithstanding, the available evidence raises questions regarding the focus of EU measures for entry governance, and whether irregular entry, when it happens outside of EU/Schengen designated border crossing points or concerns persons who do not meet entry conditions at border checkpoints, should be the priority.

A second significant issue concerns the **legal framework, rules and procedures for the access of TCN to the territory of EU and Schengen states**. These states retain the sovereign right to determine who can be admitted to their territory, subject to their international obligations as well as their obligations under EU law. The national authorities of EU and Schengen states must apply common procedures including on entry conditions and the grounds on which entry can be refused. They must also follow common rules and procedures for the issuance of short-stay visas. On the other hand, the national authorities of EU Member States must coordinate various aspects of their immigration policies. This includes the issuance of combined single permits for residence and work, and the coordination of entry and residence requirements for family reunification and migration, highly qualified and seasonal workers, as well as students and researchers. The key finding of AdMiGov research here is that **the arrangement of harmonisation and coordination obligations found in EU law results in a heavily fragmented landscape of measures**, to the extent that it would be more accurate to speak of **multiple entry regimes**, including for TCN formally falling in the same legal categories. Fragmentation results from the sharp contrast between the relatively high degree of harmonisation in policies on entry checks at external borders and the issuance of short-stay visas relying on directly applicable law, and the looser and sector-based approach (with the exception of the Single Permit Directive) for immigration policy where measures require transposition into national law. With regard to policies on border checks and visas, fragmentation also results from the margin for operational discretion left to national authorities in determining various aspects of entry requirements, for instance on the supporting documents that TCN might be required to provide to prove the purpose of their stay or their means of subsistence. With regard to common immigration policy measures, fragmentation derives from the reliance on legal instruments that require transposition into national law, leading to divergences between Member States related in particular to the substance of applications or procedural considerations. In addition, this framework does not set EU-wide rules affording legal and sage pathways to low-skilled migrants, despite the introduction of the right to equal treatment under the Single Permit Directive. Overall, then, legal provisions for EU entry governance generate **legal uncertainty and unpredictability**.

Alongside the legal dimension of entry governance, AdMiGov researchers have also **examined EU policymaking on entry from a political economy standpoint, in order to understand the role of private, commercial actors** in the development of EU measures and policies conditioning the access of TCN to the territory of EU and Schengen states. This line of inquiry is particularly important in a context where **border and migration enforcement increasingly rests on digital infrastructures such as large-scale information systems and resorts to digitally-mediated measures for document and identity checks** (verification and identification). Measures of concern currently under implementation here include the Entry-Exit System (EES), European Travel Information and Authorisation System (ETIAS) or the interoperability modalities between border and visa information systems (in the framework of Regulation (EU) 2019/817). Interactions between EU institutions, bodies and services and private commercial actors in relation to border control and enforcement have markedly intensified and proliferated over the last fifteen years. They extend beyond the provision of services to include the joint conduct of research and development activities, and the shaping of policy priorities. In part, **EU entry governance policymaking takes place in blurred fora** such as the former European Security Research Advisory Board (ESRAB), European Security Research Innovation Forum (ESRIF), and at a more specific level the Horizon 2020 Advisory Groups and European Technology Platforms, **where commercial and industry actors are afforded to co-produce entry governance measures**, in particular large conglomerates from the security, defence, aerospace and biometrics industries. This has afforded these companies the possibility to play a dominant role and co-shape entry governance priorities, positioning themselves as unrivalled experts and exacerbating the focus on high-technology measures and security aspects, including the militarisation of parts of EU entry governance. While commercial actors can be stakeholders in policies related to entry governance, it is important to ensure that they do not benefit from

disproportionate access to the policy process as a result of the relatively significant resources at their disposal.

With regard to the **operational practices of entry governance** at air, land and sea borders, AdMiGov researchers have examined operational contexts at air (Brussels Airport), land (Terespol/Brześć border crossing, Belarus/Poland) and sea (Lesvos island, Greece) EU external borders. Three main findings emerge from this inquiry.

**First**, **access to the territory of EU and Schengen states is a disaggregated process** and **entry governance operational practices are diffused across multiple sites rather than concentrated at a single moment and point of entry**. This is very much built in the "tiered" access control design of EU integrated border management. TCN travellers and visitors encounter operational practices related to EU entry governance both prior to their departure and after they have physically arrived "at" an EU external border. This is the case for all persons who require some kind of authorisation prior to their journey (Schengen visa, long-stay visa and in upcoming years a travel authorisation issued through ETIAS), the issuance of which systematically involves an assessment of "migration risk." Diffusion is particularly acute for entry by air, where airlines are required under threat of sanction to forward the personal data of passengers prior to and upon departure, perform document and identity checks several times before passengers even board their aircraft, and can refuse transportation to persons deemed insufficiently documented. Operationally, entry governance also extends until after the moment when travellers and visitors have physically arrived at destination. In the case of Lesvos, for instance, persons arriving outside of authorised entry points are not considered as having legally arrived on Greek territory despite the fact that they have physically made land.

The **second ensuing key finding** is that **entry is not granted or denied through a single decision or single actor**. Meaningful decisions regarding persons who do not meet entry conditions, especially when these persons state their intention to introduce an application for international protection, are not made at first-line checks. EU entry governance today involves, in fact, the repeated sorting and channelling of TCN based on multiple assessments. Such assessments take place at different stages and locations in the process of entry, and involve determining, among others, whether a visitor is properly or improperly documented, whether they have clear or unclear travel reasons, appropriate or inappropriate means of subsistence, the degree of risk they present in terms of migration enforcement, public order or national security, or assigning them a degree of vulnerability because of age, gender, nationality, or health condition. What differentiates operational contexts is the number and purpose of such assessments as well as the actors involved in such assessments. In the case of entry by sea on Lesvos island, for instance, medical professionals play a crucial role in entry governance through vulnerability evaluations, which can be used to detect medical signs of past persecutions or serious harm in the context of asylum applications. The fact that such vulnerability assessments can be impactful for the asylum process, however, in the context of an understaffed and underfunded public healthcare system such as Greece's at the moment, also opens the possibility of illicit and exploitative activities, especially when it involves private healthcare providers. In the case of entry by air, the employees of commercial carriers also have a key role in determining whether a TCN is appropriately documented and therefore should be transported because they are likely to be admitted on the territory of EU and Schengen states upon arrival. What comes across in all three operational cases, furthermore, is the extent to which these many actors operate in a state of organisational flux and relative instability. Operational contexts are not affected only by changes in patterns of regular and irregular cross-border movements of persons, but also by rapid and regular institutional and legal change. Changes can also be about resources – money, authority or equipment. Rapidly evolving organisational contexts can mean that actors are not able to perform as they should, and that there are incentives to devise workarounds and piecemeal solutions that can affect how safely and predictably third-country nationals can cross EU external borders.

Finally, AdMiGov research on operational practices of entry governance in the EU finds that **across the board, operational practices of entry governance jeopardise the fundamental rights of third country nationals**, although these challenges are unevenly distributed. Entry appears to be when and where TCN are the most exposed to legal uncertainty, detention, deportation or pushbacks. This is a result of operational disaggregation in space and time. Border and migration enforcement authorities are able to require that carriers check the travel documents of TCN and refuse transportation to those who are deemed inappropriately documented, without clear paths to review and redress. They can hold persons "at" the

border, that is off the legal territory of the state, despite the fact that these persons have physically arrived. In the case of both of entry by air and entry by sea, TCN held at the border are almost systematically detained and served with deportation orders before their application for international protection has been examined and before they have exhausted appeal possibilities. In the operational context of entry by land examined by the researchers, TCN are routinely pushed back even after they have made clear that they intend to submit an application for international protection, and made to remain at the border in unsafe conditions and to come back several times to seek access to the EU/Schengen area.

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**POLICY IMPLICATIONS AND RECOMMENDATIONS**

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A first, general policy implication of AdMiGov research findings at this stage is that **the availability and quality of data on EU (entry) migration governance should be improved** in order to sustain an evidence-based debate on and evidence-based measures for EU migration governance. Available, methodologically-sound and reliable data in and out of itself does not, of course, guarantee quality evidence, and evidence itself is only one component of law- and policy-making. However, reliable and robust data can also support independent assessments and evaluations of policies and measures and thus contribute to the quality of the policy and public debate on migration governance. Two immediate policy recommendations, one general and one specific, can be made in this respect:

- **General recommendation:** a common methodology and list of contact points/sources for statistics collected and compiled by Eurostat and Frontex on border management and the enforcement of EU border and migration legislation should be established.

- **Specific recommendation:** the European Commission submitted in May 2018 a **legislative proposal** amending **Regulation (EC) No 862/2007 on Community statistics on migration and international protection** (COM(2018) 307). The proposal is currently awaiting the first reading in the Council. **The co-legislators should consider an additional modification which would amend Article 5** on 'Statistics on the prevention of illegal entry and stay' which would require Member States to supply to Eurostat statistics on the number of third-country nationals who have been refused transportation by air, land and sea carriers as a result of their obligations established in national legislation on the basis of Council Directive 2001/51/EC of 28 June 2001 (carrier sanctions regime).

A second, general policy implication of AdMiGov research findings at this stage is **that the "diffused" shape of EU external border and the disaggregated outlook of entry governance are sharply challenging for the political prospect of establishing safe and orderly pathways to international protection and migration**, including of providing legal certainty and predictability. Existing rules, on the one hand, may well leave too much of a margin of appreciation to national authorities in applying EU law on entry, for instance to determine if a TCN meets the entry conditions listed in the SBC. **The point is not to deny the right of states to determine who can or cannot be admitted to their territory, but to make sure that this right is exercised in fair and predictable ways for TCN**. On the other hand, while building a tiered, including "pre-border", access control model has been an objective of EU policy since the entry into force of the Amsterdam Treaty, this has led to **a situation where EU rules are applied not only extraterritorially but also by actors who are not competent for border and migration enforcement in the first place, such as carriers**, and who are not bound by the same obligations as the EU and the Member States. The "tiered" outlook of EU entry governance also means that at this time parts of the EU and Schengen area, from specific sites such as the transit areas and detention zones of international airports to entire locations such as Lesvos island, are excised from their legal territory, authorising practices of systematic detention and facilitating deportation.

This second implication is not readily addressed through any direct policy recommendation because it deals with the general shape of EU entry governance at present. It does however stress the **need for assessment criterion of existing as well as forthcoming EU measures for entry governance that would take into account some of the issues and implications uncovered in or confirmed by AdMiGov research**. The following is a selection of preliminary criterion (see also final WP1 report D1.4), to be further developed over the course of AdMiGov research:

- **Reporting criterion:** AdMiGov research on entry governance, contributing to a significant number of existing research findings on the same matter, highlights that there are lingering concerns on the availability, accessibility, accuracy and reliability of both qualitative and quantitative data on EU migration governance. In the specific context of entry governance, a reporting criterion should assess the extent to which existing or foreseen measures includes reporting obligations for EU bodies and national authorities on their impact. Modalities to be considered for such a criterion include the extent to which data is made available, the existence of quality control procedures for this data, and the robustness of the methodologies through which said data is generated.

- **Diffusion criterion:** diffused and disaggregated entry governance generates processes that are less certain, less predictable for persons crossing the EU external borders and carry the concrete possibility of infringing upon fundamental rights, especially for TCN and including for persons who intend on applying for international protection in an EU Member State. While there might be grounds for national authorities to perform "pre-entry" checks on persons, a diffusion criterion could be established involving the extent to which existing or foreseen measures envisage the performance of extraterritorial entry checks, the extent to which such checks involve making decisions about the degree of "migratory risk" presented by persons as opposed to simply verifying that they meet entry conditions, as well as the extent to which measures delegate assessments and decisions to third parties (other than EU and Member State asylum, border and migration authorities), be they private or public.

- **Privatisation criterion:** national authorities increasingly rely on private, commercial actors for a variety of entry governance operations, from outsourcing aspects of visa application procedures to requiring that air, land and sea carriers perform document and identity checks on their passengers, with potentially important implications for safe and orderly pathways to international protection and migration. In addition, the private for-profit sector is increasingly involved in the development, implementation and management of measures related to entry infrastructure. A privatisation criterion would specifically assess this aspect of EU entry governance, with modalities such as the actual or foreseen extent of involvement of private actors in EU measures, or the extent to which issues of accountability and redress related to the activities of such third parties are taken into consideration.

AdMiGov examines the entirety of the migration governance "chain" and process, including entry, stay and exit, incorporating issues and sites related to labour migration, international protection and sustainable development goals. The focus of the project as a whole in on how migration governance is actually practiced, rather than simply on the rules and on how it should be. By studying how migration governance is practiced, the overarching and eventual objective of AdMiGov is to generate "bottom-up" criteria and indicators of "good" migration governance to support the EU in implementing its commitments under the UN Global Compacts and Sustainable Development Goals. Among the starting assumptions of AdMiGov is that migration governance today is unavoidably "multi-level", involving multiple and overlapping geographic scales (domestic, global, local and/or regional), multiple and overlapping areas of concern (development, health, international protection, labour, law enforcement and so on) as well as multiple actors in the governmental, non-governmental, and commercial sectors. The research presented in this brief was conducted in the context of AdMiGov Work Package 1 (WP1) on "Entry Governance" over the course of the project's first year (February 2019-January 2020).

All findings rely on qualitative and quantitative data and data that were generated on the basis of desk research of publicly available EU and national legislative and policy documents, activity and policy reports, technical studies and cost assessments. This is particularly the case for WP1 work on the law of entry, which has developed a legal and legislative mapping of EU and selected national rules and procedures on entry governance. When available, researchers have drawn from information provided by independent public bodies working on migration governance, such as the Belgian federal migration centre (Myria) in the air borders case. In addition, WP1 research has drawn on reports by non-governmental organisations active in the field of international protection and migration. When relevant, information has also been collected from the private sector and relevant trade bodies.

WP1's investigation into the political economy of entry governance has traced interactions between EU public and private commercial actors by setting up two datasets. The first dataset, developed in collaboration with the Danish investigative media Danwatch, consists of a spreadsheet collecting contracts for entry governance related research (7th Framework Programme, Horizon 2020) and professional services contracts (eu-LISA and Frontex) from 2007 onward. The second dataset is a spreadsheet as well, which collects information available from the EU Transparency Register on meetings between European Commission officials and major private companies from the security and defence industry involved in border control and management. Findings generated from these datasets have been further complemented by desk research on non-governmental sources such as Statewatch, Stop Wapenhandel and the Transnational Institute, as well as lobbyfacts.eu, Corporate Europe Observatory and Transparency International's Integrity Watch.

WP1's research on operational practices of entry governance, finally, involved investigating three different operational contexts at air, land and sea EU external borders. The purpose of the research was not systematic comparison, causal inference and hypothesis-testing through a "small-n" experimental research design. In addition, the specific aim of the research have been to develop a "bottom-up" analysis of entry governance by looking at the actions and involvements of first-line actor, and to understand how the entry of TCN is effectively governed and the degree of divergence between norms and rules and activities on the ground. Each operational context was rather approached as a specific setting in which it was possible to observe and analyse the actions, patterns of interaction, practices, and routines involved in the daily conduct of EU entry governance in order to grasp the full range of this governance. To this end, this part of WP1 research has mostly relied on qualitative methods to generate data, including direct observation and semi-structured interviews. In terms of population, the focus of the research was on operational actors involved in entry governance rather than border-crossers themselves, and on how they think and speak about, problematise and enact, entry governance. In addition to qualitative data, WP1 researchers used quantitative data extracted from public datasets and published statistical information from Eurostat (datasets on the enforcement of migration legislation *migr_eil*, and for air borders datasets *avia_paexcc*, *avia_paexac* and *avia_paoa* on air passenger transport) and from Frontex (annual risk analyses).

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