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"Against Europe, by dint of Europe" The Dublin Regime and the Contradictions of European Populisms

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"Against Europe, by dint of Europe". The Dublin Regime and the Contradictions of European "Populisms"

Tom Montel [*]

Abstract

Does Europeanisation of borders and migration policies necessarily infringe national sovereignty? This paper proposes to question this commonplace by analysing the entanglement of three *internal tactics of bordering* promoted by national-populists in the wake of the 2015 "crisis" with the Dublin Regulation – namely, the EU legal framework governing the allocation of asylum seekers across EU Member States (MS). Not only does the biometric database related to Dublin Regulation (the EURODAC) enable national authorities to diminish the number of applicants for whom they are deemed responsible, but it may also be used in a variety of ways for setting administrative traps against other categories of third country nationals (TCN). Thus, against the widespread belief, this paper argues the Common European Asylum System (CEAS) might be, in some respect, highly needed for enacting national sovereignty in the Schengen context. Whereas the policies presented here were publicised in the name of "re-nationalising" the management of asylum flows against the EU leadership, they might have paradoxically relied on the wide usage of dataveillance instruments offered by the EU itself. Thus, this article will finally offer a better understanding of some ambivalences of Eurosceptical parties in their relation to the CEAS.

Keywords: Asylum, Dublin regulation, EURODAC, National-Populism

Abstract

L'Europeizzazione dei confine e delle politiche di migrazione lede per forza la sovranità nazionale? Questo articolo intende interrogarsi su questo luogo comune analizzando la correlazione fra tre tattiche interne di confine, promosse dai nazional-populisti alla nascita della "crisi" del 2015 con il Regolamento di Dublino – ossia, il quadro giuridico dell'Unione Europea per gestire la distribuzione dei richiedenti asilo fra gli Stati Membri (SM) dell'Unione Europea. Non solo la banca dati biometrica legata al Regolamento di Dublino (EURODAC) permetteva alle autorità nazionali di diminuire il numero dei richiedenti per i quali erano ritenuti responsabili, ma sarebbe stata anche utilizzabile in una molteplicità di modi per porre cavilli amministrativi a svantaggio delle altre categorie di cittadini di paesi terzi (TCN). Inoltre, al contrario di quanto comunemente pensato, questo articolo sostiene che il Sistema Comune Europeo d'Asilo (CEAS) potrebbe essere, per alcuni aspetti, altamente necessario per attuare la sovranità nazionale all'interno del contesto Schengen. Considerando che le politiche qui esposte furono pubblicate nel nome della "ri-nazionalizzazione"

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della gestione dei flussi di richiedenti asilo contro la dirigenza europea, queste potrebbe paradossalmente poggiare su un largo uso degli strumenti di sorveglianza dei dati, offerti dalla stessa Unione Europea. Dunque, questo articolo offrirà finalmente una migliore comprensione di alcune ambivalenze dei partiti euroscettici nella loro relazione con il CEAS.

Parole chiave: Asilo; Regolamento di Dublino; EURODAC; Nazional-Populismo

Introduction

It is five years now since institutional discussions on the CEAS are facing a deadlock. This is usually presented as the result of an irreconcilable conflict between those who want *more* Europe and those who want *less* of it. On the one hand, there are front-line MS which plead for solidarity and "burden-sharing". According to the former president of the Italian council Giuseppe Conte, a common area without frontiers calls for a common solution – a view grossly shared by the Parliament and the Commission. On the other hand, nationalist politicians advocate for pure inter-governmentalism and oppose any binding obligations for MS, bringing to mind the struggle successfully waged by the Hungarian prime minister Viktor Orbán against any permanent relocation schemes. Whereas the former supposedly promotes freedom of movement as the first step towards a genuine EU citizenship, the latter contests such a "cosmopolitan" view.

This picture, nevertheless, is overly reductive. In reality, there is a whole range of actors who do not fit into these two categories, given that the spectrum is multidimensional. The political antagonism is far from aligned with the "geographical" divide between the countries of first entry and the central ones. Nor is it aligned with the divergences between the Council, the Commission and the Parliament. On the external dimension, the two sides belong to the same coin: Europe must act as one for outsourcing coercion. Whereas on the internal one, right-wingers certainly stand out for their national egoism but they might not be as "anti-EU" as they pretend. This last point – the subject of this article – ought to be read in light of the ambivalence of the CEAS. Namely, that its core pillar – the "Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person" (EP and The Council 2013a) – is not merely a binding legal framework frustrating MS sovereignty but also aimed at policing mobility.

According to John Torpey, the quintessential feature of state sovereignty lies in the claim to exercise the *"monopoly of the legitimate means of movement"* (2000). In this sense, it is not characterised by the ability to effectively regulate entries on the territory – which is certainly all the more reduced in the Schengen context – but by the one to decide who is entitled legal entry and who is not. Yet, according to Viktor Orbán, Matteo Salvini or Brexiters, the EU is infringing sovereignty, especially when understood as such. This belief of a mutual exclusion between state sovereignty and Europeanisation of migration policies is precisely what is discussed here.

Most commentators tend to consider this Europeanisation to be an answer to rather than a cause of the state's *"loss of control"* (Sassen 1995). But this doesn't necessarily contradicts the assumption that EU institutions are expropriating the Nation-State competencies in the field of borders and migration. The question to ask, then, is: what if it was both a reaction and a cause of this loss of control? Or, on the contrary, if the CEAS is intimately related to technologies of border surveillance, can it not be that it constitutes an asset for national authorities willing to regulate legal entry of non-European citizens on their national territory? Can those claiming to take back control of migration from the EU handle those technologies for reinstating a national[istic] agenda on migration and borders?

In order to explore those above questions, it will first be necessary to present some socio-historical backgrounds on what can be framed as the "Dublin Regime". Then, drawing from a multi-sited field survey between Italy and Northern Europe undertaken since 2015, as well as primary and grey documentation, this paper will focus on the domestic implementation of the EU database related to the Dublin Regulation – the EURODAC. Henceforth, three *tactics of bordering* (De Genova 2017), by which national governments have used this IT surveillance system for "renationalising" borders, will be examined. This article is part of an ongoing research situated at the crossroads between critical security studies (Huysmans 2000; Bigo and Guild 2005; C.A.S.E. 2006) and more ethnographic encounters with migration and its [partial] "autonomy" (New keywords Collective 2015; Hess and Kasparek 2017; De Genova 2017), both sharing the same sociological attention towards everyday practices of security and the lived experiences of those primarily affected by them: in this case, the *"Dubliners"* (Picozza 2017) *"suspended in transit"* (Oelgemöller 2011). It will nevertheless also focus on the *political entrepreneurs of (in)security* often referred to as "populists" involved in the events detailed below[1].

[1] I wish to warmly thank Didier Bigo for his insightful comments on a draft version of this article.

1. Considerations on the socio-genesis of the *Dublin Regime*

Without doubt Schengen has limited Member States' capacity to regulate EU citizens' mobility, since abandoning this prerogative was unanimously agreed in the Amsterdam Treaty. Still, coming back to the process started with the signing of the 1985 Schengen agreement it can be suggested that the invention of the internal/external borders came along with the shaping of a distinction between EU and third country nationals (Hailbronner 1994; Kostakopoulou 2000; Crowley 2001; Bigo and Guild 2005, chap. 1). The limitation of sovereignty when dealing with the former can be regarded as the counterpart for the making of the single market. In turn, the security deficit that this was supposedly destined to provoke would justify tightening the grip on the latter's circulation to, and within, the EU: a spillover of the internal market into an internal security issue (Huysmans 2000). This is how Europeanisation became the name for the alignment of national policies regarding TCN entry and residence with the ones of the most restrictive MS (Guiraudon and Lahav 2000) as the latter came to justify a series of so-called "compensatory measures" at the external borders, but also within the Schengen territory (Hailbronner and Thiery 1997).

Those measures were firstly laid down in the Schengen Implementing Agreement negotiated and approved by French, German and Benelux countries' representatives involved in the four "Schengen groups" set up for its drafting in 1986 (1990). Conversely, the concomitant Dublin Convention (1990) was the first legal instrument which included all EEC Members, though it was similarly concluded outside the EU framework (Hailbronner and Thiery 1997). Yet, the latter grossly reproduced the former's chapter VII, which addressed the criteria for allocation of responsibility for processing an asylum application. Basically, this chapter had been copied from the Schengen to the Dublin Convention (David Lorenz, cited in Kasparek 2016).

By reaffirming the principle of one single application in one single MS while keeping similar responsibility criteria, the Dublin Convention *de facto* excluded asylum seekers from freedom of movement. So, on the one hand, it can be regarded as the first move towards the progressive inclusion of all MS in the negotiations and incorporation of the Schengen Acquis within the community framework. On the other hand, it confirmed this principle as an essential "compensatory measure" – along with stricter external border checks and visa policies – conditioning participation to Schengen. In so doing, it consecrated a certain vision regarding the fate of TCN within the future area without borders elaborated by those informal and secretive intergovernmental fora like the Schengen group, but also TREVI and the

ad hoc group of Immigration (see for instance Belgian Presidency 1987; Ad Hoc Group Immigration 1992).

According to the preamble of the Dublin Convention, this was only aimed at avoiding asylum seekers "in orbit", shuttled from one country to another. However, the goal was not so much to ensure that every application is examined *at least* once, but rather that it is examined *only* once: basically, in the first country of entry. This contentious "first entry criteria" unveils the primary aim of the *Dublin Regime* of relieving the burden of northern countries by transforming their southern and eastern neighbours into "*buffer zones*" (Neuman 1993; Geddes 2000; Kasparek 2016). Therefore, another function of the *Dublin Regime* grew over the years. Namely: the securitisation of "secondary movements" framed as a threat to free movement, and the criminalisation of "multiple asylum claims" framed as an abuse against the right to asylum. In short, the *Dublin Regime* was created as an answer to the complex issue of limiting freedom of movement of TCN by other means than border check as to secure a dual regime of mobility.

As early as 1991, security professionals involved in those aforementioned intergovernmental fora acknowledged the uneasiness to enforce this system without any means for tracing the individual route of asylum seekers. Consequently, they acted the objective of creating a fingerprinting system for that purpose (TREVI Ministers 1991). A trans-European biometric database called EURODAC was negotiated from then, established in 2000 and implemented in 2003. Since then, all asylum seekers (category 1 entry) and "irregular" crossers of the external borders (category 2 entry) are to be registered into it. From the start, its scope went beyond the field of asylum by introducing the possibility for law enforcement authorities to compare profiles of undocumented migrants within the database (category 3, see further). Paradoxically, it is through the inclusion of their profile in the database that asylum seekers find themselves excluded from freedom of movement and face *"digital deportability"* (Tsianos and Kuster 2012) in case of a subsequent "irregular" secondary movement. The term *"banopticon"* (Bigo 2007) is particularly relevant to conceptualise this process of *exclusive inclusion* insofar as it features the possibility opened by the virtualisation of internal borders to reinforce the control of undesirable categories while normalising the majority.

With regards to the rest of the CEAS, it is incontestable that post-Amsterdam developments restricted MS room for manoeuvre while both 1990 Conventions were finally incorporated into the community legal framework. When the ambition to endow the EU with such a framework emerged at the 1999 Tampere Council, it was no secret that it would compel MS with minimal standards for reception (The

Council 2003), international protection (The Council 2004) and procedure (The Council 2005) – all sanctioned by the CJEU. Yet, the "harmonisation directives," and the relative empowerment of EU institutions came only after the *Dublin Regime* was put into place and as a counter-part to what had been decided first by the Council (Geddes 2000; Guiraudon 2003; Guild 2006).

Considering the heterogeneous and sometimes contradictory processes behind the term "Europeanisation", one should acknowledge the dual dimension of the CEAS. As it has now incorporated a set of binding rules guaranteeing minimal rights for TCN, the CEAS finds its roots in northern MS' restrictive stance that dates back to the 1990's at least. Its core structure – Dublin and EURODAC – was negotiated mainly through intergovernmental cooperation that enabled circumventing domestic politico-legal constraints (Guiraudon and Lahav 2000; Geddes 2000, 174) with the Commission as an mere observer from 1992 to 1997. This first dimension was pushed forward by some MS and conceded by others while negotiating their inclusion into Schengen. It is only once those principles had been enshrined that the long-standing claim by the Parliament (1987), the Commission (1985) and the UNHCR (1991) for harmonised standards as a prerequisite for the completion of the single market would meet small success. After years of struggles waged by them to have a say, the second dimension – the "harmonisation directives" – would finally emerge through the consultation procedure from 1999 on. Notwithstanding that the CEAS was entirely redrafted through the ordinary method in 2013, it would be overly reductive to assume that it was imposed by EU institutions against MS – more so as it is the Council that until now has the last word in the legislative procedure.

Despite the fact that they resisted their institutionalisation as to remain beyond accountability, it has been suggested that those actors involved in the plethora of intergovernmental fora came to form a genuine (but centrifugal) network – or *guild* (Bigo 2018) – of security professionals with their own agenda, field and rationality. The transnationalisation of those bureaucracies of security experts came along with their autonomisation (Guiraudon 2003) and the imposition of their vision of the way to guarantee security and freedom within Schengen (Bigo 1996; 1998; Bigo et al. 2007). The fact that they were stemming mostly from national Home Affairs ministries did not prevent them to profoundly influence supranational agencies like FRONTEX, European asylum Support Office (EASO), or the European Agency for the management of Large-Scale IT systems (EU-LISA).

Even if it mirrored the interests of specific powerful northern MS, this fragmented rationality impregnating the field of internal security is generally considered, with good reason, to be something different from the territorial-sovereign one. One that could

only be achieved through technological, integrated, interoperable and transnational devices of surveillance at a distance able to selectively enact new “smart”, “mobile”, “digital”, “invisible”, and “biometrical” borders (Broeders 2007; New keywords Collective 2015; De Genova 2017). Consequently, sovereignty has been somewhat abandoned in favour of other analytical categories of power analysis like governance, management, assemblage, apparatus or *dispositif*. Because it is characterised by the imperative of merging freedom with security, the central function endorsed by knowledge power, and the heterogeneity of the stakeholders involved in it, some have proposed the Foulcauldian concept of *“governmentality”* (Bigo 1998; Haahr and Walters 2004; Guild 2011; Tazzioli 2014) to define this “post-sovereign” government of circulations based on *security* (Foucault 2004).

In this picture, national authorities in charge of border and migration management seem further marginalised by the transfer of their competencies to supranational bodies and the reinforced role of the Commission. One could believe MS loss of ability to control their territorial frontiers themselves was the price to pay for better controlling mobility in Europe as a whole. This would suggest the idea of a zero-sum game between “governmentality” and sovereignty, as well as between digital and territorial borders: As if the former had replaced the latter. In this case, only by opposing the new borders of Europe could one reinstate national sovereignty. Against this proposition, some have suggested that *“the transnational does not oppose the State in practical terms. Often, it is even a condition for its existence”* (Bigo 2018, 11). Then, what if the former and the latter could instead combine and reinforce one another?

Admittedly, with the Europeanisation of borders, the locus of control is diffracted both upstream and downstream (Bigo and Guild 2005, 1) on the frontier line. However, does “de-territorialisation” of internal borders necessarily imply “de-nationalisation” of their regulation? And does the increasing role of supranational agencies and instruments for regulating migrant flows necessarily contribute to the marginalisation of national policy-makers and law enforcement authorities? The large attention given to the «upstream» dimension rather leans towards an affirmative answer. Especially since the implementation of the *Hotspot Approach*, the European management of the external borders has been interpreted as a form of “*externalisation*” of internal borders or even of “*troikaisation*” of migration policies (Heller and Pezzani 2016). For our concern, the takeover of the identification procedure at disembarkation by EU agencies (Ibid, Rodier 2017; Vradis et al. 2018; Tassin 2019) gives good reason for this argument.

Logically, though contrastingly, turning the gaze towards the much less documented "downstream" practical implementation of the EURODAC might nuance this hypothesis of an intrinsic opposition between the sovereign-territorial and the European ways of bordering. The three cases presented here will thus illustrate how they can converge in policies implemented in accordance with political agendas pretending to reinstate national sovereignty. This exploration may shed some light on how certain aspects of the *EURODAC Banopticon* already hypothesised at the macro level – such as the risk of a function creep (Tsianos and Kuster 2016) – take shape at the micro level. Conversely, it will broaden the field of vision of the analyses proposed so far concerning each of the cases by offering essential keys to understand their embeddedness in the *Dublin Regime.* In so doing, it will both highlight the tensions between security discourses and security practices promoted by national[istic] *entrepreneurs of (in)security* and question the supposed one between their approach and the EU-integrated one.

2. Re-imagined national boundaries within Schengen

As already suggested, our imagination about internal borders is captured by an incompatible opposition between a supposedly cosmopolitan "Schengen Spirit" and a territorial-sovereign one, with its spectacular checkpoints and barbed wires celebrated by nationalist narratives. However, when it comes to bordering in practice, "hard" and "soft" borders are not as mutually exclusive as both narratives seem to suggest. "Schengenisation" does not entails the abolition but rather the reconfiguration of borders in such a way as to remain unnoticed for European travellers while effective for undesired mobilities. Besides, the Schengen Border Code does allow for exceptional reintroductions of border checks under certain conditions elucidated in its Title III (EP and The Council 2016). Since 2015, those exceptions have become the norm as six MS countries continuously prolonged them on the ground of tackling terrorist threats and/or irregular secondary movements (EC 2019). In turn, those restored checks have been partially able to embrace the "Schengen spirit" as they were targeting specific crossing points supposedly used by irregularised migrants as to spare most of the *bona fide* travellers. In order to ensure this filtering function of borders, the specificity of those reintroduced checks may lie exactly on a broad usage of EU instruments of surveillance.

The 2018 so-called "Seehofer Deal" perfectly illustrates this last point. It can be interpreted as an attempt to transcend the incompatibility of the two narratives by experimenting a *bordering tactic* combining hard and soft borders. In fact, this is coherent with Seehofer endeavour of the time to re-appropriate the AfD proposals

without going against his government's pro-EU stance. At the time, Horst Seehofer was both the leader of the CSU and the new tough right-wing German Minister of Interior. Foreseeing the AfD far-right party success in the upcoming October Bavarian elections, he endorsed part of its program in June. Noticeably, he advocated for the swift readmission to Austria – or to their responsible MS in case of a positive hit in EURODAC – of all those intercepted without proper documentation at the Austrian land borders in the context of the checks reintroduced therein since 2015. Merkel agreed to all the 63 proposals of his "Migration Masterplan" (BMI 2018) except this one (Knight 2018). After some dithering, she stepped down, afraid to lose a vital partner for her coalition as the issue was turning into a major political crisis. Until a European compromise would have been reached on the Dublin reform, this ad hoc solution would be enhanced upon the condition that it would be formalized through bilateral agreements in accordance with Article 36 of the Dublin Regulation (Karnitschnig 2018). After an oral agreement between Merkel and 14 heads of states during the Euro summit on 28 June 2018, Seehofer concluded such administrative agreements with his Spanish, Greek and Portuguese counterparts (but, unsurprisingly, not Salvini).

Those readmissions have to be clearly distinguished from a Dublin procedure (Lübbe 2018). In the later case, the person is considered to have entered the national territory, thoroughly registered as an asylum seeker – with all the rights and legal remedies it implies – before being subjected to a long, costly and uncertain transfer procedure detailed in the Dublin Regulation. Conversely, in the case of those fast-track readmissions of persons refused entry at the German-Austrian border, a juridical *"fiction of non-entry"* (Hruschka 2019) on the German soil – similar to the ones in international airport transit zones (Makaremi 2009) – is introduced. The person is not considered to have entered the national territory, and henceforth not registered as an asylum seeker, but detained before a probable deportation within less than 48 hours.

Here, biometric data are processed prior to any registration of international protection though the person *"has expressed a desire for it"* (Hellenic Ministry of Migration Policy and BMI 2018). The article 17 of the EURODAC Regulation (EP and The Council 2013b) details the conditions upon which profiles of persons found illegally staying on the territory of a MS could be transmitted to determine if the person had previously lodged an asylum claim in another MS. In the case of a positive hit following this "category 3" search, it becomes possible to initiate a take back procedure (EP and The Council 2013a, Art. 24). Yet, those arrangements clearly state that they apply only when a "*cat.1 Eurodac Hit*" signalled a previous asylum claim in another country (see for instance Hellenic Ministry of Migration

Policy and BMI 2018). Yet, contrarily to cat.1 transmitted data, cat.3 ones cannot be compared to cat.2 data but only to cat.1. So, if only positive hits against cat.1 fall within the scope of the arrangements, that implicitly confirms that biometric data are processed as cat.3 by the German authorities notwithstanding the fact the persons are not deemed "present on the territory" so as to avoid registering their claim. In any case, such discretionary arrangements feature a clear function creep of the EURODAC, initially intended to be used only in the context of an asylum procedure.

Albeit those readmissions are inconsistent with the international, EU, and domestic legal framework as a German Court finally ruled (ECRE 2019), they are made possible by the extension of the scope of the *EURODAC Banopticon*. Then, those same policies intended to protect the nation from irregular fluxes framed as a side-effect of free movement are in reality embedded in the Schengen police cooperation routines. Justified by a supposed failure of the *Dublin Regime* to stem secondary movements, such reintroductions of hard borders would paradoxically be ineffective if not articulated with digital "soft" ones enabled by this same Regime. For this reason, it is ironic that it has been justified by its supposed breakdown and presented as a temporary solution before its overhaul. Reminding the already mentioned duality of the CEAS, this case finally illustrates how the pressure exerted by those claiming to oppose "migrant invasion" does not result into a rejection of the European framework as a whole. The procedural guaranties foreseen by the Dublin III Regulation must be circumvented. But the scope of the *EURODAC Banopticon* must be extended so as to combine EU biometric *tactics of bordering* with national-territorial ones.

3. Theo Francken and the "category 3" searches

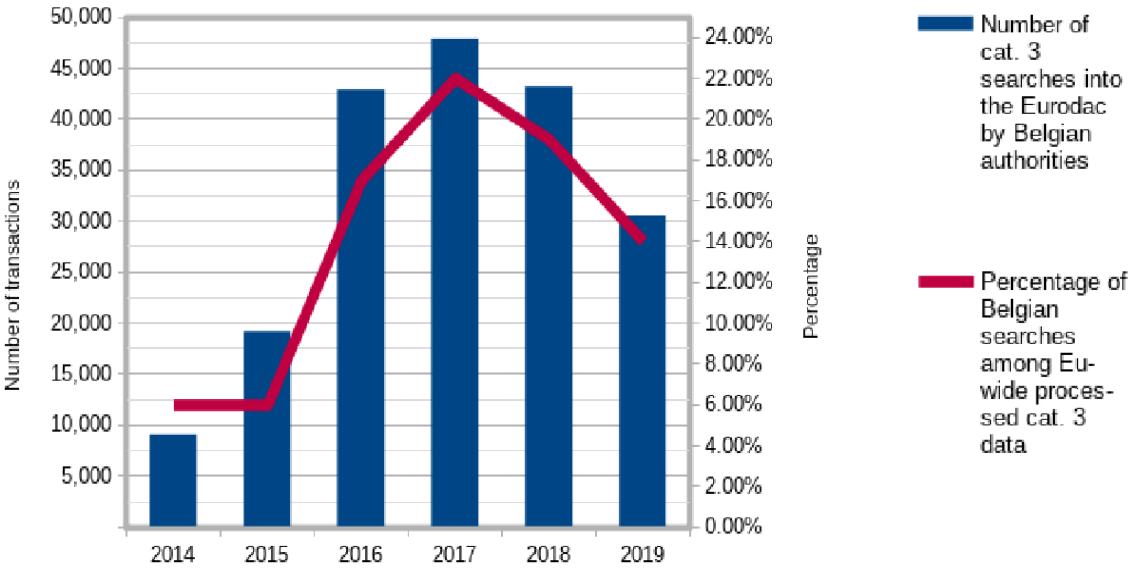
The second *tactic of internal bordering* presented here lies in the Belgian context. When the New-Flemish Alliance (N-VA) – a xenophobic regional-populist party – joined the government in 2014 for the first time, its leader Jan Jambon required the interior ministry like Seehofer did in Germany. Moreover, he named Theo Francken Secretary of State for Asylum, Migration and Administrative Simplification, who holds, *inter alia*, the tutelage of the General Commissariat for Refugees and Stateless persons (CGRA). Known for his anti-migrant stance, Theo Francken set himself up as the providential man when the country faced the backlashes of the 2015 crisis. From the start of 2016, with the reinforcement of the Franco-British border and the beginning of Calais's dismantling operations, Belgium became the new departure point for people on the move to the UK.

The first measure adopted comprised of the reintroduction of checks at the French border between 23 February and 22 April 2016 (Belgian Delegation, Jambon, and

Michel 2016). However, when the inefficiency of such a spectacular decision became obvious, controls shifted from the border to the Belgian soil, around the Maximilien Park where transit migrants were encamped close to the Brussels Gare du Nord. Francken committed to finding any means for the effective removal of the persons arrested during the round-ups that took place from August 2017 onwards. Convinced that 80% of those persons *"entered Belgium via Italy, where they gave their fingerprints"* (Wuyard 2017), Francken firstly envisaged rigorously applying the Dublin framework (Francken 2016) not only for asylum seekers but also for those transit migrants. Thus, the main deterrent for Channel crossings from Belgium became lengthy detention followed by readmissions to other MS.

Since the aforementioned arrested transit migrants were not registered as asylum seekers in Belgium, they could not be subjected to a proper Dublin procedure. Nevertheless, their profile could still be compared in the EURODAC as cat.3. In the case of a positive hit, it becomes possible to implement the order to leave the territory ("Ordre de quitter le territoire") through a Dublin take back procedure. Avoiding to register the claim wards off the risk of becoming responsible for them in the eventuality of a negative hit. Moreover, it allows indefinite detention during the procedure and so, for swifter removals. This case is quite similar to the German case. However, given that the person is deemed present on the national territory and procedural guarantees are respected, the readmission procedure is formally congruent with the EU legal framework.

Figure 1: Belgium cat.3 Transactions processed in the EURODAC



Note. Data extracted from the Successive EU-LISA Annual Reports and Statistics

Data shown in figure 1 highlights the wide usage of this practice by Belgium law enforcement authorities when confronted to the risk of a *"second Calais"* (Li 2017) in Brussels. Cat.3 entries rose by 112% in 2015 and 124% in 2016. Admittedly, the absolute (but not relative) increase in cat.3 checks in 2015 is not related to domestic policies, but to the European-wide conjuncture of that time. In contrast, the absolute and relative figures of the consecutive years reflect a specific evolution of Belgian law enforcement practices congruent with the aforementioned Francken 2016 General policy note. One of five cat. 3 EURODAC searches was carried out by a Belgian officer in 2017. Numbers remained substantially high until 2019. That is to say, after the "transit migrants" emergency vanished, but at the precise moment the N-VA was ousted from the coalition.

Numbers can seem low: between September and November 2017, only 76 of the persons arrested were effectively deported to another MS (Li 2017). Still, such policy remains efficient on a discursive level, upon the condition that Theo Francken boasts of it excessively on social media. What is more, his affirmation that such policy is highly dissuasive for all transit migrants seems all too realistic. In fact, the people headed to the UK having left Belgium whom I met explained their departure in terms of the risk of lengthy detentions followed by Dublin deportation. This is particularly true when considering the fate of those not yet registered in the EURODAC when arrested, as will be explained.

4. The hidden function of Dublin for enforcing returns with[out] regard to international law

While those with a positive hit were swiftly sent back to other EU countries, Francken worked hard to deport those with a negative one to their home countries. For this purpose the Secretary of State enhanced collaboration with Secret Services from Sudan – allegedly, the main country of origin of the detainees. This was the prerequisite for certifying their nationality and delivering them the needed consular *laissez-passer* (Lyon 2017). In this way, from September to November, at least 10 persons were swiftly returned to Khartoum (Li 2017). Criticisms towards deportations to a country well-known for its scarce regard for human rights reached a tipping point when cases of imprisonment and torture of some returnees were reported in December (Kihl 2017). Charles Michel; Belgium's Prime Minister, consequently ordered the deportations to be stopped. The backlash occurred when it turned out that Francken lied when affirming to have followed this instruction while conspicuously proceeding with the deportations. Against calls for his resignation, the N-VA threatened to leave the coalition – like the CSU did in support of Seehofer.

He did not resign but persisted to detain people during the time of an “independent” investigation by the CGRA – for which Francken himself was responsible – into the alleged mistreatments of returnees (CGRA 2018). Eventually, he would be able to resume his deportation program (Getting the Voice Out 2018) once the inquiry published and the public attention vanished.

Despite wide media coverage, no close scrutiny has been given to the hidden function of the *Dublin Regime* in this “Maximilien Park” saga which almost brought down the government. The persons affected were in fact eligible for refugee status and possibly facing genuine danger in case of return, though they had not requested protection in Belgium (or anywhere else). For this reason, they were *de facto* and *sine die* considered not in danger upon return. The question is not merely whether they were offered the opportunity to apply as Francken asserted vehemently. Rather, it is about *why* they may have declined it. If they had accepted it, they certainly would have been released. It is likely then that they would have defected from their asylum procedure in Belgium and reached the UK sooner or later. Yet, the UK is a full Dublin State, notwithstanding that it has opted out from the Schengen Agreement and from the 2013 directives of the second phase of CEAS. Therefore, they may have faced asylum in detention in the UK followed by a transfer to the continent. This is why those I had the opportunity to meet acknowledged they firstly refused to claim asylum when they had been proposed just after their arrest. In a nutshell: those not yet registered in the EURODAC yet were particularly eager to keep their “biometric cleanliness”. Consequently, they preferred being excluded *from* the procedure than being excluded *through* it (Broeders 2011), unaware of the greater danger awaiting them[2].

Theo Francken himself stated that they *“don’t want [to apply in Belgium] because they want to go to the UK”* (Wuyard 2017). Still, this refusal was sufficient to formally consider them as safe in case of return, despite their case having never been properly examined in Europe. Facing such *“counterstrategies”* (Broeders and Engbersen 2007) for escaping the *EURODAC Banopticon*, a tricky trap has been put into place to recapture them. Ironically enough, due to the sides effects of the *Dublin Regime*, forcing people to claim asylum was the most efficient means for dissuading transit through Belgium while simultaneously reassuring public opinion of Belgium's commitment to fully comply with its international obligations. Besides, Belgian police had no interest in denying the right to claim asylum to people who would have likely refused it anyway or left Belgium in case they felt forced to accept it. Focusing on whether or not the police gave them this opportunity is missing the point. What is troubling about this story is rather that, whether searches in

[2] As some of them acknowledged afterwards, when I visited them in detention

EURODAC resulted in a positive or a negative hit, this *bordering tactic*, experimented under Francken's orders, offered the conditions for removing those transit migrants from the national territory.

4.1. A comparative detour with a collective deportation from Ventimiglia

It is worthwhile here to suggest a comparison with a very similar *bordering tactic* experimented one year before. There too, the persons subjected to it were Sudanese in transit but the context differed as it took place in the Franco-Italian border-zone of Ventimiglia. As the centre-left governments of both countries of the time were under increasing (anti-)migrant pressure, they felt a need to exhibit their commitment to curb those unruly mobilities. In France, by reintroducing border checks in the name of anti-terrorism; and in Italy, by finding ways to disperse the people pushed-back through both legal pathways and repression. All this occurred in the summer of 2016 when protests of migrants endured, followed by their supporters and opponents – all considered as a prominent danger for public order (Barone 2018).

That is why, after having implemented an internal deportation mechanism from Ventimiglia to the Taranto Hotspot, the Italian Ministry of Interior developed further policies in order to "*unload' and empty the frontier"* in the words of its head of police (Tazzioli 2017). Its head of police built close cooperation with Sudanese authorities in order to implement the returns of Sudanese nationals refusing to claim asylum in Italy. On 3rd August 2016, he signed with his Sudanese counterpart a secretive (but leaked) bilateral memorandum of understanding (Gabrielli and El Hussein 2016) very similar in substance to Francken's one. Sudanese officials could then visit people arrested in Ventimiglia in order to confirm their nationality. At least 40 among them were consequently deported from the Torino detention centre to Khartoum on 24 August 2016 with the support of Frontex (Amnesty 2016).

As in the Belgian case, people on the move were eager to preserve their "biometric cleanliness" till they reached their desired destination (France, Germany, UK...). That is why some of those raided around Ventimiglia refused to claim asylum, especially if they had previously avoided identification in the Hotspots (cat.2 in the EURODAC). Conversely, as some of them reported to me, those already registered in Italy accepted, and were subsequently released before moving to their desired destination. Like in the Belgian case too, the controversy this collective deportation triggered with regards to non-refoulement and individual case assessment principles (Amnesty 2016) should not divert attention from the indirect but crucial function of the *Dublin Regime*.

Again, even if they had truly been given the opportunity to lodge an asylum claim they would have declined it, unless they were aware of its consequences. In Fulvio Vassallo's words: *"No one applies for asylum [in Italy] if he/she thinks he/she could go do it in France or Germany. He/she does if he/she is about to be deported. In this case, they were not offered such an opportunity"* (Bagnoli 2016)[3]. Again, their rejection of the offer was rather motivated by the fear of being processed in the EURODAC than by the absence of risk upon return. Incidentally, on the few expulsion orders which have been accessed, it is clearly stated their refusal was due to their wish to apply in another country (Amnesty 2016, 48). And the Italian head of police himself reasserted it (*Avvenire* 2016). Nevertheless, they persisted in enforcing removals presupposing that they would have claimed asylum if they were in danger upon return. Whereas the Belgian government felt comfortable to use EU instruments to erect its [biometric] national borders, the Italian government of the time did not hesitate to apply administrative practices worthy of the Northern League for enforcing the EU principle of identification in the first country of arrival.

Although both schemes were very similar, one could argue that the context slightly differed on two related points. Italy was ruled by a centre-left government, and as a first entry country it was disadvantaged by the *Dublin Regime*. Undoubtedly the Italian case must be related to the recently implemented EU *Hotspot Approach* for which a primary concern was systematic identification in the first entry country (EC 2015a; Tazzioli 2017; Campesi 2018; Pelizza 2019). It is plausible that this deportation scheme, together with the internal deportation one, was partly aimed at proving to its European partners its commitment to implement the EURODAC Regulation, given that the country was facing extreme pressures to comply with it (EC 2015b; 2015c).

Nevertheless, the *EURODAC Banopticon* turned out to be useful also from the Italian authorities' point of view. Without it, such deportations to home country would not have been feasible insofar as people on the move would not have minded registering in Italy. Meanwhile, the deportation implemented here enabled the disciplining and invisibilisation of transit migrants stuck at the border. Furthermore, it pushed them into cat.1 registration rather than cat.2. Yet, it is precisely on the basis of the number of registered asylum applications that the European funds allocated to MS are calculated (EP and The Council 2014). Lastly, there is strong evidence that persons forcefully registered in Italy persist in leaving the country afterwards. So they do not necessarily represent an additional "burden" for the Italian reception system. Then it would be too reductive to view the *Dublin Regime* as a mere core-

[3] In this case, some were apparently given for a second time this opportunity in the last minute and thus avoided deportation (OpenMigration 2017)

periphery question. It does not hinder the sovereignty of peripheral MS as much as it reinforces that of the northern ones. And this collective deportation reflects how it can also be appropriated by forefront MS national authorities for their own purpose.

That said, three further observations can be drawn from this comparison. Firstly, it is plausible that their common function – or at least effect – was deterrence from any kind of resistance against the *Dublin Regime* by escaping the *EURODAC Banopticon*. Despite the small number of persons affected by those deportations, they were not anecdotal in their deterrent effect towards a residual but very visible category of migrants: those irregularly circulating across Europe. Francken was certainly right to insist that it would have sent a "*bad signal*" (Daniez 2018) to release detainees refusing to claim asylum. Because in this case, their struggle to overcome the dilemma between identification and deportation through what I have called elsewhere "*strategies of flight*" (Montel 2016) would have turned out to be successful. With regard to Ventimiglia, the ongoing protests since summer 2015 did not recur from August 2016 on, as apparently migrants became more discreet once they heard the widespread story of the collective deportation.

Secondly, deportation schemes were consistent with both a national rationality and with the European one, according to which systematic registration is a prerequisite for ordering mobility within Europe. In fact, they can be considered as essential steps towards the re-stabilisation of Schengen following the *"Long Summer of Migration"* (Hess and Kasparek 2017). These events represent the most spectacular dimension of the policies deployed against these *strategies of flight* which surface when both rationalities are articulated in one single *tactic of bordering*. Fostered by national *political entrepreneurs of (in)security* claiming to take over migration control, those forms of petty exceptionalism are in reality strongly articulated with transnational assemblages of migration management deployed against practices of migration subsumed under the administrative term of "absconding" (Montel 2021). This growing securitisation of internal flight is quite independent from local political actors as it stems from the everyday routinised practices of police cooperation in the field of EU internal security.

Lastly, the *tactics of bordering* presented here have to be read in the light of the contemporary trend towards the blurring of the divide internal/external (Walker 1993; Bigo 2001). In these cases, it is the ambition to discipline and punish *strategies of flight* – from home country, but also from transit countries and from the *EURODAC Banopticon* – that characterises that convergence. In both cases, it has been suspected that Sudanese Secrete Services were directly involved in the selection of the returnees (Camilli 2018). True or not, the rumours are plausible

insofar as no individual examination in substance has preceded returns. As a consequence, which I noticed discussing with affected communities at the time, it turned out be highly effective in spreading fear of being traced and recaptured by persecutors from their home country. In other words, the convergence of national rationale (territorial exclusion, discipline) with the EU-wide one constitutes the condition of possibility of another convergence, namely the merging of the interests of the countries of immigration and the countries of origin. The official discourse is structured around the dichotomy of the "refugee" – as one sought by police "there" but welcomed "here" – and the [economic] migrant, who is not expected to be at risk in their home country but are sought by police here. Against this background, it is noteworthy that those [would-be] *Dubliners* in question here might have been recaptured and punished for their flight by both polices.

Conclusion

The same sentence resounds all across Europe: "We will kick out from our country those Brussels wants to bring us". From this perspective, what is perhaps too hastily subsumed under the contentious term of "populists" is grossly in line with traditional far-right organisations. Yet, when it comes to "kicking out" concretely, the EU surveillance apparatus turns out to be most helpful. And the pragmatic-realist soft Euro-scepticism adopted by the former might well be what distinguishes them from the latter. Throughout the cases presented here, this article has illustrated the opportunities *Security Europe* offer for staging the spectacle of sovereignty: national-populists are rather keen on seizing upon them so as to pretend being still in charge of national security. Concerning the external dimension, not only do they not question the mostly consensual EU externalisation policies, but they are among its first proponents. Whereas on the internal dimension, one has to keep in mind the historicity of the CEAS dual dimension to grasp fully the ambivalence of their position.

They certainly do not want their hands tied by the Commission, the CJEU, or the "harmonising directives". Political forces like the N-VA, the CSU or the Tories, refute any binding obligations stemming from the second dimension of the CEAS like compulsory quotas. In some occasions they even come to join the more radical far-right parties for contesting the abolition of border checks for persons. But they certainly do not criticize their abolition for polices enhanced by the Schengen project (Bigo 1996). Nor do they complain about the ensuing establishment of transnational IT surveillance systems. National-populists do not oppose integrated solutions like the *Dublin Regime*, upon the condition that they are decided in an intergovernmental way. What unites them is the ambition to delink the two

dimensions composing the CEAS. In other words, they are eager to pick and choose what suits them best just as the UK managed to do until Brexit. In this regard, it is ironic that leaving the EU – branded by Brexiters as provoking pull-factors for immigration to the UK – may entail Channel crossing of persons that could not be sent back any longer by way of the Dublin system. This is why British officials have (unsuccessfully) pledged to keep their "selective relationship" (European Union Committee 2019) with the EU, hoping to maintain access to the EURODAC while getting rid of the Dublin framework and its procedural guaranties (Ibid, p. 93).

While they reject the second dimension of the CEAS, they might finally be the most "Europeanist" with regard to the first one. As common-sense equates Schengen with internal freedom of movement, the utmost importance of the internal dimension for the exclusion of TCN *from within* Europe is often ignored. Yet it is exactly their exaltation of both national and Schengen borders that differentiate xenophobic movements in the political arena. Therein lies the paradox: It is precisely for this reason that they are most likely to mobilize EU technologies of *bordering from within* when they reach power. In the cases presented here, politicians elected for

their pretense to do "more" than the "EU," and eventually against the Commission leadership, had nothing left but EU instruments like the EURODAC for enforcing policies based on national egoism. Moreover, they may have legitimized it in the name of the principle of asylum in the first safe country, fostered primarily within the EU framework (Oelgemöller 2011).

By enabling the tracing of individual routes as to apply this principle, the *EURODAC Banopticon* definitely contributes to the reduction of the number of persons for whom national authorities are compelled under international (and incidentally European) laws to examine their case. Moreover, our examples illustrated its multifarious side-effects and the opportunities they create for law enforcement authorities, especially because of the "function creep" inherent to the category 3 searches. The Belgium case showed how those searches open the possibility for the removal of people on the move already identified in Europe – to their responsible MS – as well as those unidentified – to their origin country. Indeed, like in the Italian case, the fear of identification in an undesired country can indirectly result in the expulsion from the EU territory without any substantial examination of the risks upon return. In the end, one has to move beyond the apparent failure of the *Dublin Regime* to fill its declared objective, of geographically fixing TCN in one particular MS, in order to delineate the power effects of this same "failure". Namely, administrative mechanisms of *exclusion from within* consistent with both a national and EU rationale. These are not necessarily deployed to the detriment of the responsible

MS from the moment the concerned persons do not remain there and thereafter find themselves denied the right to see their case examined at their destination.

To come back to the initial discussion of this article, the *Dublin Regime* evidently reinforces MS ability to decide who is allowed to enter the national territory and who is not. The transnational does not replace the national any more than biometric borders replace physical ones. The Seehofer case in particular leads to consider seriously their possible complementarity from the moment the two dimensions of the CEAS are delinked. Not a zero-sum, but a win-win game. Once securitised through technologies of surveillance at a distance like the *EURODAC Banopticon*, freedom of movement does not necessarily infringe national sovereignty. On the contrary, the latter might draw from these technologies the springs of its post-territorial renewal, but at the price of an increased dependency upon technologies of knowledge/power – like the EURODAC Banopticon – under EU agencies control (here, EU-LISA). Therein, it is ironic that those pretending to "de-Europeanise" migration policies promote *tactics of bordering* which can only reinforce the legitimacy of the European "*guild of digital technologies"* managing EU databases (Bigo 2020). The *tactics of bordering* explored in this paper do not equal pure sovereignism. Rather, they signal national actors' attempt to retake control of their borders, but within the formal EU system, and through it, as to extend the capacity of the State to *"embrace"* (Torpey 2000) subjects beyond its own boundaries. As Foucault himself suggests (2004, 111), the transition from territorial sovereignty to the government of populations does not entail the dawn of the former, but its subsumption into governmentality and reinvention through it.

Finally, if the populist projects flourished in the aftermath of 2015 are less anti-EU than they pretend, the idea that "more Europe" is needed at any cost to contain their rise becomes questionable. Until now, the Commission has persisted in promoting a comprehensive approach based on the principles of solidarity and fair sharing of responsibility. When presenting the recent 2020 Migration and Asylum Pact, the Commissioners reaffirmed that the CEAS must be taken as a whole coherent system (EC 2020). In other words, they remained committed to keeping the two dimensions of the CEAS together, insisting on their complementarity. However, in order to gain support for such a position, the Commission is always making more concessions. Indeed, it can be acknowledged how much recent developments, with regard to sanctions against secondary movements, compulsory identification, interoperability, or the extension of the EURODAC scope, amounts to reinforcing the first dimension of the CEAS (Bunyan 2018; Thym 2020; Vavoula 2021). In the meanwhile, developments on the second remained stalled. This is why, against political entrepreneurs who claim a *Security Europe* would avoid EU fragmentation

into "imagined petty nations" ["piccole patrie"] (Minniti 2018), it might be relevant to point out that this same *Security Europe* may constitute an essential prerequisite for the edification of "petty" [biometrical] walls.

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