

The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded

The commitment to a more human approach to protection and the emphasis on the fact that migration is needed and positive for Europe with which the European Commission launched the Pact on Migration and Asylum is welcome. However, this rhetoric is reflected only sparsely in the related proposals. Instead of breaking with the fallacies of the EU's previous approach and offering a fresh start, the Pact risks exacerbating the focus on externalisation, deterrence, containment and return.

This initial assessment by civil society of the legislative and non-legislative proposals is guided by the following questions:

- 1) Are the proposals able to guarantee in law and in practice compliance with international and EU legal standards?
- 2) Will they contribute to a fairer sharing of responsibility for asylum in Europe and globally?
- 3) Will they work in practice?

Rather than automatic sharing of responsibility, the Pact introduces a more complex Dublin system (by another name) and 'return sponsorship'

The Pact on Migration and Asylum missed the opportunity to fundamentally reform the Dublin system and the default responsibility for assessing asylum claims remains, in practice, with the first country of arrival. In addition, a complex system in which some form of solidarity is triggered has been proposed.

There are some positive additions to the criteria used to determine which Member State is responsible for examining an asylum application. For example, an expanded definition of family to include siblings, a broad range of family members in the case of unaccompanied children and the receipt of a diploma or other qualification from a Member State. However, judging by current Member State practice, it will be a challenge to overcome the first country of entry principle as the go-to option in favour of the new priority considerations, notably family reunification.

Solidarity is required of Member States in the case of a high number of people arriving ("migratory pressure") or disembarkations from search and rescue operations. The ensuing processes include a series of assessment and reports being drafted and pledges by individual Member States. If the aggregate response falls short, the European Commission can take corrective action. This looks less like a mechanism that supports predictable sharing of responsibility and more like the kind of negotiations among Member States with which we have all become too familiar. The complexity of what has been proposed raises doubts as to whether it is actually workable in practice.

Member States are allowed to provide "return sponsorship" instead of relocating people to their own territories, which suggests an equal focus on return to the focus on protection. Instead of supporting individual Member States managing a higher number of asylum applications, this proposal raises numerous human rights and legal concerns, especially should transfer to the so-called sponsor state take place after the deadline of 8 months has passed. Who will monitor the treatment of rejected asylum-seekers when they arrive in countries whose governments do not accept relocation?

The Pact proposes expanded use of border procedures, including increased detention

Instead of recalibrating responsibility among EU Member States, the procedural reform proposals exacerbate the pressure on Member States at the EU's external border and countries in the Western Balkans. The Commission proposes mandatory asylum and return border procedures in certain cases, including for nationals of, or stateless residents in, countries where the average EU protection rate is below 20%. It is optional when Member States are applying Safe Third Country or Safe Country of Origin concepts. However, the Commission has previously proposed that these concepts become mandatory for Member States. NGOs reiterate the concerns about the use of Safe Third Country and First Country of Asylum concepts, which were discussed extensively between 2016 and 2019. In particular, mandatory use should not be proposed again.

The proposed border procedure is predicated on two flawed assumptions - that the majority of people arriving in Europe do not have protection needs and that assessing asylum claims can be done easily and quickly. Neither are correct. A [consideration of first and appeal decisions](#) across the EU indicates that most people claiming asylum in Europe in the last three years have received a form of protection status. In addition, the Pact should not persist with the wrongheaded approach that fast asylum procedures can be achieved by reducing safeguards and introducing a system of triage. The average length of the [asylum procedure in the Netherlands](#), often referred to as the poster child for this practice, exceeds a year and can last up to two years until a decision has been taken.

The proposal will effectively result in two standards of asylum procedures, largely determined by the country of origin of the individual concerned. This undermines the individual right to asylum and will mean that more people are subject to a second-rate procedure. Proposing that Member States should issue an asylum and return decision simultaneously without clearly specifying the requirement that important safeguards related to *non-refoulement*, best interests of the child and protection of family and private life are assessed, undermines international legal obligations. The proposal also removes the automatic suspensive effect of an appeal, i.e. the right to remain pending a decision for cases decided in the border procedure.

The suggestion that people undergoing border procedures are not considered to have formally entered the territory of the Member State is misleading, contradicts recent EU jurisprudence but does not change the individual's rights under EU and international law.

The proposal also deprives people of the possibility to access residence permits for grounds other than asylum and will likely involve detention for up to 6 months at the EU's borders, a maximum of 12 weeks for the asylum border procedure and another 12 weeks in case of a return border procedure. In addition, the reforms remove the principle that detention should only be applied as a measure of last resort in the context of border procedures. By relying on more systematic restrictions of movement in border procedures, the proposal will restrict the individual's access to basic services provided by actors who may not operate at the border, including for legal assistance and representation. The similarities in outcomes to the failed 'hotspot approach' implemented on the Greek islands are notable.

The recognition that the best interest of the child shall be a primary consideration for Member states with respect to all procedures is positive. However, the Commission lowers the protection standards for children, only exempting those who are unaccompanied or under the age of twelve from border procedures. This is in contradiction with the internationally recognised

definition of children as every person until the age of eighteen, included in the Convention on the Rights of a Child, ratified by all EU Member States.

In situations of crisis, Member States are allowed to derogate from important safeguards which will subject more people to substandard asylum procedures

The concern about procedural unfairness becomes even more acute in situations where a Member State can claim that they are facing an 'exceptional situation of mass influx' or even the risk of such a situation.

When this occurs, the scope of the border procedure is significantly expanded and can be applied to all people arriving from countries where the average EU protection rate of the nationality concerned is below 75%. Both the asylum border procedure and the return border procedure can be extended for an additional eight weeks so five months each, prolonging the maximum amount of time spent in border detention to 10 months. In addition, Member States can suspend registration of asylum applications for four weeks and up to a maximum of three months. With no claim registered for weeks, people may be at risk of detention, *refoulement* and their rights to adequate reception and basic services can be severely affected.

This enables Member States to derogate from their responsibility to provide access to asylum and ensure that peoples' asylum requests are treated efficiently and fairly, and thus increases the risk of *refoulement*. From the perspective of the most extreme case of Member States acting in flagrant and persistent violation of EU law obligations, this process of requesting permission from the European Commission could be considered an improvement because currently the law is ignored without consultation of and despite criticism by the European Commission. However, this cannot be the starting point to assess proposed EU legislation. The broader impact of this will be that it opens up the possibility that the vast majority of people arriving in Europe will be subject to a second-rate procedure.

Screening at the border: risks and opportunities

The Commission proposes a "pre-entry screening" process for all people who arrive at EU borders irregularly, including following disembarkation after search and rescue. The screening process includes security, health and vulnerability checks, and registration of biometric data but it also leads to decisions which relate to access to asylum including whether to apply the accelerated border procedure, relocation and return. This process can take up to 10 days, and should be carried out as close as possible to the border. Where people will be accommodated and how reception standards will be met during that time is not clear. The screening can also be applied to people inside the territory of a Member State, which could lead to an increase in discriminatory policing. Questions arise regarding access to information, the rights of people undergoing the screening, including access to a lawyer and the right to challenge the decision; the grounds for refusal of entry; and the privacy and protection of the data collected. As Member States can easily discharge their responsibilities regarding medical and vulnerability screenings, it is not clear whether related needs will be detected and acted upon.

A welcome initiative is the proposed independent monitoring of fundamental rights at the border. To ensure that this mechanism results in accountability for rights violations at the border, including the persistent use of summary removals and push-backs across a large number of Member States, it needs to be expanded beyond the screening procedure, be independent of national authorities, and involve independent organisations such as NGOs.

The priority of return and deportation dominates the proposal

The overriding objective of the Pact is clear: an increase in the number of people who are returned or deported from Europe. The creation of the role of a Return Coordinator within the Commission and of a Frontex Deputy Executive Director on Returns without similar appointments on protection standards or relocation illustrate this point. Return is an accepted part of migration policy and support for dignified returns, with a preference for voluntary returns, access to return counselling, and reintegration support is important. However, investment in return is not the answer to the systematic non-compliance with asylum standards in EU Member States.

Nothing new on external action: unrealistic proposals which risk undermining human rights continue

The tension between the rhetorical commitment to mutually beneficial international partnerships and the insistence on migration being at the core of the EU's relationships with third countries continues. Attempts to externalise responsibility for asylum, and to mis-use development assistance, visa schemes and other tools to pressure third countries to cooperate on migration control and readmission agreements will continue. This not only risks contradicting the EU's own commitment to development principles, but also undermining its international standing by generating mistrust and hostility from and among third countries. Furthermore, using informal agreements and security cooperation for migration control with countries such as Libya or Turkey risks enabling human rights abuses, emboldening repressive governments and creating greater instability.

Lack of ambition on safe and regular pathways to Europe

An opportunity to signal that the EU is ready to contribute to responsibility sharing for protection on the international stage in the spirit of partnership with countries who are hosting the large majority of refugees was missed. Instead of proposing an ambitious refugee resettlement target, the European Commission has only invited Member States to do more and has converted Member State pledges for 2020 into a two-year scheme, resulting in a lost year for EU resettlement.

The recognition of the need to facilitate more labour migration across skills levels is welcome but the significance of labour migration for European economies and societies is not reflected in the related resources, proposals or actions.

Support to search and rescue and actions of solidarity need to be reinforced

The humanitarian tragedy in the Mediterranean Sea still needs to be addressed, including for example through EU-funded and run search and rescue capacity. Search and rescue and disembarkation are included in all relevant proposals, acknowledging that there is an ongoing humanitarian crisis. However, instead of addressing the behaviour and regulations of governments to obstruct sea rescues and enabling the work of human rights defenders, the European Commission suggests that safety standards on ships and communication levels with private actors need to be monitored. It also appears to require private actors to adhere not just to laws, but also policies and practices regarding "migration management" which can potentially interfere with search and rescue obligations.

While the issuance of guidance to prevent criminalisation of humanitarian action is welcome, this is limited to acts mandated by law with a specific focus on search and rescue. This risks

leaving out humanitarian activities such as the provision of food, shelter or information conducted on land or carried out by organisations not mandated by law which are also subject to criminalisation and restrictions.

Promising signs for inclusion

Proposed changes that would enable refugees to gain long-term residence after three years and strengthen the right to move and work in other Member States are positive. In addition, the revision of the Action Plan on Inclusion and Integration and the establishment of an expert group to collect views of migrants to inform EU policy is welcome.

The way ahead

The presentation of the proposals is a start to what promises to be another long and conflictual period of negotiations on the EU's asylum and migration rules. While those negotiations are ongoing, it is important to recall that there is an EU asylum framework in place and that Member States have obligations under existing international and EU law.

This requires immediate action by EU policy makers, including Member States, to:

- Implement existing standards in relation to reception and asylum processes, investigate non-compliance and take necessary disciplinary measures;
- Save lives at sea, ensuring search and rescue capacity, allowing timely disembarkation and swift relocation;
- Continue to seek ad-hoc solidarity arrangements to alleviate pressure on Member States at the EU's external border and support Member States to agree to relocation.

For the upcoming negotiations on the Pact, we recommend that co-legislators:

- Reject the mandatory application of asylum or return border procedures: they are substandard procedures which reduce safeguards for applicants and increase detention. They will exacerbate the current lack of solidarity for asylum in Europe by placing more responsibility on Member States at the external border. Experience from the hotspots and similar initiatives shows that adding extra asylum procedures or tracks can create significant administrative burden and costs, and generate more inefficiency;
- Work towards the end of migration-related detention, prohibit migration-related detention of children as per the Convention on the Rights of the Child and dedicate sufficient resources to appropriate non-custodial solutions for children and their families;
- Recalibrate reform proposals to focus on maintaining and raising asylum and human rights standards in Europe, rather than return;
- Work towards proposals that fundamentally reform the way in which responsibility for people seeking asylum in Europe is organised, addressing the first country of entry principle, in order to create meaningful and predictable mechanisms for solidarity;
- Limit possibilities for Member States to derogate from responsibilities to register asylum applications or process asylum claims in order to avoid creating incentives for operating in crisis mode and for lowering asylum standards;
- Increase the safeguards during the screening procedure to ensure information is provided; access to a lawyer is ensured; health needs and vulnerabilities are detected and swiftly acted upon; and address concerns regarding registration and sharing of biometric data;

- Ensure that the monitoring mechanism for fundamental rights at borders is broad in scope to cover all fundamental rights violations at the border, truly independent from national authorities, well-resourced and that it contributes to accountability;
- Resist attempts to use development assistance, trade, investment, visa schemes, security cooperation and other policies and funding to pressure third countries into cooperation on narrowly defined EU migration control objectives;
- Evaluate the long-term impact of externalised migration policies on peace, rights and sustainable development and ensure that external migration policy is not contributing to human rights violations and is conflict sensitive;
- Significantly expand safe and regular routes to Europe by swiftly implementing current resettlement commitments, proposing ambitious new targets and increasing opportunities for protection pathways as well as for regular migration to work and study in Europe;
- Strengthen the exemptions of humanitarian action and other independent civil society activities from criminalisation and remove obstacles to civil society actors providing life-saving and other humanitarian assistance on land and at sea;
- Establish an EU-funded and run Search and Rescue Operation in the Mediterranean Sea;
- Build on the promising proposals to support inclusion through access to long-term residence and related rights and by implementing the upcoming Action Plan on Integration and Inclusion at the EU, national and local level.

Signatories

11.11.11

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ActionAid Denmark

ActionAid Hellas

ActionAid International

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Alianza por la Solidaridad-ActionAid Spain

Amnesty International

ASGI

Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej), Poland

AsyLex

Asylrättscentrum/ Swedish Refugee Law Center

AWO Bundesverband

Bhutan Watch

Bulgarian Helsinki Committee

Caritas Europa

Centre for Peace Studies Zagreb

COMPASS for Refugee Youth

Conselho Português para os Refugiados – CPR (Portuguese Refugee Council)

Cyprus Refugee Council
Danish Refugee Council (DRC)
Der Paritätische Gesamtverband
Deutscher Caritasverband
Diakonie Austria
Diakonie Deutschland
Dutch Council for Refugees
ECRE
Estonian Refugee Council
Europe Must Act
European Evangelical Alliance
FARR, the Swedish Network of Refugee Support Groups
FOCSIV, Italian Federation Christian organisations international volunteering service
Forum réfugiés-COSI
Foundation Our Choice, Poland
Fundacja Polskie Forum Migracyjne/ Polish Migration Forum Foundation
Group 484
Help Refugees/ Choose Love
Helsinki Foundation for Human Rights
HIAS Greece
Homo Faber Association
Hrvatski pravni centar/Croatian Law Centre
Human Rights Watch
Hungarian Helsinki Committee
International Centre for Eritrean Refugees and Asylum Seekers -ICERAS
International Rescue Committee (IRC)
INTERMOS
Irish Refugee Council
Issues Without Borders
Italian Council for Refugees/Consiglio Italiano per i Rifugiati-onlus
JRS Europe
Legal - Informational Centre for NGOs - PIC, Slovenia
Lesvos Solidarity
Mosaico azioni per i rifugiati
Network for Children's Rights (Greece)
NOMADA Association for Multicultural Society Integration
Norwegian Organisation for Asylum Seekers (NOAS)
Norwegian Refugee Council (NRC)
Pro Asyl
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