Carriers' liability in the European Union in the era of migration and the refugee crisis

Maciej Cesarz[1]

Abstract:

The presented article attempts to put carrier sanctions policies in a perspective of the migration and refugee crisis in the EU. The development, motives and rationale of carriers' liability are explored to highlight the process of privatisation and offshoring of immigration control at the level of the EU and its Member States. The article is based on an extensive review of documents and the literature related to the carrier sanctions policy and the migration crisis. An interdisciplinary approach based on European Studies is mostly applied. The migration and refugee crisis is examined as one of the most relevant factors shaping the carrier sanctions policy in the EU. The current legal and political context is presented, including binding international and EU regulations related to carriers' responsibilities. The link between the carrier sanctions and visa policy is explored, as well as main arguments for and against maintaining the measures concerned. The paper argues that carriers sanctions constitute a relevant supporting tool for the national and EU visa policy. Aimed mostly at curbing migratory flows and combating illegal immigration, carriers' liability legislation may lead to exclusion from access to a fair and efficient asylum procedure.

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Introduction

Over the last few decades the control of migration flows has become a priority for the European states. The problem of illegal and undocumented travellers gained particular importance in the late 1980s with the rapid influx of refugees and immigrants to the territories of Western Europe. The fall of

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1   Maciej Cesarz, PhD – Assistant Professor in the Chair of European Studies, University of Wrocław, Poland; maciej.cesarz@uwr.edu.pl

communism, the war and eventual disintegration of Yugoslavia led to an increase in uncontrolled migration flows in Europe, forcing many countries affected by the growing numbers of immigrants and refugees to introduce new mechanisms of border control. Since the events of 1989 migration has been at the centre of international political concern in Western Europe – there was no more potent a symbol of the end of the cold war than the exodus of over a million people from the East which accompanied the collapse of the Berlin Wall (Collinson 1996: 76). Thus, the growing numbers of submitted asylum applications and the new means of reaching the wealthy countries of the European Union have led to substantial development of domestic regulations on undocumented passengers (Scholten 2015: 3).

The new regulatory mechanisms were designed to limit the inflow of the aforementioned category of persons through imposing sanctions on private companies carrying out transport services to persons without required documents (Scholten 2015: 3; Feller 1989: 51-53)[2]. Since the end of 1980s carrier sanctions have remained a constitutive part of national legislations aimed at effective border protection in the majority of European and, in particular, EU Member States. The implemented measures demanded private transport companies to ensure, before transportation, that their passengers were in possession of travel documents required by the state of destination. Inadmissible passengers (undocumented, inadequately documented, holding false or falsified documents) should be refused transportation by the carrier. This way, carrier sanctions policies applied by states shifted the burden of immigration and border control from state authorities to private companies (Scholten 2015: 3).

This policy gained importance in the era of the migration crisis experienced by the EU states, which reached a critical point in 2015, when approximately 1 million immigrants and refugees (mostly from Western Asia, South Asia and Africa) arrived in the Schengen zone, travelling across the Mediterranean Sea or choosing the land route through Southeast Europe. The increasing numbers of unauthorised entries to the EU remain one of the main factors determining the current responsibilities of private enterprises transporting passengers to the territories of the EU Member States. This mechanism, together with the EU's strict visa policy, may seriously affect the rights of refugees covered by international treaties and often pushes persons in need of international protection towards the migrant smuggling industry.

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2   In 1987, Germany, Denmark, Belgium and the United Kingdom adopted new legislation imposing carrier sanctions. Such tools preventing illegal immigration were not new as they started to be introduced in a few countries at the beginning of the 20th century.

Aim and structure

This paper attempts to put carrier sanctions policies in a perspective of the current migration and refugee crisis in Europe. The paper is structured as follows: in the first part, the development of carriers' liability is explored for the purpose of highlighting the motives and rationale behind this policy, which has led to the privatization and offshoring of immigration control at the level of the EU and its Member States. The second part examines the migration and refugee crisis as one of the most relevant factors shaping the carrier sanctions policy in the European Union. The third part is devoted to the current legal and partly political context and contains a brief description and comment on binding international and EU regulations related to carriers' responsibilities. In the fourth part, the relation between carrier sanctions and visa policy is explored. The fifth part presents a discussion and main arguments for and against maintaining the measures concerned. In the last part of this study, conclusions are drawn. The paper is based on an extensive review of documents and the recent literature related to the carrier sanctions policy and the migration crisis. Since the subject is related to various policies, an interdisciplinary approach based on European Studies is mostly applied.

The development of the carrier sanctions policy

Carriers have always controlled passengers' documents for their own commercial and security reasons, but, as Scholten has put it, through sanctions private companies are obliged to check passengers' documents in the interest of the state, to enhance the capacity of the state to control the movement of persons travelling across its borders. With such measures, states de facto co-opt carriers as key actors, and 'privatise' a process that has always been central to state power: immigration control (Scholten 2015). The consequences of such indirect delegation of migration management tasks to carriers through the provision of sanctions are primarily the offshoring of the jurisdiction of States and the privatization of the exercise of the sovereign power to control borders. This is expressed by the externalisation of the international protection function of national authorities and its outsourcing to private actors entitled to admit or refuse the entry of immigrants into the Schengen area (Morgades-Gil 2017: 141).

There are different reasons, however, for governments to impose carrier sanctions, but most prominently it is states' legitimate interest in curbing migratory flows and combating illegal immigration. National authorities also expect enhanced effectiveness of immigration control to be achieved through

the establishment of an additional layer of control in a cost-effective way and by enforcing visa requirements (Rodenhäuser 2014: 226). Sanctions placed upon airlines and other operators transporting persons without required paperwork constitute a key example of how border control mechanisms are currently being outsourced, privatised, delegated, and moved from the border itself to new physical locations (Bloom and Risse 2014: 65). Extraterritorial measures, like carrier sanctions (perceived as a supporting tool for a visa policy) are considered more effective, less costly and involve less publicity than internal measures of exclusion; they also allow the state to avoid congestions at the border with which it could not possibly cope by limiting the number of arrivals (Meloni 2013: 151).

The migration and refugee crisis as a factor shaping the carrier sanctions policy

The carrier sanctions policy becomes increasingly relevant in times of the migration and refugee crisis with which the European Union has struggled to cope since April 2015. Crisis phenomena themselves do not constitute a significant danger to the EU, since they are an inherent part of integration processes, and overcoming them, makes the Union even stronger. However, nowadays the diversity, intensity, increasing frequency and manifold nature of various forms of crises that the Union experiences seem to challenge the main achievements of the European integration project. Additionally, the unpredictable dynamics and hybrid nature of the EU (accompanied by the lack of vision for its eventual structure and powers), diverse integration strategies and finally – imbalance in the attainment and achievement of its goals make the current situation particularly dangerous (Skolimowska, Grzybowska-Walecka 2016: 5). Shaken by the financial and economic challenges which have left whole European regions in stagnation, the politically unstable Union is becoming an ever weaker international actor.

The arrival in Europe of more than 1 million asylum seekers in 2015 unsettled the EU like no crisis before it. The EU's current institutional and legislative arrangements were clearly not up to dealing with the huge influx of migrants, and the crisis laid deep divisions among Member States (Lehne, 2016). Although EU Member States have always been a place of destination for various migration flows, the refugee crisis has its own specificity and multidimen-sional character. In the media and political discourse, it is stressed that the EU is currently facing the greatest challenge, i.e. the largest influx of people since the end of World War II. The conflicts and persecutions in the broad neighbourhood of Europe (especially in Syria and Iraq), as well as instability and poverty in several African states are seen as the main factors forcing millions of women, men and

children to leave their country in search of protection and decent living (European Commission 2015). The numbers reflect the situation – as reported by the UNHCR and the International Organization for Migration (IOM) – persecution, war and poverty have already expelled a million people to Europe in 2015. This number was the highest in Europe since the 1990s, that is, since the breakup of Yugoslavia (UNHCR 2017)[3].

In the subsequent years, however, Member States reported a significant drop in the detections of illegal border-crossing along the EU's external borders, with 204 719 detections recorded in 2017. This represents a 60% decrease compared with the 511 047 detections of 2016 (and an 89% decrease compared with 1.8 million detections at the height of the migratory crisis in 2015) (Frontex 2018: 8).

Nevertheless, in the face of such a massive inflow of refugees, the EU's Dublin Regulation assigning the responsibility for registering and processing asylum applications to the first Schengen country of a refugee's arrival proved unfair and ultimately unsustainable. In addition, Greece and Italy could no longer fulfil their obligations and allowed refugees to move on to wherever they wanted. This imposed an equally unsustainable burden on other Member States, where most of the refugees ended up, primarily Germany, but also Sweden, Austria, the Benelux countries, and Finland (Lehne 2016). From the very beginning there was no consensus among the EU Member States over the nature of the crisis, as Europe experienced mixed migration flows, where groups of migrants and refugees overlapped.

The different legal status of arriving categories of persons plays a significant role in the context of carrier sanctions. The UN Convention Relating to the Status of Refugees defines a refugee as someone who is fleeing conflict or persecution (for reasons of race, religion, nationality, membership in a particular social group or political opinions) and is seeking refuge across international borders. A migrant, on the other hand, is someone who makes a conscious choice to leave his or her home country for a better quality of life or for economic gain (EY 2016: 2). Throughout the whole 2015 the EU, despite political divisions, made a number of significant decisions to cope with the crisis, which included a scheme for the relocation of 160,000 refugees from Italy and Greece to other Schengen states, the establishment of processing centres (hot spots) on the EU's external borders and a complex agreement with Turkey designed to curb the flow

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3   By the end of 2016, 65.6 million individuals were forcibly displaced worldwide as a result of persecution, conflict, violence, or human rights violations. That was an increase of 300,000 people over the previous year, and the world's forcibly displaced population remained at a record high.

of migrants on the Western Balkan route, and commitments to better finance the UN programs supporting refugees in the Middle East. Even though the implementation of most of these decisions made painfully slow progress (while at the same time the numbers of new arrivals kept going up), in 2016 and 2017 Europe experienced limited inflow of migrants, mostly due to the relatively effective implementation of the EU-Turkey agreement (Lehne 2016).

However, perspectives for the EU are not optimistic, taking into consideration the world migration trends. With nearly 67 million of people who have been forced to resettle due to conflicts and persecutions all over the world (almost 20 million of them are refugees, with more than half of them children), it is hard to estimate the improvement of the situation. These figures are constantly growing: the UNHCR figures show a global image of the refugee crisis, stressing that the number of forcefully displaced people is increasing in every region of the world (UNHCR 2016). Between 2009 and 2014, at least 15 conflicts intensifying the phenomenon of refugee emerged, of which: 8 in Africa (Côte d'Ivoire, Central African Republic, Libya, Mali, Nigeria, Democratic Republic of Congo, South Sudan and Burundi); 3 in Asia (Kyrgyzstan, Myanmar and Pakistan); 3 in the Middle East (Syria, Iraq and Yemen) and one in Europe (Ukraine). Even though some of these conflicts have expired, most of them still remain a potential or real source of resettlement. As a result, 1.8 million people applied for refugee status. In addition, in 2015 for a total number of 19.5 million refugees, only 128 thousand returned to their home countries, which is the lowest level in the past 30 years (UNHCR 2016). The map of the regions of the world analyzed through the lens of the Fragile State Index evidently proves that Europe is surrounded by areas of poverty, politically and economically unstable regimes, and ongoing armed conflicts (Fragile States Index 2017). In this sense, Africa constitutes one of the main sources of refugees corresponding to the latest changes in the migratory routes, the relative share of African nationals increased compared with 2016, driven by the fast-growing numbers of migrants from Maghreb countries (notably Moroccans, Algerians and Tunisians) in the latter part of 2017. Consequently, African nationals accounted for almost two-thirds of irregular migrants arriving at the shores of the EU (Frontex 2018: 8).

In the current migration context, more factors are pushing people out of their countries of origin to attractive, wealthy Europe than ever before. Since one of the main destabilization sources (Libya) is located only 450 km from the shores of Europe, it may still become a major illegal migration route. Considering the remaining large pool of migrants stranded in Libya, a Frontex analysis indicates that in the immediate future developments in that area will be most decisive for the overall number of arrivals at the EU's external borders, assuming that the EU-Turkey statement holds.

Even though the decrease in departures from Libya was reported, mostly due to the closed land gate through Turkey and Greece in consequence of the agreement signed in March 2016, one must note that this agreement is a limited instrument of preventing human flows, since at the EU's external border with Turkey, the migratory pressure in 2017 remained roughly at a level with the months after the implementation of the EU-Turkey statement (Frontex 2018: 8). Additionally, the probability of further migration of Syrians to the EU is the largest among refugees in Turkey, where linguistic and social barriers make it still very hard to create decent living conditions and the underfunding of aid organizations is becoming more and more perceptible. The destruction of the economy and the lack of education as a result of warfare may lead to under-development of the next generation and, in the future, to radicalization and eventually even greater migration (Sasnal 2015: 6).

A general decrease in the number of illegal border crossings observed at the EU external borders in 2017 was associated with a significant drop in detections on the Eastern Mediterranean route (and, secondary to it, the Western Balkan route) and the Central Mediterranean route (Frontex 2018: 8). According to latest Frontex reports, the strong rise in detections on the Western Mediterranean route, the displacement effects on the other routes and the absolute number of detections, which exceeds any total recorded in recent history before the year 2014, together indicate that the pressure on the EU's external border still remains high (Frontex 2018: 8).

It should be noted, however, that eliminating one source of irregular migration is not always a final solution to the problem, since closing one route often increases the intensity of human flows in the other. For instance, even though Frontex reported a visible decrease in departures from Libya, more boats successfully left from the shores of Tunisia and Algeria in the third and fourth quarters of 2017 (Frontex 2018: 8). Regional differences are notable, however, as the number of Eastern African nationals fell by a lot more than the relative decline in numbers caused by the curb imposed by developments in Libya would suggest: Frontex reported that the numbers of Eritreans, Somalis and Ethiopians, for instance, fell to roughly a fourth of their 2016 levels (Frontex 2018: 8).

Referring to many African and Asian countries, their destabilization and economic backwardness should be regarded as structural, so the situation and living conditions will not improve radically in the near future. Especially the share of African migrants (in particular West Africans) detected crossing the border illegally is likely to grow. The intensification of conflicts in Nigeria or in countries such as Afghanistan may additionally enhance migration to Europe.

Unlike the Eurozone or any other crisis united Europe experienced, the main determinants of migration pressures (such as war, demography, climate change, conflicts and poverty) are external. There is no indication that these factors will change in the short or even medium term. They may, however, effectively dissolve solidarity between countries of the European Union, which still hasn't worked out effective methods to alleviate the migration problems and to effectively protect its external borders.

Provisions for carriers' liability

Provisions for carrier sanctions in domestic legislations constitute one of the main tools implemented by EU Member States in order to limit illegal entries of third country nationals into their territories. According to Rodenhauser, carrier sanctions (in a broad sense) consist of the following three main components:

a) the duty of a carrier to remove an undocumented migrant brought to a country;

b) the duty of the carrier to bear all expenses (including detention or accommodation) until the undocumented migrant is removed;

c) a fine imposed on the carrier for bringing an undocumented migrant to the frontier of a state (Rodenhäuser 2014: 226).

Besides national legislation, carriers' sanctions are also covered by several international treaties, namely: the Chicago Convention on International Civil Aviation (1944); the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), supplementing the UN Convention against Transnational Organized Crime; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (2000), supplementing the UN Convention against Transnational Organised Crime.

From the European Union perspective, the most prominent provisions are included in the Schengen *acquis*. In particular, under article 26 of the Schengen Convention, states agreed that 'the carrier shall be obliged to take all the necessary measures to ensure that an alien carried by air or sea is in possession of required documents. The rule applies to air, sea, and land carriers, which at the request of the border authorities at the port of arrival must return the persons concerned to the third country from which they were transported; to the third State which issued the travel document; or to any other country guaranteeing admittance (Moreno-Lax 2017: 122).

Two additional EU directives implemented the Schengen mandate (Articles 26.1 and 2 of the Schengen Convention) on this issue and established

a harmonized, supranational system of carrier sanctions. The first Directive (2001/51/EC) was aimed at harmonizing the sanctions foreseen in European countries in order to ensure their deterrent effect, effectiveness and proportionality, and established fines between 3000 and 5000 € for each undocumented person carried (Council of the EU 2001). Directive 2001/51/EC did not prevent Member States from adopting or retaining other measures involving penalties of another kind, including immobilization, seizure and confiscation of the means of transport, or temporary suspension or withdrawal of the operating license (Article 5). The Directive requires that Member States ensure that their laws, regulations and administrative provisions guarantee that carriers against which proceedings are brought have effective rights of defence and appeal (Article 6). As intended by the EU Directive, the transposition intensified obligations for private transportation companies in Member States; however, in most of them, the impact of the Directive was rather marginal, as obligations for carriers had already existed before due to the implementation of Article 26 of the Schengen Convention.

The other Directive (2004/82/EC) extends and defines the obligations of carriers to send information concerning people who are being transported to a country of destination (Council of the EU 2004; Morgades-Gil 2017; 141). It aimed at improving border controls and combating illegal immigration by the transmission of advance passenger data (API) by carriers to the competent national authorities (Article 1). The fundamental obligation imposed here is to communicate certain pieces of information regarding passengers to be transported to the territory of the Member States to the competent border services at their request (Moreno-Lax 2017: 124). The directive also required the Member States to take the necessary measures to impose sanctions on carriers which, as a result of fault, have not transmitted data of transported persons or have transmitted incomplete or false data (Article 3.)

Contemporary EU legislation evidently confirms the tendency to broaden the liability of carriers in times of enhanced migration flows. For example on 21 April 2016 a directive on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime was adopted (European Parliament, Council of the EU 2016). It aims to regulate the transfer from the airlines to the Member States of PNR data of passengers of international flights, as well as the processing of such data by the competent authorities. Under the new provisions, air carriers will be obliged to provide the Member States' authorities with the PNR data for flights entering or departing from the EU. The mechanism itself is not new – PNR data concerning the information provided by passengers to carriers when booking a flight and

when checking in on flights are already stored in the carriers' reservation systems (Consilium 2017)[4]. The Directive stipulates that EU Member States shall lay down rules on penalties, including financial penalties, against air carriers which do not transmit necessary data nor do so in the required format. The penalties provided for shall be effective, proportionate and dissuasive (art. 14).

Carrier sanctions as a support for a visa policy

Nowadays national passports for citizens and visa systems designed for non-residents manage the orderly movement of people between states on a temporary or permanent basis. This is considered an inevitable outcome of the Westphalian order, which confirms the right to states' exclusionary practices within territories defined by borders, where the unauthorized movement of individuals represents a challenge to the principle of sovereignty, which obviously requires a degree of territorial closure (Zampagni 2013: 8).

A modern, comprehensive passport and visa system is inseparable from establishment of a modern nation-state and through centuries nation-states have successfully monopolized the authority to determine who may enter their external borders, which constitutes the principle of national sovereignty (Torpey 2000; Anderson 2015: 15-29). Visas are an instrument to control access into the state territory by non-nationals in a 'remote way', which are used by states mostly to block inflows of migrants and asylum seekers and to exclude actual or potential undesirables such as criminals or terrorists (Meloni 2013). It is a common practice for Europe experiencing increased migration to impose visa requirements on nationals of various states, particularly ones that generate significant numbers of refugees. A visa policy (including common EU visa regulations) is given far greater effect by its frequent combination with carrier sanctions, according to which airlines and other carriers are fined for bringing into a country any person who lacks a visa or other requisite documentation for entry (Nicholson 2011: 7).

It is often suggested that refugees' dangerous journeys to the EU are a result of EU visa policies and carrier sanctions. While nationals from refugee-producing countries require visas to reach the EU (Visa Regulation 539/2001), visa-issuing criteria listed in Article 21 of the Visa Code include proof of willingness and ability to return to the country of origin. On the other hand, refugees are legally defined under EU and international law as persons in need of protection, they thus

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4   PNR data includes the name, travel dates, travel itinerary, ticket information, contact details, travel agent at which the flight was booked, means of payment used, seat number and baggage information.

are unable to return to those very same countries (Article 1(A)2 of the Refugee Convention and Article 2 of the Qualification Directive) (Guild et al 2015: 4).

At the same time clauses on carrier sanctions found in Article 26 of the Schengen Convention and EU Directives had the effect that migrants without a required visa were not allowed on aircraft, boats or trains going into the Schengen Area. The airlines and other carriers operating in Schengen Area are required to check for necessary documents and refuse embarkation to travellers without visas. Asylum seekers are particularly likely to be rejected as they are naturally prone to lack full documentation and unlikely to have been granted a visa. As long as airline companies are faced with a prospect of substantial economic penalisation for erroneous decisions regarding undocumented asylum seekers, they are likely to adopt a preventive logic of 'if in doubt, leave them out' (Gammeltoft-Hansen 2016: 8). Additionally the laws on migrant smuggling ban helping undocumented migrants to pass national borders. As a result, left with no means of legal access, migrants without visas and refugees are pushed into illegality, obliged to turn to smugglers (or fall prey to traffickers) to reach the EU territory via unsafe routes (Guild et al 2015: 4). In 2015, at the peak of the migration crisis, thousands of migrants who were not holding necessary visas and thus not qualifying for an air passage resorted to migrant smugglers.

Carrier sanctions coupled with visa obligations have led to some extent to a rapid expansion of illegal activities of human smuggling such as the buying, selling and exchange of false, counterfeit or stolen passports, visa stamps and other empty papers, and the organization of alternative entry routes, which used to be mostly via Southern and Eastern Europe (Cruz 1994: 5). According to Europol, in 2015 more than 40,000 people (coming mainly from Bulgaria, Egypt, Hungary, Iraq, Kosovo, Pakistan, Poland, Romania, Serbia, Syria, Turkey and Tunisia) participated in the migrant-smuggling business (Europol 2015). It is important to note the very high profits generated by illegal services including transport, accommodation and catering for migrants deciding to take a greater risk and illegally travel overland to reach EU Member States. The UN Office on Drugs and Crime reported that migrants paid between US$2,000 and US$10,000 to get to Europe, primarily via neighbouring countries (Guild et al 2015). In fact, the more difficult it has become to enter Europe, the higher the price paid to traffickers, and the more lucrative and attractive the "business" has become (Cruz 1994: 5).

Carrier sanctions in contemporary discourse

The externalization and privatization of border control followed as a most significant consequence of the indirect delegation of migration management tasks

to carriers through the sanctions. The outsourcing of the exercise of the sovereign power to control borders and the right to admit or refuse the entry of immigrants into the territory of a state empowered private actors with tasks and responsibilities which were not originally part of their core business (Scholten 2015: 2).

The official argument presented was that introduction of carriers' liability legislation had been aimed at not so much combating clandestine immigration, but rather preventing what EU Member States considered to be the widespread "abuse of asylum procedure" (Cruz 1994: 5). Thus, this mechanism is designed essentially to prevent the arrival of asylum-seekers who might attempt to travel (mostly by air) direct from their country of origin to a destination state in Western Europe to apply for asylum. According to some researchers, this policy appears to have resulted in a decline in the number of asylum applications made at airports, and can therefore be described as a qualified success from the point of view of the governments in question (Collinson 1996: 80).

However, the issue of extraterritorial immigration control has attracted a great deal of criticism from various human rights actors and provoked a lively scholarly debate. In particular, it has been questioned whether extraterritorial immigration control practices (in particular a visa policy and carrier sanctions) are compatible with the principle of non-refoulement under international refugee and human rights law[5]. Such privatization is often found controversial, because refugees have harder access to complaint mechanisms and advocacy institutions, whereas a large part of private involvement in migration management takes place 'out of sight', at points along the migratory route or in difficult-to-access locations, such as transit airports, which hampers democratic control (Gammeltoft-Hansen 2016: 24).

A relevant aspect of carrier sanctions practices discussed by some researchers is the unclear role played by immigration liaison officers (ILOs). Private transport companies may be assisted by Member States' airport liaison officers, document advisers or immigration liaison officers (ILOs) for the fulfilment of their duties associated with controlling passengers' travel documents. Thus, the offshoring of visa processes is supported by new networks of immigration officers

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5   The most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution, which has found expression in the principle of non-refoulement. The principle has been defined in a number of international instruments relating to refugees, including the 1951 United Nations Convention relating to the Status of refugees, which, in Article 33(1), provides that: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

working in origin and transit states, who check passengers' identities before they depart, rather than at the border. For example, the U.K. Border Agency has a Risk and Liaison Overseas Network (RALON) of Immigration Liaison Managers in foreign airports and British consulates who train and give on-the-spot advice to the check-in staff of flights departing for the United Kingdom (Nicholson 2011: 5).

As Moreno-Lax has put it, although boarding decisions are officially made by transport companies' staff, „there is evidence suggesting that immigration authorities of destination countries deployed in States of embarkation 'assist' or 'advise' airline and shipping personnel through direct intervention at check-in points or more indirectly by the provision of training" (Moreno-Lax 2017: 134). Nicholson also mentions a concern with such checks associated with the lack of reviewability of visa decisions – individuals refused boarding at foreign ports have little recourse against errors or arbitrary decisions (Nicholson 2011: 5). In reality, the formally equal relation between the ILO's and carriers' staff is illusory – transport companies are pressed by fines which are linked to the ILO's advice – so the situation reflects rather an overarching pre-eminence of the State of arrival, manifested in the 'advice' delivered under threat of sanctions (Moreno-Lax 2017: 134).

ILOs' activities affect protection seekers also due to the fact that their specific tasks are regulated in national law and may vary greatly from country to country; additionally, common regulations do not refer to any concrete human rights or refugee law obligations with which ILOs must comply. Thus, the presence of ILOs acts as a supplement to the system of 'imperfect delegation' inherent in the carriers' liability regime, rendering visible the 'hidden coercion' exerted by Member States through carrier sanctions (Moreno-Lax 2017: 134).

The externalized border checks highly reduce opportunities for individuals at risk of persecution to reach asylum. First of all, refugees may be refused entry on the carrier or by the immigration officer at the country of origin. Even if they manage to arrive in the country of their destination without papers required, the impetus is for carriers to return people quickly so they are not saddled with expensive detention fees (Nicholson 2011: 5). In reality, as long as airlines are faced with a prospect of substantial economic penalisation for erroneous decisions regarding undocumented asylum seekers, they are likely to adopt a preventive logic of 'if in doubt, leave them out' (Gammeltoft-Hansen 2016: 8).

Undoubtedly, forcing carriers to verify visas and other travel documents helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties to their corporate employer rather than to provide protection to individuals, and contributes to placing important

responsibility in the hands of unauthorized actors to make asylum determinations on behalf of states thoroughly untrained in refugee and asylum principles, and motivated by economic rather than humanitarian considerations (Cruz 1994: 5).

Because of their nature as a remote control instrument, visas and carrier sanctions are often described as a way for states to bypass liberal rights (mostly the non-refoulement principle) which would be triggered as soon as a non-national reaches the state border or is inside the state territory (Meloni 2013: 151). Asylum seekers are particularly likely to be rejected as they are naturally prone to lack full documentation and unlikely to have been granted a visa (Gammeltoft-Hansen 2016: 8). Imposition of fines on the carriers together with visa restrictions pushed relatively untrained individuals (carrier personnel) to make decisions that may have enormous consequence for a traveller. Another controversy is raised by the fact that such decisions, even in complex cases, are taken quickly at the check-in counter and are in fact unreviewable (Nicholson 2011: 9). According to several researchers, carrier sanctions may stay in contravention with the right to leave one's country, which is essential to the right to seek asylum (ECRE 2007: 7).

Various sources suggest that after many years of the application of carrier sanctions in Member States (such as Belgium, Germany and the UK) it is highly questionable whether it has been an effective means of curtailing the arrival of asylum seekers, since the number of asylum-seekers in these countries has actually continued to rise. It must be noted that the overwhelming majority of asylum seekers arrive through land borders or enter the country legally, as tourists, students or other kind of visitors and subsequently apply for asylum (Cruz 1994). To date, there is no sufficient answer to the question of a legal justification for the indirect delegation of migration management tasks to carriers through the provision of sanctions (Reinish and Fink 2013: 5).

As it was mentioned above, national governments and EU institutions consider extraterritorial tool of border management, including carrier sanctions, an effective and costless measures of exclusion, which reduce the number of arrivals and do not attract public attention. It is rather doubtful whether in the era of increased migration flows decision-makers in the EU and its Member States will eagerly accept the relaxation of the regime in question. In the light of the collective weakness of the EU, Member States increasingly resort to individual actions such as reimposing border controls or building fences along their frontiers, which hampers the free movement of persons even in the case of EU nationals. Even though there is an obvious need for the reconceptualization of carrier sanctions, the asymmetrical impact of the crisis itself may be a fundamental obstacle to a new and coherent collective formula for liability of private actors involved in transport.

Achieving solidarity in the face of a common challenge can be extremely difficult since only minority of EU countries were affected significantly by the migrant and refugee crisis (Lehne 2016).

Summary

Carrier sanctions are included as a provision of the Schengen acquis and have been progressively incorporated into national legislation in Western Europe over recent years. They can be perceived as a remote control instrument, which is supplementary to controls before and at the border, whereby the concept of the border as a line between states is abandoned (Scholten and Minderhoud 2008: 123). Faced by an increasing number of persons applying for asylum, EU Member States implemented measures demanding transport companies to ensure before embarkation their passengers were in possession of required documents.

The imposition of sanctions on airlines and other carriers has privatized the significant part of the offshore visa regime in that it has made having a valid visa essential to board a commercial flight or ship (Nicholson 2011: 7). Thus carriers' liability constitutes a relevant supporting tool for the visa policy of the EU and its Member States. It has placed private actors in the role of visa monitors, forcing them to play a dual role of policing a state's border abroad through the visa system and to form the border abroad for those persons who do not require visas (Nicholson 2011: 7). Although it has been argued that the effect of these blocking instrument is no more than that of visas, visas alone do not impede travel. The lack of a required visa makes migration illegal (irregular), but does not block physical access to the external border (Moreno-Lax 2017: 144).

The decision to fine carriers for bringing inadmissible passengers creates the risk for effective refoulement, when persons in need of international protection are excluded from access to a fair and efficient asylum procedure. It is considered that carrier sanctions have a potentially fatal impact particularly on subsidiary protection seekers, who do not qualify as refugees but require asylum. Thus, aimed mostly at curbing migratory flows and combating illegal immigration, carriers' liability legislation tends to undermine the effectiveness of the non-refoulement principle. Even though adverse effects of carrier sanctions like other forms of private involvement in migration management are often mentioned, it is rather doubtful whether in the era of the growing numbers of asylum seekers new, more human-rights oriented solutions referring to carriers' liability will be introduced in the nearest future.

Literature:

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Odpowiedzialność przewoźników w Unii Europejskiej w perspektywie kryzysu migracyjnego i uchodźczego

Streszczenie:

   Niniejszy artykuł zawiera analizę polityki sankcji nakładanych na przewoźników w perspektywie kryzysu migracyjnego i uchodźczego w UE. Omówiono w nim ewolucję i motywy ustanowienia odpowiedzialności przewoźników w celu ukazania procesu prywatyzacji i relokacji kontroli imigracyjnej na poziomie UE i jej państw członkowskich. Artykuł opiera się na obszernym przeglądzie dokumentów i literatury związanej z polityką sankcji przewoźników i kryzysem migracyjnym. W większości przypadków stosuje się podejście interdyscyplinarne oparte na badaniach europejskich. Kryzys migracyjny i uchodźczy jest rozpatrywany jako jeden z najbardziej istotnych czynników kształtujących politykę sankcji nakładanych na przewoźników w UE. Przedstawiono aktualny kontekst prawny i polityczny, w tym wiążące przepisy prawa międzynarodowego i unijnego regulującego obowiązki przewoźników. Analizie poddano też związek między odpowiedzialnością przewoźników a polityką wizową, a także najważniejsze argumenty przemiawiające za albo przeciw utrzymaniu wymienionych środków. W artykule postawiono tezę, że odpowiedzialność przewoźników stanowi istotne narzędzie wspierające krajową i unijną politykę wizową. Ukierunkowane głównie na ograniczenie przepływów migracyjnych i zwalczanie nielegalnej imigracji przepisy dotyczące odpowiedzialności przewoźników mogą jednakże uniemożliwić dostęp do uczciwej i skutecznej procedury azylowej.

Słowa kluczowe:

sankcje nakładane na przewoźników, kryzys migracyjny, zarządzanie granicami zewnętrznymi w UE