EUROPEAN POLICY CENTRE

Odysseus Network
Academic Network for Legal Studies on Immigration and Asylum in Europe
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From Compromise to Implementation: A New Era for EU Migration Policy?

Evangelia (Lilian) Tsourdi
Alberto-Horst Neidhardt
Helena Hahn
(eds.)

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ABOUT THE EPC

The **European Policy Centre** (EPC) is an independent, not-for-profit think tank dedicated to fostering European integration through analysis and debate, supporting and challenging European decision-makers at all levels to make informed decisions based on evidence and analysis, and providing a platform for engaging partners, stakeholders and citizens in EU policymaking and in the debate about the future of Europe.

The **European Migration and Diversity** programme provides independent expertise on European migration and asylum policies. The Programme's analyses seek to contribute to sustainable and responsible policy solutions and are aimed at promoting a positive and constructive dialogue on migration. The programme follows the policy debate taking a multidisciplinary approach, examining both the legal and political aspects shaping European migration policies. The analysts focus, amongst other topics, on the reform of the Common European Asylum System; the management of the EU's external borders; cooperation with countries of origin and transit; the integration of beneficiaries of international protection into host societies; the links between migration and populism; the development of resettlement and legal pathways; and the EU's free movement acquis. The team benefits from a strong network of academics, NGO representatives and policymakers, who contribute regularly to publications and policy events.

The **Odysseus Academic Network** is a network of experts in European immigration and asylum law and policy. It was founded in 1999 by Philippe de Bruycker, Professor at the Institute for European Studies of the Université Libre de Bruxelles (ULB), initially with the financial support of the European Commission. The Network brings together legal experts from all EU Members States, Schengen associated States (Norway, Switzerland, Iceland), as well as Turkey. Its coordination team is based in Brussels. The Network and its members provide comprehensive scholarly analysis of European law and policy; undertake consultancies for EU institutions; support the studies of the European Migration Network (EMN); organize European thematic conferences; publish scientific and policy outputs at European and national levels; communicate and co-create research with policy-makers; run a widely read blog that analyses legal and policy developments; and, undertake training in these fields, most notably through a well-established annual summer school held in Brussels and a certificate program combining long-distance learning with residential elements.

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Introduction

by **Helena Hahn, Evangelia (Lilian) Tsourdi, Alberto-Horst Neidhardt**

Following the green light by the European Parliament in May 2024, the Council voted in favour of the New Pact on Migration and Asylum. After years of disagreements on the reform of the Common European Asylum System (CEAS), the co-legislators were ultimately able to achieve a compromise on the legislative package. The reform paves the way for a new generation of EU asylum and migration laws. Many initially hoped that the reforms could also open a new chapter for the EU's policies in this area. Yet, uncertainty around the implementation of the new rules remains high. Not all member states stand behind the reform package, as the successful but not unanimous vote in the Council showed. With migration as high as ever on the EU and national political agendas on the one hand, and demands for further legislative changes on the other, it is more important than ever to have an in-depth and comprehensive understanding of the reforms' impact.

The adoption of the new rules is just the first step in a longer legislative process, with the political stakes expected to only grow further in the new EU cycle. It will be crucial in the coming months to assess preparedness for the implementation phase and identify potential shortcomings.

The New Pact seeks to streamline migration processes, as illustrated by the new 'seamless' procedures it sets in place at the EU's borders, consisting of screening, border asylum procedures, and border return procedures. The Pact also seeks to address longstanding deficiencies in responsibility-sharing over asylum seekers among member states. In addition, it establishes new governance structures, new fora and coordinators. It foresees pivotal new roles for the EU institutions, for example in ascertaining situations of migratory pressure, operationalising solidarity, and overseeing the smooth running of border processing. In an effort to depart from the past, further measures were also adopted to crisis-proof the EU's migration and asylum systems and respond to situations where migration is instrumentalised for political purposes. The New Pact establishes national level monitoring mechanisms for the detection and follow-up of fundamental rights violations during screening and border processing. Monitoring will help preserve access to asylum. Nevertheless, other Pact provisions, such as curtailed procedural rights during border processing, risk jeopardising the rights of asylum seekers and migrants.

Even before these new measures were formally adopted, the European Commission was determined to see them properly implemented from day one. Ursula von der Leyen, re-elected as European Commission President for a second time, emphasised the New Pact implementation as a key priority.[1]

With divergent national practices and lack of compliance having undermined the CEAS' functioning in the past, this strong focus on implementation is a significant evolution, aimed at ensuring adherence to the new rules once they become fully applicable in 2026. Based on a Common Implementation Plan launched by the Commission in June 2024, member states were tasked with presenting National Implementation Plans by early December 2024, identifying the needed capacities and resources. Collectively, these plans are meant to guide EU and member state action and preparedness. Pressure on national authorities is thus high. Yet, authorities at the EU and member state level are still grappling with many legal, operational, and financial questions.

The adoption of the reforms has done little to either depoliticise migration debates or slow down the appetite for further legislative change. Since the reforms' adoption, some member states have demanded stricter rules to respond to situations where migration is being instrumentalised. A case in point is the Polish government's announcement that it will temporarily prevent migrants crossing its borders from neighbouring states from claiming asylum, amidst growing concerns that Russia and its allies are using migrants to destabilise the country and the EU. If member states take unilateral actions against the newly adopted reforms, it would undermine what the Pact sets out to achieve.

Meanwhile, some member states have openly signalled refusal to fully implement the new rules,[2] while others have called for their swifter implementation. Both could prove problematic, considering the intricate linkages of the different components of the reforms.[3]

In addition, most member states have requested further legislative changes in the area of returns, with the European Commission expected to present a reform proposal by summer 2025. Meanwhile, electoral gains by the far right have reshaped Europe's political map, leading to a growing normalisation of restrictive immigration rhetoric and agendas. At the same time, President von der Leyen espoused the exploration of "innovative solutions" to address irregular migration to Europe, adding further political weight to the sense that actions beyond the Pact are needed to address migratory challenges.[4]

All the above developments render the New Pact reforms even more significant for the future governance of migration, but also symbolically. They also show that the adoption of the new rules is just the first step in a longer legislative process, with the political stakes expected to only grow further in the new EU cycle. It will be crucial in the coming months to assess preparedness for the implementation phase, identify potential shortcomings and highlight the areas and risks that policymakers, national authorities, EU agencies, and international organisations should consider as priorities.

IMPLEMENTING THE BUILDING BLOCKS OF THE FUTURE EU MIGRATION AND ASYLUM SYSTEM

Against this backdrop, the European Policy Centre and the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe joined forces and conducted in-depth analyses of some of the key adopted reforms, identifying challenging aspects of the reforms, whether legal, political, or practical in nature, and proposing a set of forward-

looking reflections that could enhance implementation outcomes, in line with fundamental rights. This book brings together these analyses, which were published between June and September 2024, following the adoption of the reforms.

The chapters in this book analyse the building blocks of the EU migration and asylum systems after the New Pact, as follows:

Evangelia (Lilian) Tsourdi focuses on screening, border asylum processing, and border return procedures making up the new 'seamless procedure' at EU's external borders. Such a set-up reflects the intricate links between different policies and operational needs, especially in border areas and in light of mixed migration flows. Her contribution identifies elements that could support smooth implementation, such as EU funding and the new national monitoring mechanisms. However, she also outlines several legal, practical, and material challenges that may undermine the new procedural set up and jeopardise migrant's fundamental rights.

In his chapter, Philippe De Bruycker examines the functioning of the Asylum and Migration Management Regulation which replaces the so-called Dublin system. He discusses the new mandatory but flexible solidarity mechanism, as well as the complex system for identifying member states considered to be under migratory pressure and determining the necessary level of solidarity. The contribution also unpacks the new governance structures that are intended to improve the predictability and stability of the new system of sharing responsibility. He sets out ways in which the functioning of the new mechanisms could be enhanced but also cautions on the limitations of the current approach to realising inter-state solidarity.

Alberto-Horst Neidhardt explores the expected functioning of the new rules introduced to address situations of crisis, instrumentalisation, and force majeure. His chapter examines the derogations foreseen in such emergency scenarios and other response measures foreseen by the new crisis management system. While acknowledging the need to better prepare for possible future emergencies, the chapter questions the sustainability of the new rules and whether this new system will suffice to preserve the functioning of the CEAS in emergency situations and convince member states not to resort to stricter unilateral measures. It also offers recommendations on how the system could be rendered more effective, avoiding protracted emergencies and addressing their deeper causes.

Several reforms comprising the New Pact on Migration and Asylum are strongly tied to the so-called external dimension of the EU's migration policies. This is because the implementation and stability of the newly established migration system is contingent on viable partnerships between the EU and third countries. In their chapter, Andreina De Leo and Eleonora Milazzo explore how the reformed provisions on safe country clauses and flexible solidarity will shape relations between the EU and third countries. Their insights shed light into how genuinely equal partnerships could be developed in the future, while cautioning how the EU's heavy reliance on third countries risks compromising its strategic autonomy and could backfire on achieving more resilient asylum systems.

This book goes beyond the core New Pact files and includes a contribution on a related policy area, namely the functioning of the Schengen system and its governance.

In recent years, the resilience of the Schengen area has been shaken by terrorism, the COVID-19 pandemic, and greater migratory movements. Seeking to effectively counter these challenges, the EU revamped the Schengen Borders Code. In his chapter, Daniel Thym argues that

the reform amounts to an agglomeration of half-hearted structural changes that may ultimately prove insufficient to overcome the deep-seated deficiencies that have undermined trust between members of the Schengen area. He also cautions that smaller-scale amendments may, accordingly, fail to create a more resilient Schengen system. Nevertheless, his contribution also outlines ways that could help EU institutions and member states succeed in implementing the new rules and ultimately delinking internal border controls from secondary movements.

QUO VADIS, MIGRATION AND ASYLUM POLICIES?

Several overarching issues run throughout the chapters of this book. A fundamental concern is the expected impact of the reforms on the ground, and whether they sufficiently address the structural problems that have long undermined the functioning of the CEAS and integrated border management. Pivotal horizontal elements are the balance between solidarity and responsibility, the redefinition of roles and responsibilities of institutional actors, as well as the implications of the new rules for fundamental rights.

The book provides a critical and balanced assessment of both the more promising and problematic elements of the reforms and identifies outstanding problems. It also sheds light on policy and political developments that took place since the analyses' first publication as individual contributions, including the above-mentioned announcement by Poland on access to asylum in cases of alleged instrumentalisation as well as the extension of internal border controls within the Schengen area by Germany and the Netherlands in fall 2024. Looking ahead, it is hoped that this book will help to anticipate possible future developments in areas connected to the reforms.

The book also considers key questions that EU and national policymakers will have to address in the run-up and as soon as the package of reforms becomes fully applicable as of 2026. For example, what immediate and long-term funding, training, and infrastructures will be necessary to operationalise the new rules? Such insights should pave the way for more informed discussions on future policymaking, for example on the design of and funding allocations under the next MFF (2028-2034).

The New Pact aims to ensure adequate enforcement of the new rules and to 'rationalise' migration governance through elements such as streamlined border processes, regular risk and capacity assessments, structured cooperation mechanisms and more clearly delineated responsibility coupled with enhanced solidarity. While many questions remain unanswered, collective needs and common interests should come first to ensure continued support by member states and the rules' implementation. A long-term perspective on migration governance should replace emotional, short-term thinking and unilateral actions that have characterised EU migration and asylum policies in the recent past. The tasks ahead are indeed monumental, but this book aims to help smooth the way forward by identifying the work that remains to be done in the new policy cycle.

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[1] Letter by European Commission President Ursula von der Leyen to EU member states on 10 points of action on migration, 14 October 2024.

[2] Aleksandra Krzysztoszek, "Polish government insists new EU migration pact poses national security threat", Euractiv, 25 October 2024.

[3] Charles Szumski and Fernando Heller, "Spain's Sánchez to ask early implementation of EU pact on migration", Euractiv, 9 October 2024.

[4] Letter by European Commission President Ursula von der Leyen to EU member states on 10 points of action on migration, 14 October 2024.

The new screening and border procedures: Towards a seamless migration process?

1

Evangelia (Lilian) Tsourdi

Executive summary

This chapter assesses the new screening, border asylum processing and border return procedures following the recently adopted New Pact on Migration and Asylum reform to examine possible legal challenges and shortcomings, as well as propose forward-looking reflections for proper implementation.

Screening, border asylum processing, and border return procedures are part of the revamped procedural setup foreseen by the reformed Common European Asylum System (CEAS). They are meant to make up a new seamless process at the EU's external borders, streamlining and simplifying procedural arrangements. Creating a seamless border migration process is not inherently negative, especially in light of mixed migration flows and irregular arrivals. However, this chapter shows that challenges may arise due to short processing time and inadequate material conditions, among others. More broadly, efficiency may be prioritised over the quality of processing.

Implementing the new rules in a protection-oriented manner will be instrumental in realising the Pact's goals in compliance with member states' obligations under refugee and human rights law.

Implementing the new rules in a protection-oriented manner will be instrumental in realising the Pact's goals in compliance with member states' obligations under refugee and human rights law. To this end, the chapter raises points for further reflection that could feed the thinking of EU and national policymakers and administrators, international organisations, and civil society in carrying out and supporting implementation. The chapter points to several possible initiatives, including actions to ensure adequate financial support, guarantees in relation to deprivation of liberty and for the protection of vulnerable applicants as well as effective monitoring in the new system.

Introduction

This chapter focuses on screening, border asylum processing, and border return procedures following the newly adopted reforms introduced by the New Pact on Migration and Asylum. These three stages are part of the Pact's revamped procedural set-up, which is meant to streamline, simplify, and harmonise procedural arrangements in the reformed Common European

Asylum System (CEAS). They are governed respectively by the new Screening Regulation,[1] the Asylum Procedures Regulation (APR),[2] and Border Return Procedure Regulation (BRPR).[3] They are also supported by EURODAC, a database containing biometric data of applicants for international protection and persons apprehended in connection with an irregular crossing of the external borders of member states.[4]

Screening, border asylum processing, and border return procedures are meant to make up a new seamless process at the EU's external borders. Creating a seamless border migration process is not inherently negative, as it reflects the intricate links between different policies and operational needs, especially in border areas and in light of mixed migration flows and irregular arrivals. As early as 2007, the UN Refugee Agency (UNHCR) voiced the need for differentiation between categories of persons making up mixed flows, swift identification at the external borders, and referral to an appropriate procedure through its so-called Ten Point Plan.

Challenges with the Pact's approach to a seamless migration process may, however, arise for several reasons. These include curtailed procedural guarantees, also in what concerns the right to an effective remedy, short processing times, inadequate material conditions, both in general and concerning the needs of vulnerable groups, inability to provide services in remote locations, prioritising efficiency over the quality of processing, and finally, excessive recourse to deprivation of liberty and restrictions to freedom of movement.

After introducing the regulations' basic novelties, this chapter reflects on the implications and operationalisation of the new rules, exploring these and further challenges. The concluding section highlights forward-looking reflections for the implementation stage of this new three-stage process, considering such challenges. These reflections pay attention to the notion of 'adequate capacity', the issue of financial support, the regulation of and limits to deprivation of liberty, the implementation and impact of vulnerability assessment, as well as the operationalisation of the right to an effective remedy and the set-up of monitoring of fundamental rights violations.

1. The main characteristics of the new three-stage border process

The newly adopted Pact instruments generalise screening obligations in border areas and further within EU territory. They expand the use of border asylum procedures, rendering them mandatory in several cases. They also intrinsically connect border asylum procedures with border return procedures. These new rules redesigning EU border migration processes only partly reflect the vision laid out by key actors such as the UNHCR.[5] Civil society organisations, including the European Council on Refugees and Exiles (ECRE), also cautioned against mainstreaming border procedures in EU asylum and return policies, citing fundamental rights concerns.[6]

Against this background, this section presents an overview of the three-step seamless migration process the New Pact

aims to set in place, highlighting the importance of legal and operational issues such as the content of the process, the individuals it applies to, the location where it takes place, and the time limits for its completion.

Screening is the first step in the new process and entails preliminary health and vulnerability checks, identity verification, registration of biometric data, and a security check. It also foresees filling out a screening form, and the referral to the appropriate procedures, such as for asylum or return.

Screening can occur at the EU's external borders, or within the territory. At the external borders, screening applies to three categories of non-EU nationals who do not fulfil the entry conditions under the Schengen Borders Code:

i) those apprehended in connection with an unauthorised crossing of the external border of a member state;

ii) those disembarked following search and rescue (SAR) operations at sea; and

iii) those seeking international protection at a border crossing point without fulfilling the entry conditions.

The third category concerns non-EU nationals who already applied for international protection. In that case, other relevant asylum instruments, such as the Reception Conditions Directive (RCD) or the APR apply.

Border procedures are an exceptional type of asylum procedure, in the sense that they foresee derogations in terms of rights and standards in elements such as entry to the territory, restrictions to freedom of movement, or right to an effective remedy.

Within the territory, screening is to be carried out with respect to non-EU nationals, when there is no indication that an 'illegally staying' third-country national was subject to controls at the external borders.

After the screening stage, the Pact presents two scenarios for border asylum procedures. Border procedures are an exceptional type of asylum procedure, in the sense that they foresee derogations in terms of rights and standards in elements such as entry to the territory, restrictions to freedom of movement, or right to an effective remedy.

The first scenario allows for a degree of discretion, while the second scenario makes border procedures mandatory. Regarding the former, member states may (but do not need to) apply border procedures in the following cases:

i) if an asylum application is made at an external border crossing point or in a transit zone;

ii) following apprehension in connection with an unauthorised crossing of the external border;

iii) after disembarkation following a SAR at sea operation; or,

iv) in the context of a relocation.

In case member states decide not to apply border procedures in these cases, then the asylum claims are examined under in-territory procedures.

In case member states decide not to apply border procedures in these cases, then the asylum claims are examined under in-territory procedures.

Border procedures instead become mandatory where asylum applicants:

i) are considered to have intentionally misled the authorities by presenting false information or destroyed documents;

ii) pose a danger to national security or public order;

iii) are from countries of origin with low recognition rates at first instance, understood by the APR as countries that have a recognition rate of 20 % or lower, according to the latest available yearly Union-wide average Eurostat data, unless there has been a significant change of circumstances, or the applicant comes from a group for which this recognition rate is not representative (for example LGBTQI+ applicants).

These three grounds, notably the last one, may lead to the mandatory application of border procedures in many cases. Those who would have to presently undergo the mandatory procedure due to the last ground would include, for example, applicants from Pakistan and Bangladesh who, in 2023, were among the top 10 countries in terms of volume of the applications within the EU.[7] The APR nevertheless contains derogations to this obligation when a member state reaches a certain capacity (on this, see below, Section 2.1).

Border procedures involve decisions made regarding inadmissibility, as well as decisions on the merits of cases where there are grounds for accelerating the processing of an asylum claim. An admissibility decision entails that the protection elements of the claim are not examined.

Instead, the application is found inadmissible, for instance because the 'Safe Third Country' clause applies (see Box 1). By contrast, a decision on the merits involves ascertaining the protection elements of the claim.

Under the new rules, those subjected to a border procedure are not authorised to enter the territory. Therefore, border procedures operate under the 'legal fiction of non-entry', even if the applicants have physically entered the state's territory. While this does not mean that border procedures operate in a complete legal vacuum, it does imply lowering individual guarantees. For example, when it comes to deprivation of liberty, applicants might be detained for the purpose of determining their right to enter the territory, subject to the principles of necessity and proportionality.

Finally, the Pact establishes border return procedures when an application is rejected following an asylum border procedure. Those subjected to a border return procedure are also not authorised to enter the territory.[10] The hope is that a seamless link between asylum and return within

Border procedures operate under the 'legal fiction of non-entry', even if the applicants have physically entered the state's territory.

Box 1: The Safe Third Country concept

The APR expands the use and scope of the Safe Third Country concept.[8] For example, where third countries are parties to the 1951 Refugee Convention but retain a geographical limitation to its application, making it impossible to access refugee protection there, the APR introduces the notion of having access to "effective protection". An example is Turkey, which retains a geographical limitation to the 1951 Refugee Convention and only affords refugee protection to refugees from Europe.[9] While Turkey activated temporary protection for Syrians, persons from other non-European countries cannot access refugee protection and the rights of the Convention. Problematically, the APR provisions contain minimal guarantees to ascertain what effective protection entails, which correspond to standards below those foreseen by the 1951 Refugee Convention, for example in terms of subsistence. In addition, the APR foresees that in 2025, one year after its entry into force, the European Commission will review the concept of Safe Third Country and "shall, where appropriate, propose any targeted amendments". This suggests that amendments might occur, further lowering standards for a third country to be considered safe.

the framework of a border procedure will render returns more efficient and raise the current return rates. In reality, return outcomes hinge on a number of factors, such as the cooperation of the countries of origin, or the practical feasibility of return (referring to issues beyond the respect of the principle of non-refoulement). The EU will not be able to address these issues simply through a redesigned type of procedural set-up, as established by the APR and other new instruments.

Especially important in this context is the duration of the various stages of the process. Screening at the borders should take place within a maximum of seven days, and within-territory screening within three days. Border processing needs to be completed within a 12-week limit from registration of the asylum claim until the applicant no longer has the right to remain and is not allowed to remain. This time limit is extended up to 16 weeks in case of relocation to account for the time it will take to transfer the asylum seeker from the member state of first entry to the member state of relocation. Border return procedures, the next step in the foreseen process, must then be completed within 12 weeks from the moment the person no longer has the right to remain and is not allowed to remain in the member state. Derogations on these time limits apply in situations of crisis.[11]

These time limits are very ambitious, especially considering the current practice of border processing.[12] The risk is that, in their effort to abide by these stringent time limits, member states might end up lowering the quality of processing. In addition, such restrictive time limits may not provide the necessary time for asylum seekers to be appropriately informed and adequately prepare their file and case, which could also lead to deficient procedural outcomes.

2. Implementing the new procedural set-up: Challenges and implications

The functioning of this seamless migration process at the borders will depend on several legal, operational, and financial considerations. Among others, this chapter identifies as especially relevant the notion of 'adequate capacity', financial support, the regulation of and limits to deprivation of liberty, the implementation and impact of vulnerability assessment, the operationalisation of the right to an effective remedy, and the monitoring set-up. These aspects are examined in the following sections.

2.1 ADEQUATE CAPACITY: ENHANCING RESPONSIBILITIES FOR MEMBER STATES AT THE EXTERNAL BORDERS

Currently, processing asylum applications in border procedures is not an obligation but a possibility for member states. Nonetheless, after the surge in irregular arrivals of asylum seekers in 2015-2016, several EU countries, such as Greece, introduced border procedures. The current experience of processing at the borders has been controversial due to deficient reception conditions and lengthy processing periods.[13] Against this backdrop, other than setting

obligations to process applications at the border in several scenarios, the APR also introduces the notion of adequate capacity.

Countries at the Southern or Eastern external borders of the Union will need to ensure more places for border processing than other member states, overall and at any given time.

Adequate capacity refers to the number of persons who must go through the asylum border procedure and return border procedure at any given moment. The APR establishes the overall EU adequate capacity at 30,000 places. In simple terms, this means that throughout the EU, capacity to examine 30,000 asylum applications in the border procedure at all times should be maintained. This overall capacity estimate applies across the different member states.

The capacity of each individual member state is not calculated through a simple division of the total number of places (i.e., 30,000) by the 27 member states, however. Instead, each member state's adequate capacity is calculated through the following formula:

Box 2: Calculating adequate capacity

$$\frac{30{,}000 \times \text{irregular crossings} + \text{SAR arrivals} + \text{refusals of entry in the state during the previous 3 years}}{\text{irregular crossings} + \text{SAR arrivals} + \text{refusals of entry in the Union during the previous 3 years}}$$

This obligation, combined with the indicators laid out in the new instruments, such as the number of arrivals through SAR operations at sea or the number of irregular crossings, will result in additional responsibilities for member states at the EU's external borders. This means that countries at the Southern or Eastern external borders of the Union will need to ensure more places for border processing than other member states, overall and at any given time.

When adequate capacity is reached, the concerned state is no longer required to apply border procedures in cases of asylum seekers from countries with low recognition rates. This measure, however, operates on an inflow/outflow basis, and at any given point in time. When capacity is recovered, the member state must resume border procedures.

According to the new rules, member states must continue to carry out border procedures until they reach the maximum number of applicants established on a yearly basis, and calculated as follows:

- after the entry into application of the APR: 2x the number obtained through the use of the previously mentioned formula;
- one year after the entry into application: 3x the number obtained through the formula;
- two years after the entry into application: 4x the number obtained through the formula.

Even when this number is reached, border procedures remain mandatory in cases relating to the endangerment of national security and public order.

Ascertaining levels of responsibility through objective indicators marks an improvement compared to the current situation where this is a matter of contestable (self-)assessment. As such, it could enhance mutual trust. However, the new rules also raise the question of whether member states at the external borders have the infrastructure and personnel to fulfil their responsibilities, and how they could effectively be supported in the rules' operationalisation (see Section 2.2).[14] If disproportionally affected states are not supported, the rules could lead to new dysfunctionalities instead of raising mutual trust. Connected to this, there is also a risk that, to reduce adequate capacity and the burden on their national systems, the number of irregular arrivals is kept forcibly low. This, according to ECRE, amounts to a 'recipe for pushbacks', as it will incentivise member states to reduce the number of irregular crossings and SAR disembarkations.[15]

If disproportionally affected states are not supported, the rules could lead to new dysfunctionalities instead of raising mutual trust.

The mechanism's functioning also carries the potential risk of putting pressure on national authorities to speed up the processing time and 'release' capacities that are ascertained on an inflow/outflow basis. This could amplify the prospect of procedural guarantees that fall short of fundamental rights standards. Relatedly, considering additional needs and responsibilities that member states would face as part of the reforms, the current experience with processing at the border illustrates that the envisaged time limits may be especially ambitious.

2.2 FINANCING THE NEW PROCESSES: AN EFFECTIVE COUNTERWEIGHT TO ENHANCED RESPONSIBILITIES?

The Pact instruments refer to amounts made available through the national programming component of the EU funds, as well as through the Thematic Facility, a part of the funding which is not pre-allocated to national programmes.

The mandatory nature of border procedures, combined with the notion of adequate capacity, other than open questions around infrastructure and human resources, call attention to the financing component of the new process.

Across the New Pact instruments, the co-legislators have placed a higher level of attention on the needed funds for implementation. Reflecting this trend, the APR explicitly mentions the Asylum Migration and Integration Fund (AMIF), while the Screening Regulation and BRPR mention the Border Management and Visa Instrument (BMVI). The Pact instruments refer to amounts made available through the national programming component of the EU funds, as well as through the Thematic Facility, a part of the funding which is not pre-allocated to national programmes.

The AMIF stipulates that the EU and member states should direct 20% of the funds allocated under the Facility to enhance solidarity and fair sharing of responsibility between the member states. The APR also refers to further amounts made available following the EU Multiannual Financial Framework (MFF) mid-term review.[16] Through the mid-term review, the Commission secured an increase to migration and border management budget of two billion euros. This is also aimed at the implementation of the border process and New Pact reforms. Once the Solidarity Pool under

Box 3: The Solidarity Pool and its links with border procedures

The Solidarity Pool introduced by the AMMR includes financial contributions in the form of transfers to the EU budget as externally assigned revenues to the benefit of eligible member states.[17] The additional amounts under the Pool will only materialise after around two years following the entry into force of the Pact reforms. It will take two years before the AMMR enters into application. However, the Commission announced in its Common Implementation Plan that it will convene the first annual migration management cycle already in 2025. The progressive increase of the maximum yearly number of applications examined under border procedures reflects this time lag, until financing via the Solidarity Pool becomes available.

the Asylum and Migration Management Regulation (AMMR) begins to operate, it will make available further amounts (see Box 3).

2.3 VULNERABILITY AND BORDER PROCESSING: AN IDENTIFICATION WITH LIMITED CONSEQUENCES?

One of the stated primary goals of the screening process is to identify vulnerabilities. The APR likewise retains the notion that individuals with specific vulnerabilities should benefit from special procedural guarantees. It also establishes special protections for specific groups, such as minors and unaccompanied minors. However, applicants with special procedural needs are not generally exempted from border procedures. Only unaccompanied minors are broadly exempted, unless they pose a danger to national security or public order.

Instead, the APR allows for the exemption or removal from border procedures of vulnerable applicants if the necessary support, whether in the form of special procedural guarantees, or special reception needs, cannot be provided. If the European Union Asylum Agency (EUAA) finds that conditions are not suitable for families with children, border procedures may also be suspended. Exemptions could also be granted for medical reasons, including mental health.

This marks a departure from previous national practice where the identification of vulnerability and special reception and/or procedural guarantees resulted in the generalised exemption or removal from border procedures.

This departure is problematic. Specialised services to address special reception and procedural needs of different groups of vulnerable individuals will likely either be unavailable at remote locations, or costly to provide. Different elements of border processing, such as tight deadlines and curtailed procedural guarantees, are also likely to exacerbate vulnerability. Member states will need to assess exemption in an ad hoc manner, which will enhance the complexity of border processing.

2.4 DEPRIVATION OF LIBERTY IN BORDER PROCEDURES: GENERALISING THE EXCEPTIONAL?

The new integrated border process poses challenges due to its link to restrictions to freedom of movement and deprivation of liberty. The three regulations examined in this chapter all require those undergoing screening, asylum, or return border procedures to reside 'at or in proximity to the external border or transit zones' or 'in other designated locations' on a member state's territory. Thus, these procedures imply, at the very least, generalised restrictions on movement. Relatedly, the reformed RCD, also adopted as part of the Pact, foresees possibilities for restrictions to freedom of movement with an enhanced provision on designated residence.

The new regulations also contemplate that those undergoing screening and border procedures may be deprived of their liberty during the processing. In addition, the reformed RCD establishes a new detention ground relating to non-respect of restrictions to freedom of movement by the applicant, while there continues to be a risk of absconding.

Both the APR and the BRPR specify, however, that where applicants are deprived of their liberty, the principles and safeguards outlined in the RCD and the Return Directive apply. These instruments make the deprivation of liberty subject to the principles of necessity and proportionality, emphasising the need for an individual assessment of each case.

As the previous section explained, vulnerable individuals are not automatically exempted from border procedures, even if there are additional safeguards established in their case. Therefore, the regulations contemplate potentially imposing restrictions to freedom of movement or depriving of their liberty vulnerable applicants, such as families with minor children. In the exceptional case of unaccompanied minors posing a danger to national security or public order, they could also be subjected to border procedures and therefore be deprived of their liberty.

The potential detention of vulnerable groups has been a controversial point in the political debate and a stumbling block in the finalisation of the negotiations. Relatedly, there is abundant case law placing significant restrictions on the detention of vulnerable applicants, especially minors.[18]

In the exceptional case of unaccompanied minors posing a danger to national security or public order, they could also be subjected to border procedures and therefore be deprived of their liberty.

An additional concern in this context is that member states might mischaracterise regimes that deprive applicants of their liberty as merely imposing restrictions to freedom of movement. The example of the transit zones in Hungary is illustrative of this.[19] The Court of Justice (CJEU), in a reference for a preliminary ruling scrutinising the conditions within the transit zones, found multiple violations of the substantive asylum and return acquis, and more specifically, of detention standards, due to the arbitrary deprivation of liberty.[20] The Hungarian government, however, contended that the regime in the transit zones did not amount to deprivation of liberty.

When it comes to the new rules, the difficulty could derive from the fact that the difference between restriction on freedom of movement and deprivation of liberty is one of degree, and not nature or substance. According to settled case law, determining whether someone is deprived of their liberty depends on their concrete situation and factors like the type, duration, effects, and implementation of the measure.[21] Thus, in several cases, an individual examination of the execution of each national regime will be necessary to conclude if it actually amounts to deprivation of liberty, regardless of what the official national designation for the scheme might be.

Overall, the instruments exclude the automatic recourse to deprivation of liberty in border processing settings. However, in this context and considering the practical aspect identified in previous sections, the concern is that in practice, efficiency considerations could lead to overreliance on regimes that factually deprive applicants of their liberty during the processing. This brings into sharp

relief issues such as monitoring, as well as access to procedural rights and guarantees.

2.5 RIGHT TO AN EFFECTIVE REMEDY AND LEGAL AID: EFFECTIVE TO UPHOLD THE PROHIBITION OF REFOULEMENT?

The expeditious nature of the first instance border asylum processing calls for robust guarantees. The right to an effective remedy is especially important to uphold the principle of non-refoulement.[22] Nonetheless, the Pact instruments foresee curtailed guarantees. In terms of border processing, decisions on the admissibility or merits can be appealed. However, several practical problems could arise, including the time limits for filing an appeal, the potential impact on non-refoulement of the lack of suspensive effect of the appeal, and provisions on legal aid.

To begin with, the Pact instruments do not foresee the right to an effective remedy for the screening stage. Instead, the Screening Regulation allows for administrative and judicial review of the information provided on the screening form during any asylum or return procedure that may ensue. Any inconsistencies identified by the person should be noted on the screening form. This means that elements that could influence the outcome of asylum or return processes, such as incorrect identification of nationality, cannot be challenged and corrected promptly. In addition, the actors conducting the registration could differ from those assessing the claims. It could thus prove difficult in practice to challenge this initial assessment of one administrative authority before another that has no jurisdiction to conduct such checks or supervision. Therefore, the issue might remain pending until it reaches the second stage, that is, a judicial or other independent authority.

Second, the appeal period is brief: between five and ten days. It is included within the 12-week limit deadline for completing the border procedures (extended to 16 weeks in case of an AMMR transfer).

Third, appeals under the border procedure lack automatic suspensive effect, except for cases of unaccompanied minors. A court can instead decide to grant suspensive effect to an appeal. This can happen either upon the request of the applicant or on the court's own motion, considering both facts and points of law. Applicants have five days from the notification of the negative decision to their asylum claim to request suspensive effect for their appeal.

Applicants have a right to remain until the deadline for requesting a court decision on the suspensive effect or, when they present a request, until that decision. If suspensive effect is not granted, they no longer have a right to remain and may be subjected to a border return procedure, even if the appeal is pending. This means that when deciding on the suspensive effect, national courts need to decide that a potential return of the applicant would not violate the principle of non-refoulement. In practice, national courts will need to assess protection-related elements of the case within very short deadlines without, however, conducting a detailed examination of the protection aspects of the claim. In such cursory examinations, the possibility of errors is higher, which this could lead to refoulement.

As highlighted earlier, during the period for the completion of the asylum border procedure – which can amount to either 12 or 16 weeks, depending on the circumstances – the applicant is not authorised to enter the territory. Member states are responsible for the timely completion of the procedural steps.

If the processing is not concluded within that time-frame and the applicant still has a right to remain, the asylum seeker is authorised to enter the territory and is directed to the regular asylum procedure. However, if the applicant no longer has a right to remain, whether because their appeal was processed, or because they did not manage to secure the suspensive effect for their appeal, they are not authorised to enter.

Fourth, particularly relevant is access to legal aid, also considering the tight deadlines and the risk of violations of the right from non-refoulement. Applicants have a right to free legal counselling in the administrative stage under the new rules. In the appeals procedure, they have access to free legal assistance and representation upon their request. However, this may be excluded in several cases, including where it is considered that the appeal has no tangible prospect of success or is considered abusive. In this case, the applicant has the right to an effective remedy against the decision to exclude them from free legal assistance and representation, and for that appeal, they are entitled to request free legal assistance and representation.

2.6 MONITORING OF FUNDAMENTAL RIGHTS COMPLIANCE UNDER THE NEW SYSTEM: MEANINGFUL EVOLUTION?

Considering their complexity, enforcing the new rules will be crucial to ensure, on the one hand, mutual trust and confidence in the new Common European Asylum System (CEAS) and, on the other, adequate protection of fundamental rights. This draws attention to the traditional approach of ensuring compliance with EU law, particularly infringement proceedings.[23] Infringement proceedings are initiated by the European Commission and consist, firstly, of a diplomatic stage of structured exchanges between the Commission and a member state which, on the initiative of the Commission, could lead to judicial proceedings before the CJEU.[24] This process has distinct limitations though, notably its diplomatic nature.

By contrast, monitoring to prevent and swiftly address fundamental rights violations is becoming increasingly important, and frequently used, in EU migration policies. In recent years, a number of EU-level monitoring or peer review mechanisms were established, such as the Schengen Evaluation Mechanism – which now explicitly includes fundamental rights compliance in its mandate – the vulnerability assessment, and monitoring of fundamental rights by the Frontex Fundamental Rights Officer (FRO), as well as the upcoming monitoring mechanism of the EUAA.

Monitoring is especially important in the context of the seamless migration process given, among others, the weaker procedural safeguards compared to other procedures, and the nature of the fundamental rights at stake, such as the prohibition of refoulement.[25] The Pact sets up monitoring mechanisms on top of the existing ones, although several questions remain.

To begin with, the Screening Regulation establishes a monitoring mechanism for ensuring compliance with international and EU fundamental rights law and investigating alleged violations. Member states must guarantee the independence of this mechanism, which should grant relevant actors broad powers, including the possibility of conducting spot checks and random and unannounced inspections. Access to relevant locations may be restricted to monitors with appropriate security clearance, though.

A significant limitation of the mechanism, though, is that it focuses on monitoring

of fundamental rights 'in relation to the screening'. As civil society organisations have warned, the vast majority of unlawful practices take place outside of official border crossings, police facilities or formal procedures, and restricting the monitoring in this manner could create blind spots.[26] In the final legislative text adopted by the EU co-legislators, the monitoring's scope has been somewhat expanded to also cover the asylum border procedure, under the same criteria established by the Screening Regulation.

Noteworthy is also that the new mechanisms estab- lished by the Pact will interact with the existing monitoring landscape in the EU's migration policies. While this multi-layered environment potentially offers a more holistic view, there is a risk of duplication and overlap.

3. Conclusion and forward-looking reflections

The Pact's stated aim is to establish 'seamless migration processes and stronger governance'.[27] The new border migration process represents a significant evolution on both counts and holds the potential to enhance effectiveness, inter-state mutual trust, and policy implementation. At the same time, aspects of the instruments risk jeopardising migrants' fundamental rights, such as the prohibition of refoulement and arbitrary deprivation of liberty. This risk emanates from different factors analysed in this chapter, such as an overemphasis on efficiency, the impossibility to ensure rights and provide the envisaged services at remote locations, or the inadequacy of the current funding landscape to effectively support member states in the operationalisation of their obligations. The implementation phase will thus be key in realising the Pact's potential in a protection-oriented manner. In this vein, the following points for further reflection could feed the thinking of EU and national policymakers and administrators, international organisations, as well as civil society, in carrying out and supporting implementation.

REFLECTIONS ON ADEQUATE CAPACITY AND FUNDING:

Overall, national administrations, guided and supported by EU institutions and agencies, must meet the important challenge of ensuring that efficiency considerations do not undermine the quality of processing in border contexts. This entails realising obligations with wide financial consequences. While more robust forms of EU funding than previously are foreseen, it is not certain what percentage of spending will be covered by existing EU resources. Additional amounts through the Solidarity Pool will only kick in after three years (see Box 1). Bearing in mind these considerations,

- EU agencies, international organisations, and civil society should promote standards, generate actionable recommendations, guidelines, and share best practices concerning the development of adequate capacity during the two-year period leading up to the application of the seamless migration process.

- Member states should activate funding possibilities under the current financial instruments, i.e. the AMIF and the

BMVI, under both national programme components and the funds' Thematic Facilities, to develop their national adequate capacity, and identify potential operationalisation gaps in advance.

- The European Commission should ensure that the national programmes and the Thematic Facilities continue to cover all aspects of national asylum systems and are not disproportionately geared to border procedures to the detriment of other aspects and objectives.

- Civil society organisations that are involved at national level in the design, operationalisation, and control of EU funding should, through the partnership principle, undertake concrete actions to ensure both the development of adequate capacities at the national level, and the equitable spread of EU funding towards different priorities.

- The Commission should ensure that the regulations are applied in a rights-sensitive manner. This also means that, in following up a notification of exhaustion of adequate capacity on an inflow/outflow basis, the Commission should not prioritise efficiency considerations over the quality of processing, merely in order to restore the inflow.

- During the planning phase as well as when the AMMR becomes operational, EU institutions and member states should assess whether the financing under the Solidarity Pool suffices to boost the funding available under the current multi-annual framework. If this is not the case, they should identify further sources of EU funding for asylum, migration, and integrated border management in the next MFF (which will become operational as of 2028) well in advance.

REFLECTIONS ON VULNERABILITY AND RELATED RIGHTS:

Vulnerable asylum seekers with special reception needs and vulnerable migrants are not per se excluded from the scope of border asylum and return procedures. Nonetheless, member states must put in place guarantees. Where the requisite guarantees and services are not available in practice, vulnerable asylum seekers with special reception needs and vulnerable migrants should be promptly removed from this type of processing. On this matter, the following forward-looking reflections should be considered:

- Member states should effectively plan the provision in border processing facilities of specialised services that are necessary to meet the special procedural guarantees and the reception needs of vulnerable applicants. Among others, these include medical and psychological assistance.

- Member states should determine what type of special arrangements are necessary to maintain family unity and protect children's rights.

- Concrete mechanisms should be established so that individual applicants can denounce the failure to meet their procedural or reception needs, and clear procedures should be in place to ensure appropriate follow-up and response times.

- EU and national level monitoring should ensure that special (reception) needs are being met.

Subjecting individuals to screening or border processes does not justify indiscriminate deprivation of liberty for mere administrative convenience. Nonetheless, the concern is that, once the new rules become applicable, expediency

might override EU standards in practice. Against this backdrop, the following considerations arise:

- Deprivation of liberty should not become an automatic or generally applicable measure. Instead, national administrations should reflect on how to operationalise individualised assessments, i.e. how to practically differentiate between profiles and individual cases in border processing.

- Where restrictions to freedom of movement, such as designated residence, are applied, relevant schemes should be designed and operationalised in a way that ensures their non-custodial nature, i.e., that the regime and conditions do not amount in practice to deprivation of liberty in the designated residences or accommodation centres.

- Alternatives to immigration detention that are fitting for a border processing context should be identified, developed, and put into practice.

- Deprivation of liberty of vulnerable migrants and asylum seekers should only be applied on an exceptional basis, where it is necessary and proportionate, also considering the individual circumstances of the person concerned. When deprived of their liberty, the vulnerable persons affected should have access to the full array of special procedural safeguards and reception guarantees that are foreseen for the specific groups under the applicable law.

- Monitoring in the screening and border asylum and return procedures should focus on decision-making around deprivation of liberty and restrictions to freedom of movement, detention conditions, and possibilities to challenge detention.

REFLECTIONS ON THE RIGHT TO AN EFFECTIVE REMEDY AND LEGAL AID:

The provisions surrounding the right to an effective remedy should in principle prevent refoulement. However, the short timeframe and emphasis on efficiency in border procedures could in practice undermine the prohibition of refoulement. Safeguards around access to information during all procedural stages, legal advice, free legal assistance, and representation at appeal levels will be key. Yet, ensuring their provision, especially in remote locations, will pose challenges. This calls for special consideration for the following elements:

- Member states should operationalise within-territory screening in a rights-compliant manner. They should also reflect on potential remedies against racial profiling in this setting.

- Specific attention should be paid to practical ways in which any incorrect information contained in the initial screening form could be meaningfully challenged in the asylum and return processing stages. Mechanisms to challenge the information included should already be available at first instance processing, not only at the appeals stage.

- To ensure the practical application of relevant rights and guarantees at the appeals stage, member states should explore assistance from EU agencies, as well as further involvement of international and civil society organisations.

- The instruments significantly expand the categories of applicants who will not have access to an appeal with an automatic suspensive effect, especially groups that may be subjected to non-mandatory border procedures (e.g. all disembarked migrants). Sufficient training of relevant

judicial or appeals authorities should take place to ensure the effective respect of the non-refoulement principle in such cases, while deciding on the suspensive effect of those appeals.

REFLECTIONS ON MONITORING OF FUNDAMENTAL RIGHTS COMPLIANCE:

Given the political and practical significance of fundamental rights violations in connection to border controls, the independence and effectiveness of monitoring are crucial. To this end, the setting up of these new mechanisms should consider the following elements:

- These new monitoring mechanisms the Pact foresees need to be accompanied with a robust mandate. Access to relevant facilities at the EU's borders must be guaranteed.
- Member states should operationally arm these mechanisms with the capacity to trigger national level investigations as possible follow-up.
- To avoid duplication while enhancing the effectiveness of monitoring, the EU should compare the information and output from different monitoring exercises, such as the Schengen Evaluation Mechanism, the vulnerability assessment and monitoring of fundamental rights by the Frontex Fundamental Rights Officer (FRO), as well as the upcoming EUAA monitoring mechanism. Synergies should be created so that, whenever concrete initiatives are not possible under one mechanism, alleged violations of fundamental rights could be investigated through another instrument, also guaranteeing suitable follow-up actions.
- Monitoring should engage to the possible extent relevant actors beyond the institutions, including international organisations and civil society, also involving external and independent experts.

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[10] The BRPR provides specific rules on the return border procedure in situations of crisis. See, in this book, the chapter by Alberto Horst Neidhardt.

[11] *Ibid*.

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[14] See, in this book, the chapter by Philippe De Bruycker.

[15] "European Pact on Migration and Asylum – Latest Developments", European Council on Refugees and Exiles, 17 March 2023.

[16] "Schinas: EU to allocate additional funding for migration, border protection", eEkathimerini, 8 January 2024.

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[18] See, e.g., ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, Appplication No. 13178/03, October 2006; ECtHR, Popov v France, Application Nos. 39472/07 and 39474/07, 19 January 2012. See also Human Rights Committee, General Comment No. 35, UN Doc CCPR/C/GC/35, 2014, para 18 and Human Rights Committee, D and E v Australia, HRC, Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002, para 7.2; and Human Rights Committee, Jalloh v Netherlands, Communication No 794/ 1998, paras 8.2 – 8.3. See also, Tsourdi, E. (2020). "International Human Rights Law, EU law, and Alternatives to Immigration Detention: Shaping Control Standards and Judicial Interaction in an Heterarchy", in Moraru, M., Cornelisse, G. and De Bruycker, P. (eds) *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing), pp. 167-191.

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The new European Solidarity Mechanism: Towards a fair sharing of responsibility between member states?

2

Philippe De Bruycker

Executive summary

For a long time, the allocation of responsibilities over asylum seekers among EU member states has been a bone of contention in the functioning of the Common European Asylum System (CEAS). Unfair responsibility-allocation rules under the 'Dublin system' and lack of compliance have resulted in deteriorating trust among member states. As part of the New Pact on Migration and Asylum, the recently adopted Asylum and Migration Management Regulation (AMMR) seeks to remedy the dysfunctionality of this system. Yet, it preserves the criterion of the country of first entry. At the same time, it also establishes a new mandatory but flexible solidarity mechanism. Under this new mechanism, member states will be obligated to provide contributions either in the form of relocations, financial contributions, or in-kind contributions.

Despite this innovation, questions remain as to whether it will suffice to counterbalance the disproportionate responsibilities of member states at the EU's external borders. Therefore, the fundamental political choice of keeping the Dublin system largely intact requires an equally strong political and practical commitment to implementing solidarity. As such, the AMMR also introduces a new annual migration management cycle, defining concrete steps for determining member states under pressure and solidarity needs, based on a comprehensive approach and assessment of migration, reception and asylum capacity. This focus on management, with a heightened role for the European Commission, reflects the EU's desire to proactively anticipate and respond to migration flows.

The fundamental political choice of keeping the Dublin system largely intact requires an equally strong political and practical commitment to implementing solidarity.

As member states will continue to face migratory pressure in the future, the proper implementation of the solidarity mechanism and, more broadly, the good functioning of the CEAS will depend on this new management system, as well as on the development of adequate implementation plans. Against this background, this chapter focuses on the solidarity provisions under the AMMR. After highlighting the slow emergence of solidarity in EU asylum policy, the Study examines the operationalisation of the newly introduced solidarity mechanism as part of the new annual migration management cycle. It then unpacks the system for determining solidarity and the types of contributions states will be able to benefit from.

Introduction

For many years, the EU asylum system has been marked by an imbalance between member states' responsibility over asylum seekers based on the 'Dublin' rules and the provision of solidarity to counteract their effects. The recently adopted New Pact on Migration and Asylum reforms address this imbalance through a new mandatory, but flexible solidarity mechanism as part of the Asylum and Migration Management Regulation (AMMR).[1] However, despite this innovation, it remains to be seen whether the changed system around solidarity will be enough to overcome the systemic imbalances once the AMMR begins to apply in mid-2026. This is because the minimal changes to the responsibility determination system left the country of first arrival principle intact, such that there is a risk that the reinforced solidarity provisions will not sufficiently alleviate the burden placed on member states.

This chapter examines the solidarity provisions under the AMMR. After shedding light on the emergence of solidarity in the policy debate, the chapter unpacks how the solidarity mechanism will be operationalised as part of a new annual migration management cycle. The subsequent sections focus on the determination of solidarity needs at EU and national levels, how the benefiting and contributing member states will be identified as well as the new broader institutional governance framework. This will be followed by an analysis of the types of solidarity contributions, whose flexibility is fundamental for the acceptance of this new mechanism by the different groups of member states.

For many years, the EU asylum system has been marked by an imbalance between member states' responsibility over asylum seekers based on the 'Dublin' rules and the provision of solidarity to counteract their effects.

1. The emergence of solidarity in EU migration and asylum policies

What is remarkable is less the creation of the solidarity mechanism than the fact that the EU and the Schengen area functioned without it for 34 years. Such a system was needed since 1990 when the Schengen and Dublin conventions were

adopted without integrating any kind of solidarity. The Schengen convention places the responsibility for control to member states located at the external borders, while the Dublin convention also obligates them to examine asylum applications.

Despite the congenital defects of Schengen and Dublin, solidarity was a non-issue during the 1990s. Article 63 of the Amsterdam Treaty envisaging the "promotion of a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons" was ignored. The 1999 Tampere Conclusions, despite their remarkable forward-looking character, also disregarded the issue. Some modest forms of solidarity emerged during the 2000s with the creation of a dedicated fund for "Solidarity and management of migration flows" in 2007. Operational solidarity emerged with the creation of Frontex in 2004 and the European Asylum Support Office (EASO) in 2010, but these agencies were considered primarily as vectors for practical cooperation between the EU and member states. Finally, relocation first emerged via a project to support Malta; however, it remained small-scale, with only 600 persons relocated between 2009-2013.

The authors of the Constitutional Treaty were perceptive when in 2004 they included in the project a provision on solidarity that with the Lisbon Treaty, later in 2009, became Article 80 of the Treaty on the Functioning of the European Union (TFEU). Following this provision, solidarity must be implemented in view of a "fair sharing of responsibility". However, it took until the so-called "migration crisis" of 2015/16 for solidarity to become an important political issue.[2] Two 2015 Council decisions on the relocation of 34,700 asylum seekers from Greece and Italy provoked a constitutional crisis with the 'Visegrád Four Group' – a political alliance of four Central European countries, the Czech Republic, Hungary, Poland and Slovakia – radically opposing the mandatory nature of the scheme. After this period, relocations were only conducted voluntarily, resulting in the transfer of only 5,000 asylum seekers between 2022-2024.[3]

The failure of voluntary solidarity led the European Commission to propose a mandatory but flexible solidarity mechanism featuring three options of equal weight (relocation, financial solidarity and alternative measures) in 2020 as part of the New Pact. Due to the divisions among member states, the system is organised on a flexible basis – following a North/South line about the balance between responsibility and solidarity but also following a West/East line with member states from Central Europe opposed to relocation – to enable solidarity through funding and not relocation. While the adoption of the mechanism is a real novelty and a major achievement for the EU, some of the political tensions remain unresolved. As such, its implementation will be the real measure of its success.

2. The original imbalance between responsibility and solidarity

The Dublin system unfairly allocates responsibility for examining asylum applications. The criteria of first entry into the EU being the most applicable one in practice, the burden for processing claims falls upon the member states located at the

external borders. This is primarily the case for Southern member states for the moment but could, depending on migratory developments, also apply to those at the Eastern borders.

The emphasis on the principle of solidarity and fair sharing of responsibility by the AMMR is welcome, but the way it is defined by Article 6 is rather surprising. Under the elements quoted, four refer to responsibility and only one to solidarity.[4] This is curiously the object of the brief point e) following which member states shall "provide effective support to other Member States in the form of contributions on the basis of (their) needs". One will notice that the goal of Article 80 TFEU aiming at a fair sharing of responsibility has disappeared. This approach which is based on responsibility rather than solidarity is not a surprise as the Dublin system of responsibility allocation was largely left untouched under the AMMR.

The fundamental political choice to keep Dublin instead of amending it in favour of a fairer system requires a very strong mechanism of solidarity. This is a major characteristic of the Pact to keep in mind when evaluating the efficiency of the new solidarity mechanism.

The insistence on the idea of management shows the willingness of the EU to more proactively anticipate and respond to migration flows.

3. The operationalisation of solidarity

The EU and its member states are this time around attempting to manage migration and asylum through a "comprehensive approach" announced by the first chapter of part II of the AMMR. The goal is to ensure "consistency between asylum and migration management policies in managing migration flows to the Union (…) with the overall aim of effectively managing migration and asylum". The insistence on the idea of management shows the willingness of the EU to more proactively anticipate and respond to migration flows.

This Prometheus task is exemplified by the internal[5] and external[6] components of this comprehensive approach. The AMMR requires member states to prepare national strategies "to ensure their capacity to effectively implement their asylum and migration management systems", including "preventive measures to reduce

the risk of migratory pressure as well as information on contingency planning", and "information as regards legal obligations stemming (...) at national level". These national strategies will be followed by a long-term European Asylum and Migration Management Strategy to be adopted by the Commission for five years.

Given the effective implementation of the Pact as of mid-2026, the Commission presented on 12 June 2024 a Common Implementation Plan[7] that will serve as a basis for member states to develop their own National Implementation Plans.[8] This interaction between the national and European levels will lead to a kind of coordination between the EU and its member states that the Commission had proposed twenty years ago, albeit without success.[9] Being only at an embryonic stage – for example, compared to the European employment policy based on the open method of coordination, which gives a prominent role to the Council tasked by making recommendations to member states about the implementation of their national policy[10] – it remains to be seen how the new coordination mechanisms will develop in the area of migration and asylum.

The European and annual strategies, reminiscent of the Schengen and of the external borders policy cycles or even the European Semester yearly cycle of economic policy coordination, are part of an "annual migration management cycle". The critical moment will be 15 October of every year, when the Commission will adopt an implementing decision determining the member states under migratory pressure and a proposal for a Council implementing act establishing the Annual Solidarity Pool. The process starts with the European Annual Asylum and Migration Report that the Commission will adopt. This amounts to a stock taking exercise culminating in an assessment of the overall migratory situation based, among others, on the number and nationalities of asylum seekers, persons granted protection, illegally staying migrants, return decisions and persons who left the territory, persons apprehended crossing irregularly the external borders and the number of attempted irregular border crossing. Interestingly, it will also include a forward-looking projection for the coming year as well as information on member states' level of preparedness (in particular, their reception capacity). Curiously, it does not refer explicitly to the criterion of external borders as if their type and length had no impact on the burden that their control represents for the member states depending upon their geographical location.

All these steps indicate that the EU's role has expanded beyond its classical legislative function as an executive arm to take on a more active role in implementing the migration and asylum policies on the ground. The allocation of EU funding to implement the Pact, as well as the increasing role played by EU agencies, point in the same direction. This management exercise is particularly interesting as it will make clear to which extent member states implement EU law, for instance, whether they put in place the necessary number of reception places regarding their obligations deriving from the Reception Conditions Directive. The policy debate will thus not be limited to solidarity but include the issue of responsibility.

Finally, there seems to be a weakness in the operationalisation of solidarity. Notably, no evaluation of its results is, at least explicitly, foreseen. Except for the classical general monitoring and evaluation clause under the AMMR and the monitoring function attributed to the EU Agency for Asylum, no reporting and evaluation phases are included in the policy cycle. This lacuna contrasts with the Schengen cycle which, based on an evaluation mechanism, leads to recommendations followed up by a monitoring phase to

check their effective implementation, and involves each year the Schengen Council in reporting about the state of implementation of the Schengen roadmap.

4. The determination of solidarity levels and the identification of benefiting and contributing member states

In comparison to the 2016 recast Dublin III Regulation proposal,[11] which envisaged a corrective allocation mechanism based on the number of asylum applications and a very simple – if not simplistic – reference key that was rejected by the member states, the AMMR establishes a sophisticated and complex solidarity mechanism.

The first element of the mechanism is the establishment of the Union-wide responsibility to be shared among all member states, based on numerous and diverse qualitative and quantitative criteria, particularly the number of arrivals, the average recognition rate and the average return rate.

The second element relates to the total solidarity contributions to be shared among the benefiting member states, i.e., the Solidarity Pool. This pool must be established in a "balanced and effective manner" that "reflects the annual projected solidarity needs of the Member States under migratory pressure". Minimum annual thresholds are set to 30,000 relocations and €600 million for financial contributions. The number of 30,000 relocations – reflecting the 30,000 places to be made available in the asylum border procedures – may seem quite low, but would, if well implemented, considerably surpass past numbers of relocations. Compared to the assessment of needed relocations based on the number of arrivals of asylum seekers in the EU, evaluating the amount of financial solidarity will be much more complicated.

The third element concerns the determination of the member states under migratory pressure. This refers to "a situation brought about by arrivals or applications of third-country nationals (…) that are of such a scale that they create disproportionate obligations on a Member State, (…) even on well-prepared asylum, reception and migration system and require immediate action, in particular solidarity contributions". Considering the specificities of the geographical location of a member state, it covers situations with a large number of arrivals. This process leaves wide discretionary power to the Commission as there is no reference to a calculation based on the total number of arrivals at the EU level. It will, however, lead to a more objective basis than it used to be the case previously, reflecting as much as possible the real burden faced by member states. This crucial element was missing prior to the AMMR's adoption, enabling member states to claim that they were overburdened without impartial and reliable parameters in place.

The evaluation of the burden of member states will be set against their level of preparedness for the arrivals on their territory. As such, they may be required

to increase their asylum or migration capacities prior to being able to benefit from solidarity. In this context, a member state not identified as under migratory pressure can require the Commission to examine its situation by a notification and take a decision regarding its case.

The fourth element is about the contribution that the benefiting member state will receive. The AMMR specifies that it is about *indicative* contributions, the discretion of the Commission being this time limited by a precise reference key indicated in Annex II to the AMMR. This takes into account the population of member states in relation to the total population of the EU as well as the national Gross Domestic Product (GDP) against the Union's GDP.

A critical characteristic of the AMMR compared to the 2016 Commission proposal is the flexibility of the mechanism. Following Article 57, "Member States shall have full discretion in choosing between the different types of solidarity measures (…) or a combination" of them.

5. The flexibility of the types of solidarity contributions

A critical characteristic of the AMMR compared to the 2016 Commission proposal – wherein relocation was the only solidarity tool proposed – is the flexibility of the mechanism. Following Article 57, "Member States shall have full discretion in choosing between the different types of solidarity measures (…) or a combination" of them. This flexibility is welcome: not only can it persuade member states that are reluctant to relocate to agree to participate in the system, but also because physical transfers like relocations are much more difficult to implement than other forms of solidarity like financial transfers.

There are three types of different solidarity measures, all considered of equal value:

- **Relocation** – in other words, physical solidarity, i.e., the transfer of persons between member states. This usually pertains to asylum seekers, but it can also concern beneficiaries of international protection, if member states bilaterally agree. Receiving member states may indicate preferences for the profiles of people to be relocated, after which the benefiting member state shall identify eligible persons. Such a system grants asylum seekers no right to choose a specific member state of destination. The use of coercion to relocate asylum seekers against

their will may constitute an incentive for secondary movements that will probably continue.[12] Other elements driving them, like the different levels of reception conditions for asylum seekers depending upon the wealth of member states, will also not automatically disappear with the Pact. At the same time, meaningful links between the asylum seeker and the receiving member state like family links or cultural considerations must be taken into account. Where the member state has relocated an applicant for whom the member state responsible has not yet been determined, the receiving member state shall determine the responsible member state based on the Dublin criteria, with some exceptions. It is worth asking if a potential double transfer (one for relocation and another one for Dublin purposes) constitutes an effective solution in this context.

- **Financial contributions** – transfers of money from one contributing member state to the Union budget for the benefit of another member state. The money can be used for various purposes, including migration, reception, asylum, pre-departure reintegration, border management and operational support, though is the benefiting member state that shall determine the actions to be funded. The possibility of funding border management through financial contributions has been criticised by NGOs considering that it can lead to measures making the exercise of the right to asylum more difficult for asylum seekers. This should not be the case if provisions under the AMMR requiring member states to take all measures necessary and proportionate to prevent and reduce irregular migration "in full compliance with fundamental rights" are respected. It will be interesting to see if the Commission will extend its opposition to using EU funds for the construction of border walls to the use of financial contributions for border management purposes.

Financial contributions may also provide support for actions within third countries upon the condition that they "might have a direct impact on the migratory flows at the external borders of Member States or improve the asylum, reception and migration systems of the third country concerned, including assisted voluntary return and reintegration programmes". The AMMR specifies that financial contributions for projects in third countries shall in particulars focus on "enhancing the capacity of asylum and reception in third countries". These solidarity measures within third countries should be implemented for the benefit of EU member states, but also in a spirit of true solidarity with third countries.[13]

Despite this not being a legal requirement of international refugee law, "support(ing) partners hosting large numbers of migrants and refugees in need of protection" is one of the external components of the Comprehensive Approach in line with the principle of solidar ity guiding the Union's external actions and Common Foreign and Security Policy following Article 21(1) of the Treaty on European Union (TEU). This should be the case as "promoting legal migration and well-managed mobility, including by strengthening (…) partnerships on migration, forced displacement, legal pathways and mobility partnerships" is one of the elements upon which financial contributions in third countries should focus.

It is worth noting that the Commission must maintain a ratio between 30,000 relocations and €600 million in financial contributions when proposing the content of the Solidarity Pool. The idea that member states refusing relocation must pay € 20,00014 per person they refuse to relocate has often been quoted as part of the political deal, but it is not reflected by the text of the AMMR, maybe because of the opposition of Eastern member states refusing what they

consider as a penalty. If this calculation had not been abandoned, it could have been considered as one point of reference for the calculation of the financial solidarity or alternative solidarity measures that member states refusing reloca- tion would have to implement.

- As a third option, alternative solidarity measures focus on operational support, capacity building, services, staff support, facilities, and technical equipment, in other words in kind solidarity. These contributions will be counted as financial solidarity, their concrete value being established jointly by the contributing and benefiting member states. It is the benefiting member states that will make a request for this kind of solidarity. At the end of a given year, unused contributions will be converted into financial contributions.

6. The institutional framework for implementing solidarity

The institutional framework laid out by the AMMR establishes two new fora at EU level as well as the new appointment of a Solidarity Coordinator. If some observers will deplore the development of what they consider as bureaucracy, one must acknowledge that this is necessary to make the new solidarity mechanism work.

As mentioned above, the Commission retains the responsibility for identifying member states under migratory pressure. This executive prerogative could obviously not be retained by the Council because member states would not have been impartial, and it has therefore been attributed to the Commission as an independent institution. On the contrary, the Council has decided to keep the power to adopt the implementing act establishing the Solidarity Pool upon a Commission proposal. The Council has discretionary power but must respect the ratio mentioned above between relocation and financial solidarity. Keeping such a decision in the hands of the Council is not a surprise due to its sensitivity for member states, and it will help to ensure mutual ownership over the process.

The AMMR also creates two fora where member states will be represented. The first one is the High-level EU Solidarity Forum, which is made up of member state representatives "at the level of decision-making power" and chaired by the Presidency of the Council. This forum will prepare the ground for the adoption of the Council implementing act, but it will have more than a purely preparatory role and fulfil a political task. It will have to come to a conclusion to be endorsed by the Council about the content of the solidarity pool regarding the number of relocations and financial contributions as well as the pledges of each contributing member state to be made in the framework of this forum.

The second one is the Technical-Level EU Solidarity Forum, which will be made up of representatives of member states at the senior level but chaired by the Solidarity Coordinator. As indicated by its denomination, this forum will oversee and operationalise the solidarity mechanism between the member states. Even if its role appears technical, it will be essential to link the solidarity measures pledged by the contributing member states with the needs

expressed by the benefiting member states and ensure a balanced distribution of the solidarity contributions available among the benefiting member states.

Finally, regarding the Solidarity Coordinator, this marks the fourth appointment of this kind in the area of migration and asylum, following the Schengen, Return and Anti-Trafficking coor dinators that are all linked to the Commission. The position corresponds to an operational role by facilitating the best interaction and cooperation among benefiting and contributing member states. Its importance is shown as this person will be assisted by an office "provided with the necessary financial and human resources" which is not the case with the three other coordinators, all of whom work with very limited means.

7. Conclusion and forward-looking reflections

While the Dublin system has so far regulated member states' responsibility for asylum seekers, it now features alongside solidarity provisions in the AMMR. This is the result of a long process marked by the crisis of 2015 and the failure of voluntary solidarity. The introduction of a solidarity mechanism was necessary because the Dublin system of unfair distribution of responsibility has been left almost untouched by the AMMR. The adoption of this mechanism goes together with the creation of a new policy cycle for the operationalisation of solidarity. Its creation translates into a complex system determining the level of solidarity needed and identifying the benefiting member states considered to be under migratory pressure. The system is based on flexibility with a choice given to member states based on three different types of solidarity. The institutional framework set up led to the creation of new European forums and of a new function of solidarity coordinator.

The overarching question is whether the new rules and the way they will be implemented can achieve a fair sharing of responsibility among member states.

In this vein, the following points for further reflection could feed the thinking of EU and national institutions and policy makers.

On the balance between solidarity and responsibility:

- EU institutions should ensure that the right balance is established between responsibility and solidarity within the Common European Asylum System.
- EU and national policymakers should keep in mind that the fundamental political choice to maintain the Dublin system of responsibility determination requires a very strong level of solidarity between member states.

On the determination of solidarity levels:

- The European Commission should adequately use its discretionary power to determine the member states under migratory pressure.

On operationalising the different types of solidarity contributions:

- Member states should identify the asylum seekers to be relocated by considering their links with member states as much as possible to avoid secondary movements.
- Member states should ensure that financial transfers linked to projects to be implemented through the solidarity mechanism do not obstruct the exercise of the right to asylum.
- Member states should ensure that financial contributions supporting actions within third countries are not exclusively in the interest of the EU but also in the interest of third countries. Funding should be designed and implemented in a spirit of solidarity with those countries hosting large numbers of asylum seekers and refugees, in line with the "Comprehensive Approach guiding the Union external actions and Common and For eign and Security Policy".

On the governance of the solidarity cycle:

- To facilitate the operationalisation of effective coordination between the EU and member states, inspiration should be drawn from pre-existing coordination mechanisms, such as in the realm of the European employment policy.
- EU institutions and member states should make all necessary efforts to develop the new annual migration management cycle effectively, particularly regarding *ex-post* reporting and evaluation of its results.
- The Commission should ensure that the office of the Solidarity Coordinator is provided with all the necessary financial and human resources to work efficiently.

[1] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013. PE/21/2024/REV/1. OJ L, 2024/1351, 22.5.2024.

[2] On the Crisis and Force Majeure Regulation and how the New Pact tries to address the shortcomings revealed by previous "migration crises", see, in this book, the chapter by Alberto-Horst Neidhardt.

[3] European Commission (2024) "Voluntary Solidarity Mechanism: 5,000 asylum seekers relocated ahead of the mechanism's transition to the new solidarity framework." 14 June.

[4] Member States are supposed to maintain "national effective asylum and migration national systems including return"; ensure that "necessary resources and sufficient competent personnel are allocated"; "apply correctly and expeditiously the rules on the determination of the Member States responsible"; "take effective measures to reduce incentives for and to prevent unauthorised (secondary) movements between the Member States".

[5] Among others under Article 4 "effective management of the Union's external borders", "swift and effective access to fair and efficient procedure for international protection", effective management of the return of illegally staying third-country nationals".

[6] Among others under Article 5 "effectively prevent irregular migration and combat migrant smuggling and trafficking", "support partners hosting large numbers of migrants and refugees and build their operational capacities in migration, asylum and border management", "address the root causes and drivers of irregular migration and forced displacement", "enhance effective return readmission and reintegration".

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Common Implementation Plan for the Pact on Migration and Asylum, COM(2024)251 final, 12.6.2024.

[8] Commission Communication of 12 March 2024 "Striking a balance on migration: an approach that is both fair and firm", COM(2024)126, pp.3-4.

[9] See the Commission Communications of 11 July 2001 on an open method of coordination for the community immigration policy COM(2001)387, and of 28 November 2001 on the common asylum policy, introducing an open method of coordination COM(2001)710.

[10] See Article 148 of the Treaty on the Functioning of the European Union (TFEU)

[11] Regulation of the European Parliament and of the Council 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 (recast), COM(2016)270 final, 4.5.2016.

[12] See, in this book, the chapter by Daniel Thym.

[13] On the goals to be pursued through cooperation with third countries see, in this book, the chapter by Andreina De Leo and Eleonora Milazzo.

[14] This amount is the result of the division of the €600 million foreseen as minimum amount for financial solidarity by the number of 30,000 foreseen for the minimum number of relocations in the Solidarity Pool.

The Crisis and Force Majeure Regulation: Towards future-proof crisis management and responses?

3

Alberto-Horst Neidhardt

Executive summary

The benefit of using the derogations remains unclear, while solutions to address the root causes of an emergency may lie outside the New Pact instruments or even migration policy. Considering this, the newly adopted rules do not suffice to future-proof EU crisis management.

In recent years, the EU has been confronted with emergencies that have severely impacted the asylum and reception systems of member states. Following the adoption of the New Pact reforms, the Union now has a dedicated instrument for dealing with such situations. The newly adopted Crisis and Force Majeure Regulation (the 'Regulation') sets in place a procedure for determining if a member state faces an emergency and defines which response should be set into motion, including enhanced solidarity and derogations from the Asylum Procedures Regulation (APR). Against this background, this chapter examines the added value and the challenges relating to the implementation of these measures. To this end, it explores key aspects of the crisis cycle, including the potential impact of the derogations, the authorising procedure as well as the monitoring and coordination mechanisms to be used in an emergency.

The chapter's overarching question is whether the EU will be better prepared for future crises after the adoption of the New Pact reforms. It highlights that the EU is potentially better off with a common framework, also considering the likelihood of volatile migration flows in the future. Nevertheless, this chapter points to the ambiguities and grey areas in the Regulation, underlining that the flexibility for facilitating EU responses could come at the cost of legal certainty. At the same time, the benefit of using the derogations remains unclear, while solutions to address the root causes of an emergency may lie outside the New Pact instruments or even migration policy. Considering this, the newly adopted rules do not suffice to future-proof EU crisis management. To address possible challenges, this study includes forward-looking reflections which underline the need to make exit strategies part of the crisis response from the start. It also recommends using all foreseen measures – not just derogations – that can lead to an effective response on the ground while minimising the risks of rights violations and negative spillover effects for the EU.

Introduction

While most New Pact reforms seek to improve pre-existing frameworks, one novelty is a dedicated instrument to deal with crisis and force majeure situations in the field of migration and asylum. Especially after the disastrous political and humanitarian consequences following increased irregular arrivals in 2015-2016, the EU's lack of preparedness and capacity to respond to such situations could no longer be ignored. The Pact tries to fill this gap with a new crisis management system, mostly governed by the Crisis and Force Majeure Regulation (the 'Regulation').[1] The Regulation provides for enhanced solidarity based on the provisions laid out in the Asylum and Migration Management Regulation (AMMR)[2] and derogations from the Asylum Procedures Regulation (APR).[3] Further derogations are foreseen in other instruments, such as the temporary closure of border crossings under the amended Schengen Border Code Regulation (SBCR).[4]

Derogations have attracted a great deal of attention from commentators and civil society organisations (CSOs).[5] However, the Regulation is more comprehensive. Together with other tools, it seeks to strengthen the Union's preparedness and resilience, thus trying to prevent crises from arising in the first place. Under the new framework, the derogations are meant to be a measure of last resort: they should only apply when strictly necessary, if capacity-building and preventive measures failed, and for a limited time. Their stated aim is to ensure that national asylum and reception systems can overcome exceptional circumstances and return to a situation of normalcy as soon as possible. And yet, the exceptional measures foreseen are also to a degree discretionary, and, despite the stated goal, some member states may more readily call for their use. More broadly, the Regulation – alongside other reformed legislation – remains a legal tool. As such, its adequate operationalisation will be contingent on a variety of factors, including capacities as well as financial support.

Nevertheless, the importance of the Regulation in the reformed Common European Asylum System (CEAS) should not be overlooked, even if many may hope that it will never be used. Only with effective tools in place will the EU be able to devise and swiftly execute a collective response in the event of future crises, avoiding the uncertainty and humanitarian emergencies of the past, while also preserving mutual trust between member states and public

Nevertheless, the importance of the Regulation in the reformed CEAS should not be overlooked. Only with effective tools in place will the EU be able to devise and swiftly execute a collective response in the event of future crises.

confidence. Against this background, this chapter examines the new rules against the overarching question of whether the EU will be better prepared for future crises, including those engineered by foreign actors, thanks to this new crisis management system.

The chapter begins with an analysis of key definitions and the procedure for activating emergency rules, before turning to the foreseen solidarity measures and derogations linked to other New Pact reforms. The chapter then moves to monitoring provisions and fundamental rights protections in the new system, followed by an exploration of crisis coordination mechanisms. It concludes with forward-looking reflections. Overall, the chapter builds on key takeaways from past crisis situations, such as the increased arrivals in 2015-2016, the engineered rise in border crossings from Belarus in 2021, and the large-scale displacement following Russia's invasion of Ukraine in 2022. The chapter points to three weaknesses revealed by past emergencies, which the Regulation only partly addresses: the need for better preparedness and rapid responses, enhanced crisis coordination, and jointly agreed exit strategies.

In recent years, the EU has more than once been confronted with extraordinary situations, be that due to a surge in irregular arrivals, the use of migration as a hybrid tool by malicious foreign actors or because of unprecedented situations with major impacts on mobility, like the COVID-19 pandemic.

1. Crisis, instrumentalisation and force majeure situations: What's in a name?

In recent years, the EU has more than once been confronted with extraordinary situations, be that due to a surge in irregular arrivals, the use of migration as a hybrid tool by malicious foreign actors or because of unprecedented situations with major impacts on mobility, like the COVID-19 pandemic. Considering growing geo-political instability, but also the possibility of severe health or natural disasters becoming more frequent, the EU will need to deal with more volatile migration flows in the future.[6]

Past crises can be useful in evaluating whether the EU will be better off with the newly adopted Pact instruments.[7] And the first lesson is that, while member states and EU institutions have generally agreed about the existence of emergencies in the past at a general level, they differed as to their exact starting point and duration as well as their determining factors. In addition, each emergency raised unique challenges for national asylum and reception systems. Reflecting this, the situations covered by the Regulation should be seen on a continuum with, but also as distinct from those covered by the AMMR, such as 'migratory pressure' or 'significant migratory situations'.[8] They are all considered exceptional, either because of the scale of irregular arrivals, or because of their causes, as in the case of instrumentalisation and force majeure respectively. And yet, they also differ from one another.

Due to the highly variable characteristics of the situations that the newly adopted rules cover, the Regulation embeds flexibility in the new system, starting with the inclusion of broad definitions.[9] While these could facilitate EU responses in wide-ranging emergencies, they also increase uncertainty.

Crisis is defined as a situation of mass arrivals, which, considering the population, GDP, and geographical specificities of the concerned state, renders its asylum, reception, or return systems 'non-functional' due to its 'scale and nature', with serious consequences for the CEAS.[10]

Instrumentalisation involves a situation where a third country or hostile non-state actor facilitates the movement of non-EU nationals to the EU's external borders or to a member state with the intended aim of destabilising the Union or undermining a member state's capacity to perform essential functions.[11] The Regulation's recitals specify that neither smuggling nor humanitarian assistance should be considered forms of instrumentalisation, provided they do not aim at destabilising the EU or a member state.

Force majeure refers instead to unforeseeable circumstances outside a member state's control, also defined as 'abnormal', which could not have been avoided and thus prevent a member state from fulfilling its obligations under the AMMR and APR.[12] Some clarity on what qualifies as force majeure is provided in one of the Regulation's recitals, which cites pandemics and natural disasters as examples.[13]

Compared to previous versions under negotiation, the final text of the Regulation somewhat improves legal certainty. For example, unlike the Commission's original proposal from 2020, an 'imminent risk' does not suffice for crisis situations to arise.[14] Yet, ambiguities remain. Illustrating this, asylum and reception systems must be 'non-functional' for a situation of crisis to arise.

However, nowhere does the Regulation specify what this means. It also remains unclear how it could be proven, or contended, that a humanitarian mission has the goal of destabilising the EU or a member state, because the term 'destabilising' is itself undefined.

Therefore, the definitions remain broadly framed. Embedding some flexibility in the system is understandable. That said, broad definitions could contribute to conflicting interpretations and a lack of predictability. This is especially problematic considering the derogations foreseen in such scenarios and their impact, both on the functioning of the CEAS and on the activities of actors such as humanitarian organisations.

Relatedly, it is also worth noting that 'instrumentalisation' is classified in the Regulation as a specific iteration of 'crisis'. By contrast, the Commission had originally proposed a separate instrument to cover

such situations in December 2021, following a rise in unauthorised border crossings from Belarus orchestrated by the Lukashenko regime.[15] To this day, some member states consider situations of instrumentalisation as a self-standing category deserving ad hoc responses.[16] In the Regulation, mass arrivals are in fact not considered a key factor when a foreign actor engineers a migration management crisis, unlike in other crisis situations, somehow confirming their difference.

The legal and operational benefits of placing instrumentalisation into the crisis category can thus be questioned. In the long-term, it may not prevent national demands for a special treatment of such situations, and for further targeted measures. Illustrating this prospect, the letter from 15 member states addressed to the Commission in May 2024, just a few weeks after the European Parliament and Council had agreed to the Regulation, called for strengthening or even reforming the newly adopted tools "to address the threats posed by the instrumentalisation of migrants at the EU's external borders".[17]

As such, the definitions in the Regulation will likely continue to generate debate and disagreement, even among institutional actors. Far from being an abstract issue, this uncertainty can have significant systemic consequences, depending on whether and which derogations and supporting measures will be authorised in an emergency.

2. Embedding crisis preparedness and responses in the new migration management cycle

Questions and ambiguities regarding the scenarios covered by the Regulation and the conditions for applying the derogations are in part addressed by the authorising procedure established by the new law (see Table 1). This procedure does not happen in a vacuum, but as part of the annual migration management cycle foreseen by the AMMR, with further relevant provisions on preparedness.[18]

As part of this broader policy cycle, member states should develop national strategies, including preventive measures to reduce the risk of crisis and force majeure situations, and identifying actions to ensure a sufficient level of preparedness. To this end, states should consider contingency planning foreseen under the recast Reception Conditions Directive (RCD) and the Commission's reports issued within the framework of the Migration Preparedness and Crisis Blueprint.[19] The latter amounts to an operational framework for monitoring, anticipating, and managing migration flows (see Box 1 below).[20]

While embedding crisis and force majeure scenarios in the overarching policy cycle and seeking to strengthen resilience against emergencies, the Regulation establishes an ad hoc procedure for determining the necessary response, if an exceptional situation does arise. This procedure aims to define responsibilities and speed up the EU's reaction. In doing this, it seeks to

address two shortcomings revealed by the EU's response to past crises, especially the one that took place in 2015-2016: the lack of clear roles and leadership, and the failure to react to the early signs of the emergency.[21]

Accordingly, under this new procedure, a member state that considers itself to be in a situation of crisis or force majeure should submit a "reasoned request" to the Commission.[22] The request must include a description of the situation, and how it has rendered its asylum and reception systems non-functional, as well as the requested solidarity measures and derogation(s). In its request, the member state can indicate whether it wants to benefit from a longer period for registering asylum applications. This is the only derogation that is allowed from the start, and not requiring a corresponding authorisation.

The Commission must then "expeditiously" assess the request in consultation with the concerned state, EU agencies, the UN Asylum Agency (UNHCR), and the International Organization for Migration (IOM).[23] When assessing the situation, the Commission is to verify whether the conditions spelt out in the above-mentioned definitions are met based on the information provided by the member state and relevant qualitative and quantitative indicators listed in the AMMR.[24] These include the number of asylum applications, refused entries and irregular crossings, as well as the number of non-EU nationals subject to the border procedure and the reception capacity in the requesting state.

The use of a wide variety of qualitative and quantitative indicators – and the Commission's view that no indicator takes precedence over another[25] – should enable it to carry out an evidence-based and impartial assessment, without overlooking any of the relevant factors. Yet, inevitably, it widens the Commission's discretion in evaluating a given situation.

The use of a wide variety of qualitative and quantitative indicators – and the Commission's view that no indicator takes precedence over another – should enable it to carry out an evidence-based and impartial assessment, without overlooking any of the relevant factors.

Table 1

Action	Timeline
A member state submits a reasoned request to the European Commission.	At the outset of the situation.
When submitting the request, the state may start applying a specific derogation to the APR: delays in registering an application for international protection.	Registration delays are immediately applicable for 10 days, unless later authorised for a longer period in the Council Implementing Decision.
The European Commission adopts an Implementing Decision determining if the requesting member state is in a situation of crisis or force majeure.	No later than two weeks after the member state's request.
The Commission submits a proposal for a Council Implementing Decision, including a draft Solidarity Response Plan.	Simultaneously with the adoption of the Commission Implementing Decision (no later than two weeks following the request).
The Council adopts an Implementing Decision authorising the derogations and establishing the Solidarity Response Plan.	Within two weeks following the Commission's proposal (four weeks after the request).
The Commission convenes the Technical Level Solidarity Forum to promote the application of the measures foreseen in the Plan.	Immediately following the Council Decision, and regularly during the measures' operationalisation.

Further conditions must be fulfilled for specific situations to be recognised. In determining whether a member state faces a situation of instrumentalisation, the Regulation specifies that the Commission must verify if an unexpected and significant increase in applications for international protection has occurred and indicate why the situation cannot be addressed through the EU Migration Support Toolbox, which includes operational support by agencies, Union Funds, and the Union Civil Protection Mechanism, next to enhanced diplomatic and political outreach.[26]

In all scenarios, if the necessary conditions are met, concurrently with adopting its own Implementing Decision, the Commission should also make a proposal for a Council Implementing Decision. The proposal should outline the derogations that the requesting member state would be authorised to apply and include a draft Solidarity Response Plan, to be developed in consultation with the concerned state.

Based on the Commission's proposal, the Council should then adopt an Implementing Decision authorising the derogations and the period for their application and establishing the Solidarity Response Plan.[27] The Plan should include the total relocations needed to address the crisis, financial, and alter- native solidarity contributions as well

as the total amount of contributions to be taken from the annual Solidarity Pool. While recognising the equal value of the different solidarity contributions and respecting national discretion in choosing them, the Council should also define the specific contributions that member states other than the one facing the exceptional situation should fulfil.

The procedure also establishes temporal limits.[28] By default, the duration of the derogations and solidarity measures should be three months. If the situation persists, the derogations and solidarity measures may be extended for another three months. If, at the end of this period, the concerned state requests it, the Commission may submit a proposal for a new Council Implementing Decision to amend or prolong the specific derogations or the Solidarity Response Plan, for a period of no longer than three months, extendable only once (amounting to one year in total). The Regulation also establishes that the emergency measures should be withdrawn, if the situation no longer persists. These limits reflect another lesson learnt from past crises: the need to ensure that exceptional measures in response to an emergency do not apply indefinitely.[29]

This procedure, which complements the migration management cycle laid down by the AMMR but also seeks to improve preparedness and responsiveness, appears to have been designed to strengthen the overall governance of the CEAS. Although all these goals are widely considered essential for more effective crisis management, blind spots as well as some possible sources of tension and uncertainty remain.

To begin with, if not supported by further actions, initiatives to strengthen the EU's resilience to future crises may prove seminal but insufficient. Ambiguities also remain: for example, neither the use of measures comprised in the EU Migration Support Toolbox nor, presumably, those of the Blueprint are regarded in the legislation as a precondition to benefit from the measures under the Regulation.[30] At the same time, the Commission has emphasised that, to benefit from support measures foreseen under the new system, including solidarity contributions, a member state must fulfil its responsibilities, and have resilient asylum, migration and reception systems.[31] In this respect, the EU-level Common Implementation Plan, released by the Commission in June 2025 reiterates that contingency planning under the RCD and national strategies under the AMMR are a prerequisite for a member state to be considered well-prepared. Yet, ambiguities in the Regulation will remain, and key will be to monitor and regularly assess follow-up actions by member states in this context.[32]

Broader questions also arise on how to ensure adequate preparedness for situations that may, by definition, be unpredictable and outside states' control, as in the case of force majeure and, arguably, instrumentalisation.[33]

The annual review that the Regulation includes as part of the crisis cycle could also be potentially helpful to incentivise better preparedness and responses, and preserve the experience acquired: no later than one year from the date when the emergency ended, member states must revise, where necessary, their national strategy, as required by the AMMR.[34] The goal is to implement the asylum and migration management system of member states more effectively in the future. Despite its potential benefits, the review too has limits, particularly the risk of discretionary or limited use by member states. A lack of commitment to the exercise would be problematic, considering the benefits such a collective re-assessment would provide, especially but not only if the emergency has a pan-European dimension.

A critical element for the procedure's functioning relates to the deadlines for

issuing the implementing decisions. The deadlines are undoubtedly tight, also considering the manifold scenarios covered and the slow responses in some past emergencies. In this context, it will be essential that states, the Commission, and the Council develop the human resources that enable them to fulfil their respective obligations while also facilitating information exchange. Meeting the deadlines will also be contingent on close coordination between all relevant actors from the outset, without necessarily waiting for the procedure to have formally reached a certain stage. Connected to this, mutual trust between all the actors involved will be key.

The Regulation highlights that the Commission should expeditiously assess a state's request to limit the time gap between the application of the registration delays – the only derogation permitted immediately and without authorisation – and the Council Implementing Decision.

But arguably even more important than the procedure itself will be to have a broad political consensus from the start to ensure a prompt and unified response. Illustrating this, it only took a few days for member states to activate the Temporary Protection Directive (TPD), which had remained unused for over two decades, after Russia's full-scale invasion of Ukraine in February 2022 provoked the largest displacement in Europe since the Second World War.[35] Only time will tell if member states will be able to come together and show the same unity again, if confronted with an emergency of a similar magnitude, or less, in the future.

Other than these broader considerations, there appears to be an inconsistency in the timeline. The Regulation highlights that the Commission should expeditiously assess a state's request to limit the time gap between the application of the registration delays – the only derogation permitted immediately and without authorisation – and the Council Implementing Decision. Yet, this derogation is applicable for 10 days, while the Decision may only come two weeks from the Commission's proposal.

A third problematic aspect, and possible source of tensions, could stem from simultaneous or prolonged crises, which the procedure does not altogether preclude, and, consequently, the risk of fragmentation of the CEAS. Although the Regulation limits the application of derogations and solidarity measures for the same situation to 12 months, a member state may request and be authorized to apply further measures concomitantly when it faces several of the situations covered "at the same time".[36] In addition, the Regulation does not clarify what further elements would be necessary for a new exceptional situation to arise, and no provision appears to prevent multiple requests. This raises the prospect of member states expediently demanding a new assessment every time some (self-determined) new

elements arise or the circumstances change, potentially extending the use of the derogations beyond the time limits.

While admittedly underpinned by different rules, an instructive parallel can be drawn from the functioning of the Schengen system.[37] Schengen has for years been undermined by the controversial reintroduction of what should otherwise be 'temporary' internal border controls.[38] The criticism relates to the state practice of shifting legal basis, once the temporal limits have been exhausted, and the limited justifications provided.[39] Strong scrutiny by the Commission should prevent the use of 'weak' justifications in relation to crisis and force majeure situations. Member states would also not be able to simply claim that an existing threat persists.[40] However, also considering that what counts as a new threat is unclear, it cannot be excluded that member states may similarly claim that a new situation has arisen and alternate the grounds to go beyond the time limits.

Other than this, while the 12-month overall limit to the application of emergency measures under the Regulation should prevent permanent 'states of exception', this limit may not correspond to the actual duration of a crisis or force majeure situation. Against this background, there is a risk that member states will try to use the Regulation's ambiguities and weaker points to surpass the time limit. Alternatively, if not possible under the Regulation, they may demand additional measures: states may request further derogations and support through Article 78(3) of the Treaty on the Functioning of the European Union (TFEU).[41] This Article, first used in the 2015-2016 crisis, allows for the adoption by qualified majority of provisional measures to support a member state experiencing "a sudden inflow of nationals of third countries", also making use of further discretion regarding their duration.[42]

To put this risk into perspective, it is worth noting that many of the past emergency situations often lasted longer than one year, as was the case with irregular arrivals in 2015-2016, but also the COVID-19 pandemic. Most recently, states neighbouring Belarus and Russia, facing what they consider a persistent risk of instrumentalisation have not hesitated to prolong emergency measures and a corresponding state of exception under national law, going well beyond the 12 months now permitted by the Regulation.[43]

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Even though permanent states of exception could ultimately be avoided if the Commission enforces a strict interpretation of the new rules, procedural ambiguities but also the strong

support that states may expect amplifies the risk that the CEAS may end up fragmented, especially in scenarios where member states claim to face extended crises. Considering the comprehensive derogations foreseen, and the degree of flexibility in establishing which derogations apply, there is a danger that this fragmentation and the unpredictability connected to the rules' functioning could undermine rather than protect the CEAS.

3. Embedding crisis preparedness and responses in the new migration management cycle

Each emergency requires tailor-made and targeted responses. The Pact reforms accordingly provide for a variety of measures to respond to situations of crisis or force majeure. Some are protection-oriented: the Commission could, for example, recommend using an 'expedited procedure' to speed up the granting of protection where objective circumstances suggest that applications by specific groups of asylum seekers are well-founded.[44] Other than this, the TPD could be activated to complement other emergency measures. The TPD – which the Commission had originally proposed to repeal – will thus offer a distinct form of immediate and temporary protection in the event of a mass influx of displaced persons.

At the same time, the Pact reforms foresee wide derogations from ordinary rules that could potentially impact protection standards or even hinder access to asylum. Temporary closures of border crossing points, for example, will be possible under the amended Schengen Borders Code in cases of instrumentalisation, although effective access to procedures for international protection should in principle be guaranteed.[45] But what lies at the heart of the Regulation and the new crisis management system are derogations from the APR and enhanced solidarity measures beyond those foreseen by the AMMR. To a certain extent, these derogations are discretionary: a state will be able to select from the various possible derogations foreseen to devise its response and, subject to the authorisation of the Commission and Council, apply them. That said, the Regulation establishes overarching limits, with derogations from the APR being possible in all scenarios, while enhanced solidarity measures are only available in crisis situations.

Looking at each in turn, the justification for the derogations from the APR rules is that while member states should remain bound by their obligations under the new border procedure[46], a country facing a situation of crisis or force majeure may require additional time to organise its response or re-allocate its resources.

In such situations, a member state may be able to derogate from deadlines for registrations and the duration of the border procedure. As to the former, a member state facing a crisis or situation of force majeure may be authorised to extend the period for the registration of applications

for international protection for up to four weeks instead of the standard five days, but only during the first period set out in the Implementing Decision, i.e., no more than three months, nor during any subsequent extensions.[47] As to the latter, member states in all situations of crisis or force majeure may extend the duration of the border procedure by a further six weeks (bringing the total duration to 18 weeks).[48] Further time extensions are possible under the Return Border Procedure Regulation.[49]

At the same time, via the derogations, the personal scope of border procedures under the APR can be adjusted to reflect the composition of the flows in the situation at hand.[50] This can result in significantly different responses to each situation. It can reduce pressure on responsible authorities but also, paradoxically, in heavier workloads for them.

For example, in a crisis situation "characterised by mass arrivals" – thus excluding instrumentalisation – or force majeure, member states may be exempt from processing applicants from countries with an EU-wide average recognition rate below 20% in border procedures, potentially reducing the volume of border procedures. On the other hand, a member state facing a crisis – neither instrumentalisation nor force majeure – could be authorised to expand the use of the border procedures by making decisions on the applications' merits for non-EU nationals from countries with a recognition rate of 50% or lower.

Each emergency requires tailor-made and targeted responses. The Pact reforms accordingly provide for a variety of measures to respond to situations of crisis or force majeure.

In cases of instrumentalisation, the Regulation instead allows member states to take decisions on the merits in a border procedure for all applications made by non-EU nationals who, according to the Council Decision, have been subject to instrumentalisation, and either are found in the proximity of the external border following an unauthorised crossing or presented themselves at border crossing points.

Regarding solidarity measures, while a member state may ask for support from the EU Asylum Agency, the European Border and Coast Guard Agency or Europol in all exceptional scenarios foreseen by the Regulation, enhanced solidarity is only possible in crisis situations, not force majeure.

The solidarity measures provided by the Regulation are the same as those foreseen by the AMMR. However, financial and alternative contributions should be targeted

at addressing the situation of crisis. Provisions on relocations are also tighter. While in a situation of migratory pressure covered by the AMMR, relocations – or responsibility offsets – should cover at least 60% of the solidarity needs, in a situation of crisis, all needs of the state(s) concerned should be met.[51]

To this end, the Regulation specifies that a requesting state should be able to use contributions available in the Solidarity Pool, including relocations. Furthermore, if the Solidarity Pool is not enough, the state should also be able to access further contributions, including relocations, following further pledges made in the context of the Council Implementing Decision and laid out in the Solidarity Response Plan. Considering that member states have discretion in choosing solidarity contributions, it is however possible that the combined relocations available in the Pool and the Plan are insufficient to cover all the identified needs. If relocation pledges are below the relocation needs, further, more stringent rules kick in under the Regulation. First, "where necessary", contributing states should take responsibility "above their fair share".[52] Second, where this is the case, "responsibility offsets" become mandatory to meet the needs set out in the Solidarity Response Plan.[53] Offsets involve a shift in responsibility for asylum applicants to a contributing member state following a secondary movement, as an alternative to relocations.[54]

A solidarity contribution in all but name comes from a further derogation to take back procedures in the case of crises, not applicable to situations of instrumentation and force majeure. Where a member state faces "extraordinary mass arrivals" of "such extraordinary scale and intensity" that they lead to serious deficiencies in its asylum and reception systems, it may be relieved of its obligation to take back an applicant for whom it is responsible under the 'first country of entry' principle of the AMMR.[55]

Together with mandatory offsets, this derogation constitutes a further way to reduce pressure on states facing a crisis. The Regulation also foresees measures 'compensating' a contributing state which has become responsible above its fair share.[56] The contributing state will be entitled to a proportionate reduction of its share in future solidarity contributions over a period of five years.

The Regulation therefore allows significant departures from ordinary rules, loosening responsibilities under the APR, while tightening solidarity provisions in the AMMR. Many experts consider stronger solidarity and flexibility as key for the EU crisis management system to work.[57] That said, the risk of negative spillover effects for other states and the Union as a whole is also manifest. Considering the interdependence between national asylum and reception systems, the derogations could potentially transform what is at first a national emergency into an EU-wide crisis if they do not strike the right balance. In this sense, the Commission and the Council will have to ensure that the state(s) concerned benefit(s) from sufficient support while remaining able to fulfil broader obligations in the new system. From this perspective, only measures that can address the crisis or force majeure situations should be authorised.

Yet, challenges may still arise. First, member states may have differing views on what an appropriate response should consist of, and the types of measures needed. Connected to this, the Regulation does not explain the added value of specific derogations from the APR, alongside those from the AMMR, and how they enable the concerned state to better overcome the crisis or force majeure situation.

In fact, the solutions to address or mitigate an emergency may not be found in migration policy at all. For example, looking at past situations that may fall within the scope of instrumentalisation, what reduced unauthorised border crossings from Belarus in 2021 were diplomatic efforts targeting countries of origin and transit as well as sanctions against other actors, such as airlines.[58] From this viewpoint, it is not the Regulation or the foreseen derogations per se that member states may have to turn to, if the aim is to quickly and effectively end the emergency, but rather all available tools, including diplomatic ones, also relying on the EU Migration Support Toolbox.

Turning to solidarity measures, despite innovative approaches to satisfy possible needs, questions regarding their operationalisation remain. For example, where the Solidarity Pool does not suffice to meet all the needs, the Council should also receive further pledges when adopting its Implementing Decision. However, there is no guarantee that all the needs will be met. Relatedly, in the likely event that the Pool is fully used due to a prolonged crisis, it is not clear how it will be replenished to account for further or future needs.

Against this background, innovations such as the transformation of offsets into a first-order, mandatory solidarity measure could potentially support countries that are otherwise unable to benefit from relocations in the Solidarity Pool or Solidarity Response Plan. However, offsets reduce the pool of contributing countries, as they are only applicable to asylum seekers already present on their territory, and not all member states are exposed to the same rates of secondary movements. Despite the benefits of having compensatory measures for countries contributing above their fair share, the reduced number of contributing states could negatively impact their ability to sustain the crisis, especially if this persists, with possible Union-wide consequences.

Moreover, questions remain about EU funding and its use. The first one is how to ensure that EU funds are strategically used to strengthen resilience and preparedness, while making sure that all states potentially facing emergency situations can benefit from the quick disbursement of extra funding. A second, connected question is what amounts of EU funding will be dedicated to strengthening the resilience of national asylum and reception systems, and what amounts will support the external dimensions of EU migration policy. The implementation plans by the Commission and by member states, but also the negotiations of the 2028-2034 Multiannual Financial Framework (MFF) and the pursuit of further strategic partnerships with third countries will be key to answering these questions.[59]

Beyond the enhanced solidarity and derogations foreseen by the Regulation, it also remains to be seen how member states neighbouring Belarus and Russia will transition away from the national emergency measures currently in place, once the Regulation becomes applicable in 2026, should the alleged persistent risk of instrumentalisation that they face not cease before then. This is an especially consequential question, considering that some of the adopted measures at the national level effectively block asylum seekers at the border, while the Regulation and EU fundamental rights law should guarantee access to asylum.[60] But the question also arises as to whether these countries will not instead increase the pressure to demand further exceptions from the new EU acquis in the next policy cycle.[61]

4. Fundamental rights considerations and monitoring

Since the Commission's original proposals, experts and advocacy organisations have expressed concerns about the potential impact of the foreseen emergency measures on human rights.[62] Some of these concerns were addressed during the negotiations and resulted in the rejection of further derogations and discretion: neither the Regulation nor other reforms go so far as allowing the outright suspension of the right to asylum. That said, tensions remain.

For example, by allowing for delayed registrations and, with it, the reception of a document proving their status, and all the necessary information on their application and its processing, applicants may face practical obstacles in accessing their rights for a protracted period.

Considering the risks associated with the expanded use of border procedures, the Regulation highlights that the safeguards foreseen by the APR, including the right to an effective remedy, remain in place.[63] However, appeals against negative decisions in border procedures lack automatic suspensive effect under the APR, which could have a significant impact in emergency situations. In addition, the Regulation states that organisations and persons who provide advice and counselling must have access to applicants held in detention facilities or at border crossing points. And yet, states may impose limits to their activities for public order, security, or administrative reasons, provided that access is not severely restricted.[64]

This latter provision could also prove to be a source of contention. In response to what they consider situations of instrumentalisation, some EU states have for example, restricted access to border zones by journalists and CSOs. This made it harder to provide humanitarian assistance and monitor the situation, leading to concerns about possible violations of the rights of migrants and asylum seekers.[65]

The broadening of the scenarios where persons may be subject to border procedures, and the foreseen derogations more in general, may also expose vulnerable persons to some risks, if complementary measures are not introduced. Notably, the Regulation includes several provisions dedicated to persons with special needs. For example, if authorised to lower the threshold for border procedures, states should prioritise registering minors and their family members and give priority to applications for international protection lodged by persons with special procedural or special reception needs.[66] And yet, save for instrumentalisation situations, no general exemptions to border procedures apply to vulnerable persons, including children and family members.

Because more applicants may be subject to border procedures in some emergency situations, national authorities may struggle to carry out their responsibilities efficiently while also ensuring the effective identification of persons with special needs.

Other than broadening the personal scope of border procedures, derogations also prolong their duration. Some experts and CSOs have flagged the increased dangers of being exposed to lower reception standards or even detention-like conditions in such procedures.[67] Notably, the Regulation highlights that rules and guarantees set out in the RCD continue to apply, and no derogations are allowed with respect to the required material reception conditions.[68]

As such, safeguards should be in place for vulnerable individuals, including minors and families. However, while remaining applicable, the APR does contemplate that those undergoing border procedures may be deprived of their liberty during the processing. Considering the time extensions, and that reception systems may be especially overstretched in crisis situations, there is a risk that expediency ends up overriding EU standards in practice.[69]

In this context, monitoring and reporting across all stages of situations of crisis and force majeure will be especially important. The Regulation establishes that the Commission and Council should "constantly monitor" whether a situation of crisis or force majeure persists, and promptly recall the measures, if appropriate.[70] The concerned member state, European Parliament, Commission, Council, and relevant EU agencies must also regularly inform each other on the implementation of the measures put in place.

As far as fundamental rights are concerned, no specific mandatory, independent monitoring is foreseen for situations of crisis and force majeure. However, the Commission may also ask the EUAA to initiate a specific monitoring exercise.[71] In addition, the monitoring mechanisms foreseen by other instruments would remain relevant and play an important role in closing any oversight gap.

5. Cooperation in emergency situations and in the new migration governance system

One of the critical lessons learnt from past migration management crises is the need for effective and flexible coordination mechanisms. While each crisis is different and raises unique challenges, several factors render coordination in the EU generally complex. Among others, the existence of a variety of institutional actors, each with its own mandate, amplifies the need for sustained collaboration to reach widely agreed decisions in high-pressure circumstances. Crises also necessitate responses that span different policy areas, while siloes exist within and across EU institutions. The implementation of responses depends on political direction as well as on technical coordination, which raises additional challenges.

Overcoming these challenges is essential for ensuring effective and rights-compliant responses to emergencies, while also meeting the needs of institutional actors as well as those of migrants. Otherwise, there can be gaps in the response, or duplication of efforts, leading to confusion and to exacerbating instead of solving the emergency situation, as past crises have shown (see Box 1).

There is therefore a need for robust and agile coordination mechanisms, at different levels and involving different actors, in emergency situations. These mechanisms should allow for information exchange and the effective use of available resources, in line with identified existing and future needs. At the same time, past developments point to the risk of duplication among the institutional

mechanisms that have in the meantime been set in place, and the need to avoid conflicting visions among those steering them.

Given this context, the Regulation establishes an additional layer of cooperation between EU institutions, member states, and relevant agencies to be triggered in a situation of crisis or force majeure. To rapidly boost coordination, for example, the Commission is to convene a first meeting of the Technical Level Solidarity Forum immediately after the adoption of the Council Implementing Decision.

Still, the Regulation does not do away with tools set in place during past crises. Rather, it embeds them in the new governance framework, trying to streamline cooperation across the existing initiatives and platforms. For example, it emphasises that the Commission should ensure coordination and exchange of information with other networks, such as

Box 1: The emergence of coordination tools in the context of past emergencies

The EU faced significant challenges in past emergencies, with coordination only improving over time. Due to the lack of leadership and the absence of dedicated mechanisms, for example, coordination only slowly materialised following irregular arrivals in 2015-2016. The intricate distribution of power among EU institutions and member states hindered the Union's collective capacity to react, contributing to ineffective and disorderly responses and aggravating political tensions. EU agencies, together with international organisations and civil society had to step in to fill operational and reception gaps. While showing the importance of multistakeholder responses, their involvement raised further coordination challenges, also considering the fragmented landscape with different local needs and national dynamics. Several initiatives to improve coordination were eventually launched, including ARGUS, the Commission's general rapid alert system, and its regular high-level meetings chaired by the Secretariat General. However, it was the Integrated Political Crisis Response (IPCR), the Council's in-house political crisis mechanism, that facilitated the emergence of a more coherent response by enabling more effective information-sharing and strengthening the interface between the technical and political levels, among others. Since 2015-2016, further mechanisms have emerged, with the IPCR continuing to operate in the background. In 2020, for example, the Commission launched the Migration Preparedness and Crisis Blueprint and its Network. This is a complementary coordination mechanism managed by the Commission's Directorate-General for Migration and Home Affairs (DG HOME) which seeks to monitor, collect and disseminate information. It was first used in response to border crossings from Belarus, when the Commission brought together member states, EU agencies, and the European External Action Service in weekly meetings to provide situational awareness and improve coordination. Shared information included the number of border crossings and the country of origin, thus informing EU responses, including diplomatic efforts.[73] While the Network remained active, DG HOME also launched the Solidarity Platform shortly after Russia's invasion of Ukraine, facilitating information exchange and collaboration between the EU and member states. The Solidarity Platform, also included international organisations and foreign administrations, strengthening the response on the ground and scaling up coordination efforts to the global level.

the IPCR and the Migration Preparedness and Crisis Management Network. A role is also foreseen for the Solidarity Coordinator who, according to the Regulation, should promote cooperation as well as a culture of preparedness among member states.[72]

With the Regulation and the Pact's instruments, the EU will therefore have abundant tools to facilitate coordination. Each of them could potentially play an important role in coordinating different aspects of the response if a member state faces an emergency. This could strengthen ownership, and lead to more committed responses by all the actors involved. In addition, it could help to preserve the institutional knowledge and experience acquired in dealing with past crises.

At the same time, it is worth noting that several important details have been left vague in the Regulation, and may therefore only take shape when a crisis or force majeure situation occurs.

To pick just one example, the role of the Solidarity Coordinator in crisis situations is anything but well-defined, not to mention that the Coordinator's official role is acknowledged in the Migration Support Toolbox, but not in the EU Migration Preparedness and Crisis Blueprint and its Network. Against this background, if and when a crisis or force majeure situation emerges, especially when large-scale, the leadership, personal network, and even proactiveness of key individuals will be instrumental to ensure cross-institutional collaboration and mobilise all available resources, also avoiding policy siloes.

Relatedly, it remains to be seen how in the new crisis system, international organisations and other stake-holders, including third countries, will be involved in both the planning and the implementation of the responses to situations of crisis and force majeure. This could determine the success of a response to crises that have a strong foreign policy dimension or extend beyond the confines of the EU, as was the case with Russia's large-scale invasion of Ukraine and the displacement that followed it.

Beyond these more operational considerations, the new crisis management cycle suggests a reconfigured EU institutional architecture, as also indicated by the other New Pact reforms.[74] For example, the Commission will have to navigate multiple responsibilities: gatekeeper, with a degree of discretion, when it comes to the assessment of the exceptional situation and its proposal for a response, and heading the operational response if a crisis situation is established. At the same time, it will have to ensure compliance with all obligations, including under the AMMR and the APR, also fulfilling its role of Guardian of the Treaties.

This raises capacity questions for the Commission, considering the additional resources that may be needed in an emergency. But it also calls for an assessment of the responsibilities of the EU's main executive body, and whether it will be able to fulfil its various roles effectively and impartially.

Meanwhile, while the European Parliament (EP) plays a marginal role in the new crisis management cycle, the Council will have a key function in the authorisation procedure, and on issues with a political dimension like the allocation of solidarity measures, as seen above. Against this background, a commitment to continuous dialogue, especially between the Commission and the Council, and the establishment of widely shared goals, other than inter-institutional trust will be as important as the presence of communication channels and coordination mechanisms. That said, considering the limited role of the EP, the accountability and democratic legitimacy of the process could be called into question.

6. Conclusion and forward-looking reflections

As migration flows will remain volatile in the future due to growing political instability and rising conflicts, the poor economic outlook in many regions, as well as climate change and possible new pandemics, the EU could benefit from the newly adopted common framework to address future crisis situations. And yet, this chapter also points to the ambiguities and grey areas in the Regulation that may determine the effectiveness of the crisis management system in the future, if activated. To begin with, striking the right balance between the necessary flexibility for effective responses to exceptional situations and the overall need for legal certainty and impartial assessments will be one of the key challenges in situations where a state is confronted with what it claims constitutes a crisis or force majeure.

Additionally, derogations under the crisis management cycle are vast, loosening responsibilities *vis-à-vis* border procedures, while enhancing solidar ity to alleviate pressure from the affected state. This could enable the state to reallocate its resources and re-establish the status quo ante as soon as possible. And yet, the high degree of discretion and, simultaneously, the stronger interdependence between member states' asylum, migration, and reception systems could lead to negative spillover effects for the Union in situations of crisis, especially prolonged ones affecting multiple member states. Instead of addressing the root causes of a crisis, derogations may only treat the symptoms, if not coupled with further concerted actions, such as diplomatic and policy initiatives which go beyond the means foreseen by the Regulation.

On this account, this chapter highlighted the importance of three aspects that will require operational investments and political attention in the next policymaking and implementation phases: the need for preparedness and rapid responses as well as for coordination and clear leadership, but also the importance of a shared understanding about the overall goals of the crisis management system. If these and the remaining grey areas in the Regulation and other instruments are addressed, the EU will more likely be able to stand united in the face of future challenges. Mindful of ongoing and upcoming initiatives by the Commission and member states to stimulate ownership and pave the way for implementation, the chapter advances the following forward-looking reflections:

- **Improve legal certainty by providing guidance on definitions and ensuring quality of data:** While preserving a degree of flexibility, definitional ambiguities should be clarified to the possible extent. This should not be done through exhaustive lists or simulation exercises that would not capture the complexity of potential future scenarios. Instead, non-exhaustive examples of what "destabilising intent", "non-functional" asylum and reception systems, and other vague terms in the Regulation could, for example, be provided in Commission guidelines. At the same time, the Commission should take all possible steps to guarantee the reliability of the data and the indicators used for assessing a state request, addressing inaccuracies and inconsistencies already during this preparatory phase. This would enhance legal certainty with respect to the

triggering of derogations, minimising the risk of loose interpretations and abuse.

- **Avoid protracted emergency situations by making an exit strategy a key component of all Implementing Decisions and Solidarity Response Plans:** This study suggests that the procedure for establishing a crisis or force majeure reflects a widely shared need to minimise to the possible extent the risk of arbitrariness and political interference, among others, and Solidarity Response Plans, also including objective indicators to help establish through real-time monitoring when exceptional measures should be recalled. Yet, the gradual phasing out of emergency measures should not be conditional on the end of the causes of the crisis, but on an assessment of whether states' needs have been met and the operational response has stabilised. For this reason as well, monitoring will be key and in emergency situations that may last for a prolonged period, the EUAA should also be systematically involved to boost capacity and verify the effects of derogations.

- **Strengthen preparedness and responsiveness by mobilising all resources and carrying out frequent revisions:** Member states should be incentivised to strengthen their preparedness and resilience, constantly revising their plans to avoid the unnecessary triggering of the derogations and improve rapid responses where necessary. To achieve this, the tools included in the new annual asylum and migration cycle should focus on closing potential operational gaps in reception and asylum systems and overcoming weaknesses in border processing that could lead to possible situations of crisis. In this respect, the revision of contingency plans under the RCD, which the EU-level Common Implementation Plan only foresees every three years (at minimum), may be insufficient. More regular revisions, especially in the early years of implementation could prove essential to ensure the build-up and maintenance of resilient systems. EU funding should also be targeted to this end. The negotiations of the next MFF starting in 2025 will be key in this sense, as acknowledged by the Common Implementation Plan. Other than identifying and meeting all the funding needs for well-prepared and resilient asylum and reception systems, the Commis- sion and member states should ensure that funds are sufficient to also cover for potential emergency an emerging crisis. Following an emergency, all member states should revise their national strategies to draw the lessons learnt. This should be seized as an opportunity to re-assess and reconsider all member states' responses, facilitating mutual learning and strengthening resilience, at national and EU levels.

- **Ensure tailor-made responses, including derogations and enhanced solidarity, that can bring benefits on the ground and avoid negative repercussions:** The use of derogations should be a measure of last resort, especially where they lead to negative spillover effects for the CEAS or have the potential to worsen the humanitarian situation affecting asylum seekers and migrants. When faced with a perceived crisis or force majeure situation, the requesting state should present clear, objective, and compelling reasons for their use, including comprehensive and reliable information to justify its request. Clarity on the added value of a requested derogation to respond to an emergency should be a precondition for their use. The Commission and Council, meanwhile, should base their respective implementation plans on an evidence-based assessment of the proportionality of the measures and all possible alternatives that could lead to equally positive outcomes. At the same time, they

should consider on a case-by-case basis whether the application of derogations and solidarity measures should be made contingent on also receiving support from EU agencies, and the EUAA in particular. This could provide concrete benefits on the ground and strengthen real-time monitoring. Other than this, when it comes to funding, the quick and effective disbursement of emergency resources should be ensured, and a clear roadmap for their use should be devised in the relevant implementing decision in coordination with the member state(s) affected.

- **Ensure solidarity-ready systems at all times by tracking possible further contributions during prolonged or successive crises:** while voluntary relocation contributions should be prioritised to the possible extent in an emergency situation to ease operational challenges and preserve wide support by member states, it will be essential that overall solidarity needs continue to be met. This will be as important for fulfilling on-the-ground operational needs as it is to preserve public confidence in frontline countries. Also considering the risk that both the Solidarity Pool and further pledges in the Solidarity Response Plan could be exhausted, especially in prolonged or successive crises, the EU should thus ensure solidarity-ready systems. To keep track of needs and availabilities, and replenish the overall contributions as a crisis situation unfolds, a register could be created where member states can update their possible additional pledges and further solidarity contributions.

- **Systematically consider the use of more protection-oriented elements, while also avoiding harmful practices in border processing:** the expedited procedure, an important innovation introduced by the Regulation, should not remain a dead letter. Prioritising well-founded applications would reduce waiting times and minimise human suffering, while also unlocking useful resources and capacity which could be redeployed to address urgent needs. In this sense, the use of the expedited procedure should always be considered when the evidence-based assessment of the situation indicates that there are significant numbers of well-founded applications for international protection from specific groups of applicants. The Commission, in consultation with the EUAA and UNHCR, should use the open-end language of the Regulation to proactively promote the use of the procedure in such circumstances. On the other hand, this chapter points to the risks faced by vulnerable persons whose applications are received in situations of crises and force majeure when national systems may be overstretched. Already at the stage of the assessment and of the draft ing of the implementation plans, measures should be identified to ensure that responsible authorities can swiftly and effectively identify vulnerable persons and asylum seekers with special needs in instances where the border procedure is being used and can request assistance to this end.

- **Strengthen coordination by identifying the added value of each platform used in past emergency situations and facilitating multi-stakeholder participation where needed:** the Regulation reflects an awareness of the need to achieve strong coordination between all relevant actors and institutions. Nevertheless, further actions are needed to avoid duplication and ensure optimal coordination if an emergency arises. To this end, EU institutions and agencies, member states, and other actors involved should collectively engage in an assessment of the existing tools and platforms, including those used in response to displacement from Ukraine, to identify

their added value and potential overlaps. While this should not necessarily lead to disposing of tools, greater awareness could facilitate coordination and avoid conflicting responsibilities. This exercise should consider the relevance and authority of different platforms for both crisis and regular coordination. Their value should also be assessed against the need to overcome siloed or sectoral thinking which can undermine effective crisis responses. In addition, the involvement in information-sharing, joint planning, and implementation of international organisations and other stakeholders, including like-minded third countries and civil society, should be systematically considered, in this assessment as well as in the activation of coordination mechanisms.

- **Turn the Regulation and its cycle into an opportunity to address the root causes of crisis and force majeure situations, including instrumentalisation and climate change:** considering the growing political instability, and today's worsening economic and environmental outlook, the EU will likely be faced with sudden rises in cross-border mixed migration movements. Given that the exceptional measures foreseen by the Regulation could be triggered in this context, but also the high stakes involved in their possible use, the new crisis management system and its core goal of strengthening resilience should be strategically mobilised to conduct objective assessments on the root causes of instrumentalisation and force majeure. Among others, this should include an evidence-based analysis of the unintended leverages created by prioritising short-term migration containment objectives through partnerships with autocratic or unstable foreign governments.[75] In a geopolitical context of greater rivalries, these may generate dependencies and expose the EU to greater risks of instrumentalisation. At the same time, ways to make instrumentalisation less attractive for third countries should be identified, encouraging sustainable cooperation instead.[76] As far as climate change is concerned, its impact on human mobility is not yet at the centre of EU's thinking and policymaking.[77] Given its ability to impact affected people's livelihoods through its extensive humanitarian and development aid resources, the EU should however take a leading position on climate-related mobility, using the newly adopted framework to stimulate coherent policy initiatives and leverage the necessary financial resources.

[1] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 PE/19/2024/REV/1. OJ L, 2024/1359, 22.5.2024.

[2] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013. PE/21/2024/REV/1. OJ L, 2024/1351, 22.5.2024.

[3] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. PE/16/2024/REV/1. OJ L, 2024/1348, 22.5.2024.

[4] Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. 2021/0428(COD), PE-CONS 40/24. See, in this book, the chapter by Daniel Thym.

[5] See for example, European Council on Refugees and Exiles (2021) "Alleviating or exacerbating crises? The Regulation On Crisis And Force Majeure. ECRE's assessment of risks inherent in the crisis regulation and recommendations for a significant redrafting", available at: https://ecre.org/wp-content/uploads/2021/03/ECRE-Policy-Note-32-Crisis-February-2021.pdf, last accessed: 04 June 2024.

[6] Zuleeg, F., Emmanouilidis, J. A., de Castro Borges, R. (2021) "Europe in the age of permacrisis". Commentary, European Policy Centre.

[7] This chapter draws on the valuable insights provided by published analyses of EU responses to past crises. These include, among others, Hahn, H. (2022) "Keeping a cool head: How to improve the EU migration crisis response". Discussion Paper, European Policy Centre; Collett, E. and Le Coz, C. (2018) "After the Storm: Learning from the EU Response to the Migration Crisis", Report, Migration Policy Institute; Rasche, L. (2022) "The instrumentalisation of migration. How should the EU respond?". Hertie School, Jaques Delors Centre.

[8] Migratory pressure "means a situation brought about by arrivals by land, sea or air or applications of third-country nationals or stateless persons, that are of such a scale that they create disproportionate obligations on a Member State". Significant migratory situation "means a situation different from migratory pressure where the cumulative effect of current and previous annual arrivals of third-country nationals or stateless persons leads a well-prepared asylum, reception and migration system to reach the limits of its capacity." Article 2(24) and (25) of Regulation (EU) 2024/1351.

[9] The Regulation includes relevant definitions in its articles, with further details available in the recitals.

[10] Article 1(4)(a).

[11] Article 1(4)(b).

[12] Article 1(5).

[13] Recital 20.

[14] Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final. Article 5.

[15] Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.

[16] Interview with member state representative. See also Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum - compilation of replies by Member States. CM 3754/23; 10463/2/23 REV 2, Brussels, 26 July 2023, available at: https://www.statewatch.org/media/4004/eu- pact-council-force-majeure-reg-ms-replies-12032-23.pdf, last accessed: 04 June 2024.

[17] Stoyanov, K. Minister of Interior of the Republic of Bulgaria, et al. (2024) "Joint Letter from the undersigned Ministers on new solutions to address irregular migration to Europe", available at: https://uim.dk/media/12635/joint-letter-to-the-european- commission-on-new-solutions-to-address-irregular-migration-to-europe.pdf, last accessed: 04 June 2024.

[18] See, in this book, the chapte by Philippe De Bruycker.

[19] Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration, C/2020/6469. OJ L 317, 1.10.2020.

[20] The goal is to improve preparedness and facilitate a coordinated response to a crisis.

[21] Collett, E. and Le Coz, C. (2018) "After the Storm: Learning from the EU Response to the Migration Crisis".

[22] Article 2.

[23] Article 3.

[24] Article 3 referring to Article 9 of Regulation (EU) 2024/1351.

[25] Interview with an official of the European Commission.

[26] Article 3(4)(2). The Toolbox, which is further defined in the AMMR, was proposed during the New Pact negotiations with the aim of providing member states with the necessary tools to react to specific migratory challenges, including crisis

and force majeure situations. Other than the derogations included in the Crisis and Force Majeure Regulation and enhanced diplomatic and political outreach, it includes measures such as the activation of the Union Civil Protection Mechanism and strengthened actions and cross-sectoral activities in the external dimension of migration. See Article 6 of Regulation (EU) 2024/1351.

[27] Article 4.

[28] Article 5.

[29] Collett, E. and Le Coz, C. (2018) "After the Storm: Learning from the EU Response to the Migration Crisis".

[30] Recital 22.

[31] YouTube video, European Policy Centre "The New Pact on Migration and Asylum: Unpacking responsibility and solidarity", 21 March 2024.

[32] Communication from the Commission, Common Implementation Plan for the Pact on Migration and Asylum, COM(2024) 251. This chapter only briefly elaborates on the contents of the Common Implementation Plan, as the latter was published shortly before its publication.

[33] Fakhry, A., Parkes, R., Racz, A. (2022) "Migration instrumentalization: A taxonomy for an efficient Response" Hybrid CoE Working Paper.

[34] Article 16(3).

[35] De Somer, M. and Neidhardt, A. H. (2022) "EU responses to Ukrainian arrivals – not (yet) a blueprint", Discussion Paper, European Policy Centre.

[36] Recital 25.

[37] See, in this book, the chapter by Daniel Thym.

[38] See De Somer, M. "Schengen and internal border controls" in De Somer, M., De Brouwer, J. L., De Bruycker, P. (eds) (2019), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration* (Brussels: European Policy Centre), pp. 119-130.

[39] Cebulak, P. and Morvillo, M. (2021) "The Guardian is Absent Legality of Border Controls within Schengen before the European Court of Justice", *Verfssungsblog*, 25 June, available at: https://verfassungsblog.de/the-guardian-is-absent/, last accessed: 04 June 2024.

[40] In the joined cases C-368/20 NW v Landespolizeidirektion Steiermark and C-369/20 NW v Bezirkshauptmannschaft Leibnitz, the Court of Justice of the EU (CJEU) held that member states can only re-introduce border controls within the Schengen Zone under strict conditions. The CJEU stated that the (now amended9 Schengen Borders Code permits the temporary reintroduction of border controls if there is a serious threat to the public policy or internal security of a member states. However, such a measure cannot exceed a maximum duration of six months. A member state can only reintroduce such measures after the six-month period has ended, if it is faced with a new serious threat. The new threat affecting its public policy or internal security must be distinct from the previous one. Such strict conditions would apply by analogy in case of use of the derogations foreseen by the Crisis and Force Majeure Regulation.

[41] Recital 11 of the Regulation specifically states that the "adoption of measures under this Regulation in respect of a particular Member State should be without prejudice to the possibility to apply Article 78(3) of the Treaty on the Functioning of the European Union (TFEU)."

[42] See Radjenovic, A. (2020) "Emergency measures on migration: Article 78(3) TFEU", European Parliamentary Research Service,

649.325 available at: https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649325/EPRS_ATA(2020)649325_EN.pdf, last accessed: 04 June 2024.

[43] "The state of emergency at the Latvia–Belarus border is extended until 10 May 2023", *Republic of Latvia*, 31 January 2023: Tanner, J. (2024) "Finland extends Russia border closure until April 14 saying Moscow hasn't stopped sending migrants". *Associated Press*, 8 February. "EU Eastern Borders: Poland Publishes Data Showing 6000 Pushbacks in Past Six Months — Finland-Russia Border Closure Extended Again — Estonia Considers Closing Border Crossing Points". *European Council on Refugees and Exiles*, 16 February 2024.

[44] Article 14.

[45] Article 1(3) of Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders

[46] See, in this book, the chapter by Evangelia (Lilian) Tsourdi.

[47] Article 10.

[48] Article 11

[49] Article 6 of the Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148. PE/17/2024/REV/1. OJ L, 2024/1349, 22.5.2024.

[50] Article 11.

[51] Recital 30.

[52] Article 9.

[53] *Ibid.*

[54] See, as part of this series, the policy study by Philippe De Bruycker.

[55] Article 13.

[56] Article 9.

[57] See Hahn, H. (2022) "Keeping a cool head: How to improve the EU migration crisis response".

[58] Eccles, M. and Barigazzi, J. (2021) "EU presses Iraq to halt migrant flights to Belarus". *Politico*, 5 August; Roth, A. and O'Carroll, L. (2021) "Turkey bans citizens from Syria, Yemen and Iraq from flying to Minsk". *The Guardian*, 12 November. See also Rasche,

L. (2022) "The instrumentalisation of migration. How should the EU respond?".

[59] On the definition of strategic goals to be pursued through cooperation with third countries see, in this book, the chapter by Andreina De Leo and Eleonora Milazzo.

[60] See "Finland to present plan to push back migrants on Russian border". *Euractiv*, 20 May 2024; and "FINLAND: Proposed Legislation Could Breach International Human Rights Commitments – Frontex Extends Operation on Finland-Russia Border – UN Urges Finland to Introduce Safeguards for Accessing Asylum Procedures". *European Council on Refugees and Exiles*, 24th May 2024.

[61] This could be as part of a revision of the Regulation, or through Article 78(3) of the TFEU examined above.

[62] See for example, "Analysis of the New EU Pact on Migration and Asylum A "fresh start" for human rights violations". *EuroMed Rights*, October 2020; on instrumentalisation, see "CCBE position paper on the proposal addressing situations of instrumentalisation in the field of migration and asylum". Council of Bars and Law Societies of Europe, 16 February 2023

[63] Article 11(10).

[64] Article 11(10).

[65] Sundberg Diez, O. (2023) "EU Crisis Regulation: Securing reforms or constructing a crisis?". Commentary, European Policy Centre.

[66] Article 10; Recital 41.

[67] European Council on Refugees and Exiles (2024) "ECRE comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147", available at: https://ecre.org/wp-content/uploads/2024/05/ECRE_Comments_Crisis-and-Force-Majeure-Regulation.pdf, last accessed: 04 June 2024..

[68] Recital 9.

[69] For a similar observation in normal circumstances, see, in this book, the chapter by Evangelia (Lilian) Tsourdi.

[70] Article 6(1).

[71] Article 6(2).

[72] See, in this book, the chapter by Philippe De Bruycker.

[73] Hahn, H. (2022) "Keeping a cool head: How to improve the EU migration crisis response".

[74] See, in this book, the chapters by Philippe De Bruycker and Daniel Thym.

[75] See, in this book, the chapter by Andreina De Leo and Eleonora Milazzo.

[76] See Rasche, L. (2022) "The instrumentalisation of migration. How should the EU respond?".

[77] Hahn H. and Fessler, M. (2023) "The EU's approach to climate mobility: Which way forward?". Discussion Paper, European Policy Centre.

Responsibility-sharing or shifting? Implications of the New Pact for future EU cooperation with third countries

4

Andreina De Leo and Eleonora Milazzo

Executive summary

Following the adoption of the New Pact reforms, the external dimension of the EU's migration policy will acquire even greater relevance. With prospects of internal responsibility-sharing among member states remaining uncertain, limiting irregular arrivals and facilitating returns are being presented as essential preconditions to avoid putting pressure on national migration, asylum and reception systems. From this viewpoint, securing stable cooperation with third countries will be instrumental for the sustainability of the newly reformed Common European Asylum System (CEAS).

This chapter examines the external dimension of the recently adopted New Pact reforms, specifically the Asylum Procedures Regulation (APR) and the Asylum and Migration Management Regulation (AMMR). The APR includes reformed provisions on safe country clauses that aim to facilitate returns. As for the AMMR, the reform includes a solidarity mechanism to support member states facing disproportionate responsibilities. Yet, the flexibility of this solidarity mechanism combined with the overall systemic priority of limiting pressure on national reception systems will likely translate into stronger incentives to use funding to contain irregular arrivals.

While the New Pact has manifold policy goals, the containment priorities pursued in the external dimension of the EU's migration policy may fail to reflect the interests of partner countries sufficiently. Instead of promoting more balanced cooperation at the international level, they could lead to further responsibility-shifting to third countries. At the same time, the reforms pay insufficient attention to fundamental rights. This could incentivise cooperation with countries with poor human rights records. Because these also tend to be unstable and unreliable partners, in terms of ensuring adequate protection standards and a genuine commitment to continued cooperation, the external dimension of migration policy might backfire on the EU's goal of achieving a more resilient and fairer CEAS, unless strong complementary measures are taken prior to and during the reforms' implementation.

Introduction

Several of the reforms comprising the New Pact on Migration and Asylum are inextricably linked to the so-called external dimension of the EU's migration policy. Due to the uncertainty regarding the functioning and effectiveness of the newly introduced solidarity mechanism, reducing irregular arrivals and facilitating returns are framed by the European Commission and member states as a promising strategy to achieve a more stable EU migration and asylum system.[1] In this context, the EU and member states will likely seek to strengthen partnerships with third countries even further.

Containing arrivals and facilitating returns are not the only priorities of the New Pact reforms, but several new rules have been introduced with these goals in mind. Most relevant are the Asylum Procedures Regulation (APR) and the

Asylum and Migration Management Regulation (AMMR). The former allows for an expanded use of safe country clauses, seeking to facilitate returns at the cost of robust legal and procedural safeguards. Meanwhile, the newly established system of mandatory but flexible solidarity under the AMMR could lead to the prioritisation of financial contributions for actions in third countries and a disproportionate focus on containing irregular arrivals.

The new rules therefore risk creating incentives to outsource responsibilities to third countries to obtain short-term advantages for member states. This calls into question the EU's objective of achieving a fairer system and could lead to a further deterioration of protection standards, especially in a context of global geopolitical and economic instability.

Practical and legal challenges related to the implementation of the rules may also arise. As this chapter highlights, these include the failure to sufficiently consider fundamental rights risks when establishing partnerships, and lack of effective cooperation from third countries. Seeking support from third countries will not come without risks for the EU's strategic autonomy either. The Union's commitment to pursuing its strategic interests and acting independently from its partners in other policy areas stands at odds with its dependency on partners to manage migration, particularly when the latter are autocratic regimes.

The Union's commitment to pursuing its strategic interests and acting independently from its partners in other policy areas stands at odds with its dependency on partners to manage migration, particularly when the latter are autocratic regimes.

These tensions around the external dimension of migration policy will likely gain relevance in the new policy cycle as the reforms gradually enter the implementation phase. The expansion of partnerships with third countries is expected to see momentum following gains by centre and far-right groups, both proponents of such efforts, in the 2024 European Parliament (EP) elections. Up until now, diverse cooperation arrangements have been explored. On top of newly established partnerships at the EU level, such as the one with Tunisia or Egypt, or national ones, like the Italy-Albania Protocol, in May 2024, 15 member states urged the European Commission to seek additional solutions to man age migration, including partnerships with third countries.[2] The EU-level Common Implementation Plan for the Pact, released in June 2024, similarly underscored the importance of intensifying and deepening cooperation with partner countries for "the sustainability of the Pact".[3]

Reducing the number of irregular arrivals and increasing return rates will thus remain priorities for the EU and

its member states. This chapter analyses the provisions of the Pact that will most likely reinforce the ongoing externalisation trend, focusing on their implications for fundamental rights and EU foreign policy. Considering potential risks and the impact on implementation, the chapter proposes forward-looking reflections, arguing that the EU should work towards establishing balanced partnerships and stronger human rights safeguards.

International refugee law does not bar agreements assigning responsibility for refugees between states, as long as there are sufficient safeguards to guarantee effective access to protection from direct and indirect refoulement and other threats.

1.Expanded use of safe country clauses under the APR

Safe country concepts – which consist of safe country of asylum, safe third country (STC) and safe country of origin – are central to understanding the implications of the New Pact reforms for the external dimension of EU migration policy. Within asylum procedures, 'safe country of asylum' or STC concepts are used to declare an asylum application inadmissible and assign protection responsibilities to a state different from the one where the applicant has applied for asylum. The use of 'safe country of origin' clauses instead allows for a swift examination of asylum applications through accelerated procedures when the applicant's home country is considered safe.

The idea behind these concepts is to swiftly finalise the processing of claims to return asylum applicants arriving from third countries where their lives and freedoms are not at risk. This is meant to avoid burdening national asylum systems and make it possible to concentrate efforts and resources on the processing of other claims.[4]

International refugee law does not bar agreements assigning responsibility for refugees between states, as long as there are sufficient safeguards to guarantee effective access to protection from direct and indirect refoulement and other threats.[5] The overall aim is to encourage states to work together to protect refugees, ensuring a fair balance and division of responsibilities within the international community. It is worth emphasising that 75% of the world's refugees and other people in need of international protection are hosted in low- and middle-income countries.[6]

At the end of 2021, refugees living in the EU were estimated to constitute less than 10% of the world's refugees.[7]

Despite this, the increasingly strong appetite among EU member states to outsource refugee protection and externalise migration control to countries outside the EU has led to a greater use of safe country notions in the past years, even before the adoption of the New Pact reforms.

The newly adopted APR is likely to reinforce this trend by reforming and expanding the use of such notions. In particular, it provides for the broader applicability of safe country clauses in the framework of i) the assessment of safety when applying the concepts of first country of asylum and STC; ii) the interpretation of the connection requirement to readmit an applicant to a given safe third country; iii) the possibility of designating a third country as safe country of origin with territorial limitations or exempting certain groups from the designation; and iv) the adoption of a common list for safe countries of origin and safe third countries, coming on top of national lists.

Collectively, these changes indicate the reinforced importance of the external dimension of EU migration and asylum policy in the New Pact reforms. That said, substantial legal and practical obstacles remain, potentially impacting negatively on the implementation phase of the reforms.

1.1 SAFETY ASSESSMENTS

The increasingly strong appetite among member states to outsource refugee protection and externalise migration control to countries outside the EU has led to a greater use of safe country notions.

Member states may use first country of asylum or STC clauses to declare an asylum application inadmissible. This means that member states can avoid examining an application on the merits when applicants have already received protection from a third country or if they could request and obtain such protection from a safe third country with which they have a connection.

While this possibility already existed in the now repealed Asylum Procedures Directive (APD), the APR makes it easier for member states to give up responsibility and shift it to non-EU countries by lowering the criteria for the safety assessment.

Under the APR, both the safe country of asylum and the STC concepts can only be applied on an individual basis, allowing applicants to challenge the assumption that a third country is safe for them, in continuity with previously

applicable rules under the APD. However, the APD required third countries to have ratified the 1951 Refugee Convention or be able to provide comparable levels of protection. The APR instead introduces the concept of access to effective protection. Under this new provision, a country can be considered a safe country of asylum or a safe third country if, in addition to protection from persecution, serious harm, and refoulement, it complies with basic human rights standards, namely access to means of subsistence, essential healthcare and education. These are looser standards compared to the Refugee Convention, which also foresees access to housing and employment, freedom of association, and property rights, among other guarantees.

Furthermore, the APR allows member states to presume that these requirements are fulfilled when there is an agreement between the EU and a third country providing that readmitted migrants will be protected in accordance with the relevant standards and the principle of non-refoulement. This is a significant legal change, considering the EU's efforts to sign agreements of this kind with third countries in recent years, which could render it easier to apply safe country clauses. However, acceptance of these standards does not necessarily guarantee compliance. In fact, evidence of systemic fundamental rights violations committed by EU partner countries considered safe, like Turkey or Tunisia, suggests the opposite.[8] If concluded and implemented on the ground without rigorous assessment and monitoring of the respect of legal and procedural standards, these agreements could lead to sub-standard asylum procedures and reception conditions. The related application of the first country of asylum and STC clauses could ultimately expose applicants to the risk of refoulement.[9]

1.2 THE CONNECTION REQUIREMENT

The second element that might broaden the applicability of safe country clauses in admissibility procedures relates to the interpretation of the connection requirement for readmitting an applicant to a given safe third country. The Commission's initial proposal in 2016, which constituted the basis of its 2020 APR proposal, explicitly included transit through a third country as an element establishing a sufficient connection between the applicant and that country for the STC notion to apply.[10] However, after heated negotiations, the adopted legislative text retrains the approach already contained in the APD, leaving it to member states to define the specific connection requirements in their domestic legislation.

At the same time, recitals in the APR provide that the connection requirement is considered satisfied when the applicant has settled or stayed in a given third country.[11] While recitals guide the interpretation of EU norms, they are not legally binding. The inclusion of the notion of stay, next to that of settlement, could, if interpreted loosely, potentially encourage member states to consider passing through a country for a limited period as sufficient for the connection requirement to be met.

On this basis, Italy, which has strongly advocated for such a loose interpretation of the connection requirement, could, for instance, seek to return asylum applicants from Guinea or the Ivory Coast to Tunisia even if they have never lived, worked, or established meaningful connections there.[12]

While this interpretation could translate into a significant shift of protection responsibilities to third countries, its practical effectiveness remains questionable. The case law of the Court of Justice of the EU (CJEU) has already clarified that mere transit is not enough to send applicants back to a third country.[13] This likely explains why the Commission's

originally proposed interpretation of the connection requirement from 2020 was not retained. Thus, attempts to outsource international protection responsibilities to countries of transit when it is not possible to establish meaningful links are likely to fail, even under the newly reformed rules.

However, the APR foresees a possible review of the STC concept in 2025, one year after the entry into force of the Regulation. The prospect of further reforming the STC concept and the connection requirement was emphasised in the May 2024 letter to the Commission by 15 member states, giving further political impetus to this action.[14] It is also worth noting that the European People's Party (EPP) manifesto for the 2024 EP elections called for a "fundamental change" in EU asylum law and the offshoring of asylum procedures to countries outside the EU, in a seeming nod to the UK-Rwanda agreement.[15] Such arrangements are not permissible under the new rules as they involve sending asylum applicants to a safe third country which they never even transited through, thus not fulfilling the connection requirement.[16] Yet, the political weight of the letter and manifesto, especially after the EP elections results, suggests a strong willingness to find novel ways to shift responsibilities to countries outside the EU, including revisiting the connection requirement or further watering down the standards to be considered safe.

The prospect of further reforming the safe third country concept and the connection requirement suggests a strong willingness to find novel ways to shift responsibilities to countries outside the EU.

1.3 SAFE COUNTRY OF ORIGIN DESIGNATION

Regarding the use of safe country clauses in decisions on the merits, the APR allows for examining the merits of an application in a border procedure when the applicant comes from a safe country of origin. Akin to the use of first country of asylum and STC clauses, this was already permissible under the APD. However, the APR makes it mandatory for member states to transpose the concept of safe country of origin into their domestic legislation. Furthermore, it broadens the applicability of this provision by making it possible to designate a non-EU country of origin as safe even when the latter cannot be considered such in its entirety or for all applicants. The provision does so by allowing exceptions relating to specific parts of a territory or clearly identifiable categories of persons, which codifies in EU law a practice already employed in some member states.[17]

This trend follows the enlargement of the scope of the 'internal flight alternative' concept in the new Qualification Regulation, whereby an asylum claim could be refused if an

applicant could move to a safe part of the country of origin.[18] A few member states have recently pushed to apply this concept to Syrian applicants, a move strongly opposed by civil society organisations.[19]

Designating non-EU countries as safe countries of origin with territorial exemptions will increase the number of countries that can be included in the list of safe countries of origin, and thus the possibility to accelerate the asylum procedure. While the possibility to rebut the presumption remains, the restrictive time limits and limited access to legal aid in border procedures will most likely make it difficult to reverse the presumption in practice, in addition to exacerbating the risk of divergent practices among member states.[20]

1.4 SAFE THIRD COUNTRY AND SAFE COUNTRY OF ORIGIN LISTS

The fourth and last novelty relates to both the concepts of STC and safe country of origin. The APR foresees the possibility of adopting an EU-wide list of third countries considered safe, in addition to national ones. This represents the latest attempt to promote the adoption of an EU-wide list concerning safe country of origin, after the latest failure to reach such an agreement in 2017, and the first attempt to adopt a common list when it comes to safe third countries.[21]

Designating non-EU countries as safe countries of origin with territorial exemptions will increase the number of countries that can be included in the list of safe countries of origin, and thus the possibility to accelerate the asylum procedure.

Introducing a common EU-wide list could have brought some clarity and eliminate fragmentation: according to the original 2016 Commission proposal, an EU-level list was necessary to limit divergent practices on the use of safe country concepts among member states, thereby contributing to the goal of further harmonisation of EU asylum rules.[22] This is so because all member states would apply the designation at the EU level, remedying the existing fragmentation.[23]

While the text of the adopted APR confirms this objective, it crucially retains the possibility for member states to adopt their own national lists alongside a potential EU-wide one, undermining harmonisation efforts.[24] If anything, the coexistence of two lists could potentially lead to a wider use of both STC and safe country of origin concepts.

Notably, the co-legislators did not agree on either list when the APR was adopted, meaning that these lists could only be adopted through a future amendment of the Regulation proposed by the Commission. This reflects the difficulties of

finding consensus on the safety of non-EU countries, even if their designation should be based on objective criteria, namely fulfilling the conditions of effective protection.

If a common list were adopted, the only situation in which member states would be required to align their lists to the EU one is in case of a suspension of a third country. The APR foresees that a country could temporarily, through a delegated act, or permanently, through an amendment in accordance with the ordinary legislative procedure, be suspended from the EU-wide list following a change of circumstances, meaning if the conditions to be considered safe are no longer met. In case of temporary suspension, member states would not be able to put the same country on their national lists. In case of permanent suspension, member states could only add that country to their national lists if the Commission does not object, a right the Commission could retain for only two years.

Even if alignment between the two lists in case of a suspension could help to prevent fundamental rights violations, it would only marginally contribute to harmonisation efforts, failing to substantially reduce the risk of divergent practices.

The APR foresees that a country could temporarily, through a delegated act, or permanently, through an amendment in accordance with the ordinary legislative procedure, be suspended from the EU-wide list following a change of circumstances, meaning if the conditions to be considered safe are no longer met.

2.The expanded applicability of safe country clauses: Legal and practical challenges

The APR significantly expands the applicability of safe country clauses to declare an asylum application inadmissible or reject it. In doing so, using the safe country notions inevitably results in a shift of responsibility for protection to third countries. The APR provisions reflect the fact that simplified rejections and returns of 'undeserving'asylum seekers have become policy priorities for the EU. Despite the relevance of these changes, two sets of potentially problematic aspects arise, one legal and the other practical, that could result in ineffective implementation of the new provisions.

From a legal perspective, the expansion and possible use of safe country clauses will create incentives to form new partnerships with countries of origin or transit or strengthen existing ones. While the EU and its member states may pursue cooperation with a variety of actors, if partnerships are brought forward without thorough human rights scrutiny, the new provisions risk incentivising the selective recourse to agreements with autocratic third countries that do not guarantee proper protection for asylum seekers or even adequate reception standards.

The Refugee Convention does not explicitly prohibit the use of safe country concepts, although some scholars have cast doubts on their legality altogether.[25] At a minimum, any responsibility-shifting arrangement should guarantee access to the rights provided in the Convention, meaning that its employment is to be considered lawful only when third countries are able to ensure the same level of protection as that provided under the Convention. Notably, this implies not only protection from refoulement, but also access to socio-economic rights. In other words, as highlighted by the UNHCR, the lawfulness of the use of safe country notions to shift responsibility to other countries depends on them being implemented in a spirit of 'burden-sharing', consistently with the legal obligations established by the Convention.[26]

The expanded use of safe country notions is not only problematic because it leads to burden-shifting instead of burden-sharing and could expose asylum seekers to violations of fundamental rights. If judicial authorities find that third countries designated as safe do not have adequate standards in practice, they might also intervene to halt readmissions.

The expanded use of safe country notions is not only problematic because it leads to burden-shifting instead of burden-sharing and could expose asylum seekers to violations of fundamental rights. If judicial authorities find that third countries designated as safe do not have adequate standards in practice, they might also intervene to halt readmissions. Beyond greater risks for asylum seekers, the latter would also make the implementation of the new provisions ineffective.

The EU's and Italy's cooperation with Tunisia illustrates this well. In 2023, Italy adopted a new law on accelerated border procedures allowing for the detention of asylum seekers at the border. Italy also secured Tunisia's commitment to readmit its own nationals in the contentious EU-Tunisia Memorandum of Understanding of July 2023, which the European Commission concluded without a dedicated human rights impact assessment.[27] Following these developments, Italy attempted to detain several Tunisian citizens on the ground that they came from a safe country

of origin. However, several Italian courts annulled the detention orders on grounds of lack of safety in Tunisia due to the country's gradual democratic backsliding.[28] As a result, the border procedure is currently blocked in Italy, pending a recent preliminary question before the CJEU.[29]

This scenario of judicial interventions could become more frequent with the application of the new safe country clauses of the APR. While the action of the Italian courts underscores the validity of fundamental rights concerns, it also shows how implementing border procedures based on safe country notions might prove less effective than expected if the desire to remove applicants quickly from EU territory trumps human rights considerations and leads to incorrect designations of non-EU countries as safe.

Nevertheless, in the future, higher numbers of people in border procedures, more lenient criteria for the application of safe country concepts, limited access to legal assistance, and short deadlines for appeals will make procedural safeguards harder to uphold.[30] Effective access to rebuttal of the presumption of safety in judicial proceedings will likely be limited, if not impossible. If unsafe countries are designated as safe and if there is no proper judicial scrutiny of fundamental rights compliance, returnees will likely be exposed to the risk of refoulement.

On top of these legal considerations, the APR and its provisions on safe country concepts could run into practical obstacles during implementation. The removal of applicants from EU territory might be hindered in practice by lack of cooperation from third countries on readmission, be it of their own nationals based on safe country of origin, or readmissions of other third-country nationals based on STC or safe country of asylum concepts.

For the first category, the EU return rate is notably low.[31] While multiple factors contribute to low returns to countries of nationality, lack of cooperation with third countries plays an important role (see Section 4).[32] Regarding the readmission of other third-country nationals to safe third countries, this has also proved hard to implement. By way of example, Turkey has refused to readmit any asylum applicant since the crisis at the Greek-Turkish border in Evros in March 2020.[33]

Despite attempts to incentivise third countries, this general lack of cooperation on return and re-admission may persist in the future. Against this background, using safe country concepts to accelerate admissibility decisions or reject applications without realistic return prospects will likely further exacerbate problems for countries having to carry out these procedures, or host rejected applicants. At the same time, it risks leaving people in precarious situations. Given the lack of prospects and the limbo that they would face, it may end up fuelling secondary movements from countries of first arrival to other EU member states.[34] This would conflict with the EU's efforts to discourage irregular onward movements and address related inefficiencies, law enforcement concerns and tensions between EU member states.

The indirect consequences of the expanded applicability of the safe country concept could therefore undermine the core predicaments the New Pact has tried to address, namely improving the resilience and stability of national asylum and reception systems, while also failing to increase return rates.

3. Flexible solidarity and financial contributions to third countries

The Asylum and Migration Management Regulation (AMMR) establishes a new system of mandatory, yet flexible solidarity. The aim of this system is to re-distribute member states' reception and protection responsibilities, notably those arising from the new mandatory screening and border procedures.[35] The AMMR does not substantially reform the 'Dublin' responsibility-allocation criteria, especially the country of first entry principle. Instead, it stipulates that those member states less affected by migration inflows should provide solidarity by freely deciding among three types of contributions: i) relocations; ii) financial assistance for either capacity building by/in member states in the area of reception, return, and border management, or to support actions within third countries that may have a direct impact on migration towards the EU or improve their asylum, reception, and migration systems, iii) or material support.[36]

This mechanism is the product of a compromise intended to ensure greater compliance with solidarity measures, following the staunch opposition by some member states to relocations in the New Pact negotiations and the years prior. At the same time, it raises several potential risks and side effects, especially regarding the external dimension of EU migration policy. There is a risk that the mechanism's flexibility leads to a prioritisation of financial contributions for actions in third countries targeted at returns and enhanced border management. Second, and relatedly, the reforms may be used to further shift responsibility towards partner countries. Third, the new provisions may also result in weaker protection in third countries.

Turning to the first risk, the AMMR states that co-operation should be aimed at supporting partner countries hosting large numbers of migrants and refugees in need of protection and building their operational capacities in migration, asylum and border management in full respect of human rights. Efforts to achieve these objectives would be welcome, considering the current global context marked by political instability and conflict and the prospect of further protection needs. Among others, the EU's efforts could be vital to strengthen the reception capacity and asylum systems in countries already hosting large number of refugees or facing that future possibility.

Yet, the current EU approach to cooperation with third countries shows that the EU's interest in containing migration usually trumps responsibility-sharing considerations.[37] Research indicates, for example, that member states currently have a clear preference for funding projects with a return priority under the Asylum, Migration and Integration Fund (AMIF), as opposed to those focusing on asylum or legal migration.[38] Recent migration deals and EU-funded actions, including those with Libya, Morocco, Sudan, and more recently Tunisia and Egypt, also suggest that projects may focus predominantly on enhancing third countries' border control capacity and thus physically stopping migrants from reaching EU territory.

To put this risk into perspective, it is worth highlighting that even EU-funded projects focused on legal migration mainly consist of information campaigns on the life-threatening dangers of irregular migration in an attempt to discourage departures to

the EU, rather than facilitating legal migration as such.[39] It is therefore reasonable to conclude that, in the future, member states will have preferences for similar actions as part of their solidarity contributions under the newly adopted mechanism.

Moving to the second risk, even if funding were to be used to improve asylum systems and reception conditions in countries outside the EU, the New Pact reforms could lead to more responsibility-shifting to non-EU countries. The possible use of solidarity contributions under the AMMR to finance projects with a protection component in third countries should be read in conjunction with the increasingly important role of safe country clauses in border procedures. In fact, supporting asylum systems in third countries might ultimately make it easier to designate them as safe destinations in the context of national or EU-wide lists.

This suggests that, instead of facilitating responsibility-sharing in line with what the AMMR aims to achieve on paper, the new solidarity mechanism, together with the APR reforms examined in this chapter, could effectively lead to non-EU countries shouldering an increased burden in relation to migration flows on behalf of the EU.

Third, the flexibility provided by the AMMR together with the overall priority of reducing irregular arrivals and pressure on member states' asylum and reception systems pose the concrete risk that even as member states show greater solidarity among each other, they do so at the expense of taking into due consideration a third country's fundamental rights situation.

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The failure to take fundamental rights risks into sufficient account when it comes to EU funding to third countries is well-known.[40] Notably, the European Ombudsman found maladministration on the part of the Commission for failing to adequately assess human rights risks in the context of EU Trust Fund for Africa projects in relation to surveillance activities.[41] Similarly, in the case of the EU-Tunisia deal, the Ombudsman launched investigations on the respect for fundamental rights during EU-funded border management and anti-smuggling operations due to the lack of a previous human rights assessment and periodic monitoring.[42] The Ombudsman has also expressed concerns over the lack of human rights safeguards when it comes to the more recent agreement with Egypt.[43]

If the current approach to cooperation with third countries and the financing of migration-related deals is reinforced by solidarity contributions under the AMMR, this could further foreclose access to asylum in Europe. Judicial redress would not be sufficient for intervening in the most blatant cases of violations. In fact, it would be virtually impossible to have judicial redress if prospective applicants are detected by border authorities in third countries and prevented from reaching the EU. In this increasingly common scenario, applicants would never come in contact with authorities of EU member states and, therefore, would not receive a formal readmission decision that could be challenged in court.

4. The reforms' implications for cooperation with third countries

Based on an examination of the APR and AMMR, and considering the political emphasis placed on the external dimension of EU migration policy by virtually all member states, the expectation is that, in the next policy cycle, the EU will seek to strengthen cooperation with third countries further, including to reduce irregular arrivals and increase returns. The letter signed by 15 member states prior to the European Parliament elections calling on the European Commission to seek "new solutions to deal with irregular migration in Europe" is a meaningful indication of this trend. It confirms that some member states do not regard the reforms as sufficient and have a strong appetite for further "complementary efforts" to stem irregular migration through cooperation with partner countries.[44]

While migration cooperation will thus remain high on the EU political agenda, it will not come without challenges for the EU and third countries. On the one hand, if member states prioritise solidarity in the form of financial contributions to partner countries, and migration containment objectives come to trump responsibility-sharing, the support that some member states may need, including in the form of relocations, could remain unmet due to the flexibility embedded in the new system. This may make it harder to build trust among member states. At the same time, the increasing reliance on the external dimension could reinforce the sense that third countries will have to bear part of the costs of the EU's difficulties in attaining a fairer and more resilient asylum and reception system. This would conflict with international standards that the EU has committed to apply in its external relations, while also undermining the Union's credibility as a foreign policy actor.[45]

Connected to this, excessive reliance on external migration policy tools might come at the cost of considering internal dynamics and impacts on third countries. For example, in a global context where migration continues to be salient and politicised, readmitting rejected asylum seekers or allowing the transfer of asylum procedures to partner countries might trigger popular backlash there. Cooperation with the EU on return and readmission, in particular, is typically seen unfavourably in public debates in West Africa.[46]

Brushing aside the needs or demands of third countries is unlikely to deliver on the goal of mutually beneficial partnerships, and may also complicate pursuing other shorter-term objectives prioritised by

member states. Sticking to return policy as an example, domestic politics in partner countries may, in fact, either turn cooperation with the EU and its member states into a source of societal discontent due to its unpopularity, or else discourage third countries from signing readmission agreements or implementing them.[47]

In recent years, the EU and member states have attempted to reverse their partners' lack of willingness to cooperate through financial and political incentives as well as using conditionalities. The latter comprise both positive rewards for cooperation on returns and readmission, like the provision of financial or technical assistance, and negative levers, notably the suspension or termination of the benefits of EU cooperation, to nudge partner countries into cooperation. Negative conditionalities have acquired greater relevance in EU legislation in the last years, particularly through tighter visa policies and trade restrictions.[48]

The use of all possible tools by the EU to achieve cooperation, among others on readmission, is to be expected in the next cycle, as the EU gradually prepares to implement the New Pact reforms. Yet, it is worth emphasising that the effectiveness of these levers, particularly negative conditionalities, is far from clear and has also resulted in popular backlash or threats from third countries to pull out of migration deals, thus undermining cooperation efforts in other domains.[49]

Turkey, for example, used irregular migration as a lever against Greece and the EU during the standoff at the Evros border in March 2020 despite the set of incentives contained in the EU-Turkey Statement, including financial support and visa liberalisation, among others. In addition, the EU's and member states' predominant focus on migration as an area of cooperation risks overshadowing other considerations about partner countries' stability and the Union's strategic interest. The case of migration cooperation with Libya is indicative of how concerns about managing and containing irregular migration to the EU have undermined efforts in the areas of peace, socio-political stability and state-building.

These examples suggest that the expected further trend of externalisation will not be without negative systemic consequences. The overwhelming emphasis on the need to reduce irregular arrivals and increase return rates could hamper the conclusion of more balanced and stable partnerships with benefits across the board, including to strengthen stability, good governance, and rule of law. But the need to achieve these objectives will also likely increase the EU's vulnerability and dependency *vis-à-vis* its partners.

More specifically, the predilection for externalisation could lead to a prioritisation of partners who are willing to engage with the EU on cooperation that includes containment objectives and, in turn, cooperation with unreliable partners with inadequate human rights standards.

In some exceptional scenarios, third countries might exploit their asymmetric advantage and the EU's dependency. For example, they may react to the EU's and member states' demands for further cooperation or to political developments outside the migration domain considered against their national interests by temporarily pulling out of migration deals or reducing border controls. In the absence of adequate countermeasures, this risks undermining the resilience of the newly reformed CEAS.[50] Underestimating the political will of partner countries to use migration cooperation with the EU on their own terms or to pursue their own foreign policy objectives might therefore backfire, particularly when dealing with autocratic or highly unstable regimes. Even if third countries genuinely cooperate with the EU, and implement their side of the deal responsibly, this asymmetry may lead to

escalating financial and political demands in the future, particularly if the EU remains strongly dependent on its partners.

Not only would this be counterproductive for achieving more efficient and resilient asylum systems. This critical dependency also undermines the EU's 'strategic autonomy' and its capability to act independently and pursue its interests in strategically important domains. In the field of migration management, asymmetric dependencies on third countries combined with lack of trust and robust internal responsibility-sharing are likely to reinforce each other.

Conclusion and forward-looking reflections

The system established by the New Pact relies heavily on the external dimension of migration policy and cooperation with third countries to achieve the reform's objectives, notably a more stable migration management system.

This strong reliance on third countries to increase return rates and strengthen border controls does not come without risks for the EU's strategic autonomy and credibility. This approach also raises serious legal and practical concerns, particularly for fundamental rights. As attention and scrutiny around the external dimension of EU migration policy is and will remain high after the New Pact, this chapter advances the following recommendations for EU and national policymakers keen on delivering on the longstanding commitment to equal partnerships with non-EU countries and stronger human rights safeguards.

- **Conduct rigorous assessments and monitoring of human rights and reception standards.** More thorough scrutiny of protection and reception standards, which should always be in line with the Refugee Convention, is essential to avoid exposing applicants to the risk of refoulement and other violations of fundamental rights. These assessments should be a pre-condition for the conclusion of agreements with third countries and encompass funding arrangements, both formal and informal, and the application of safe country clauses. Greater attention on fundamental rights protections within these agreements should also help to reduce systemic inefficiencies in the newly established asylum system, as the case of return cooperation shows. Where effective remedy is available, enforcing returns to third countries without appropriate human rights considerations may lead to litigation and suspended execution, rendering this approach time-consuming and costly, while also leaving applicants in limbo. Incorporating stronger human rights scrutiny as a requirement for agreements with third countries, funding arrangements and the application of safe country clause would, therefore, both contribute to addressing structural problems within the asylum system and substantially lower the risk of fundamental rights violations.
- Limit or avoid the recourse to partnerships with autocratic and highly unstable regimes. The EU's cooperation with such regimes on border control or return and readmission appears to be seen as an integral step to achieving its strategic priorities, notably the internal stability of its asylum system. However, normalising

partnerships with repressive regimes for political expediency does not render their unreliability, poor human rights records, and the disproportionate leverage they acquire any less problematic. For these and other reasons, the EU and its member states should reconsider or avoid concluding partnerships with such countries, particularly when the costs for their internal stability, human rights, and the EU's credibility and strategic autonomy outweigh the expected benefits of cooperation. Instead, the EU and member states should prioritise partnerships that promote development and rule of law with positive multiplier effects for stability, human rights compliance and the EU's strategic objectives.

- **Ensure balanced deployment of financial support to third countries.** Contributions under the newly established EU solidarity mechanism should avoid predominantly targeting capacity-building for border control. Solidarity contributions should instead be geared towards ensuring proper and effective access to international protection, dignified reception conditions, and regular migration channels. These investments would require a substantial shift in political priorities and public debate on migration to garner sufficient support. While the current political climate and member states' agendas are unlikely to translate into such a shift at the moment, similar investments in the future would contribute to a more manageable and crisis-resilient EU asylum system, also helping to rebuild trust among member states.

- **Pursue balanced partnerships with third countries.** Strengthening cooperation with origin and transit countries will be key for implementing the New Pact. However, the EU's recent migration deals with Turkey, Tunisia, Egypt, and others should not be considered as blueprints or models to be replicated, but as indicators of the potential implications of establishing partnerships solely aimed at reducing migration inflows. The EU and its member states should learn from the track record of these deals to avoid incurring substantial practical, legal and reputational costs in the future. For this reason, the EU and its member states should move away from a purely transactional approach based on funding in exchange for border control and deterrence measures. Instead, the EU should ensure that matters of mutual concern, such as poverty reduction, sustainable development, education, and trade are politically prioritised, become the basis for more comprehensive cooperation, and receive appropriate funding. Moreover, efforts to set up concrete legal migration channels would also render the EU a more credible partner, bilaterally and on the global stage.

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While still in the early stages, the Talent Pool and the Talent Partnerships represent promising tools that should be developed and implemented further in the coming years. Relatedly, the new EU Resettlement Framework, which is set to provide safe and legal pathways for people in need of international protection, could provide the basis to expand resettlement programmes to reduce irregular arrivals, achieve greater global responsibility-sharing, and support durable solutions.

- **Engage with research and evidence on the drivers of migration in third countries.** The pursuit of more balanced, non-transactional, and comprehensive partnerships with third countries should rest on a solid understanding of what drives migration from these countries, including people's motivations and aspirations. The EU's cooperation efforts should also involve governmental and non-governmental actors in third countries to understand how to best engage with migration politics and governance at the local, national, and regional level to define mutually beneficial terms of cooperation, support reintegration, and offer safe pathways to those who wish or are forced to move, especially considering the persistent labour and skills shortages in the EU and the effects of climate change and environmental degradation on the drivers of migration and displacement.[51]

[1] For a reference to the nexus between ensuring the sustainability of the system and limiting arrivals, see Italian Prime Minister Meloni's speech during her visit to Lampedusa with European Commission President Von der Leyen, "President Meloni's press statement during her visit to Lampedusa with President von der Leyen", Italian Government, Presidency of the Council of Ministers, 17 September 2023. In her statement during the visit, von der Leyen backed Meloni's framing, see "10-Point Plan for Lampedusa. Press Statement", European Commission, 17 September 2023. More recently, the Common Implementation Plan for the Pact on Migration and Asylum (COM/2024/251 final) presented by the European Commission states that "the EU's migration policy can only be sustainable if those who do not have the right to stay in the EU are effectively returned", p. 22.

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[11] Recital 48, Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. PE/16/2024/REV/1. OJ L, 2024/1348, 22.5.2024.

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[13] See, ECJ, Case C-564/18, LH v Bevándorlási és Menekültügyi Hivatal; Joined Cases C-924/19 and C-925-19, FMS and Others v. Országos Idegenrendészeti Főigaz.

[14] "Joint Letter from the undersigned Ministers on new solutions to address irregular migration to Europe", 15 May 2024, p. 3.

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[17] EUAA (2022) "Applying the Concept of Safe Countries in the Asylum Procedure", p. 7.

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[29] The preliminary question does not relate to the issue of safety in Tunisia but to other issues linked to the imposition of a substantial bail as an alternative form of detention. This does not necessarily imply that the court of Cassation disagrees with lower courts on their assessment of the situation in Tunisia. It simply means that the court of Cassation was not in need of interpretative guidance from the ECJ on this point.

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[33] Scazzieri, L. (2021) "From partners to rivals? The future of EU-Turkey relations." Centre for European Reform. Note that the legality leaving asylum applicants in limbo due to Turkey's lack of cooperation is currently being assessed by the Court of Justice. See Refugee Support Aegean (2024). "Hearing before the Court of Justice of the European Union on Thursday 14 March on the preliminary questions of the Greek Council of State regarding Turkey as a 'safe third country'", 14 March.

[34] HIAS Greece (2021) "Refugees in Legal Limbo: Another Overlooked Casualty of Externalising Asylum at Any Cost." 18 June. See also Desmond, A. (2024) "Caught in Limbo: The Precarious (legal) Situation of Non-removable Migrants Stranded in Europe" *Journal of Immigration, Asylum and Nationality Law*, 35(3): 252-277.

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Reinvigorating Schengen amid legal changes and secondary movements

5

Daniel Thym

Executive summary

The repeated reintroduction of internal border controls within the Schengen area in response to secondary movements of asylum applicants has given rise to political controversy in EU member states. This is the case notably in the North, while Southern states have criticised the unfair 'Dublin' criteria and lack of solidarity amid high arrivals. Over time, the inability to reduce secondary movements became a key point of contention, one that policymakers have been hard-pressed to resolve. New rules in the revised Schengen Borders Code Regulation (SBCR) respond to these concerns about secondary movements. In conjunction with the reformed Dublin criteria in the Asylum and Migration Management Regulation (AMMR), these provisions amount to an agglomeration of half-hearted structural reforms, complex legislative prescriptions, deference to state preferences, and procedural safeguards whose robustness remains to be tested. At the same time, it is unlikely that they will help to significantly reduce secondary movements.

Three amendments epitomise the direction of the latest reform. First, the revised SBCR authorises member states to unilaterally reintroduce 'temporary' internal border controls for up to 2,5 years – instead of the current six-month time limit. While the reforms could lead to a renewed impetus to avoid misuse by the member states, it remains doubtful, in light of the experience with similar provisions in the past years, whether oversight by the EU institutions will effectively reign in excessive state practices. Second, neighbouring member states can introduce a swift and cooperative return procedure in situations of irregular movements across internal borders. It remains to be seen whether a statutory exception for asylum applicants is respected in practice. Third, the AMMR retains the option of multiple asylum applications and the transfer of jurisdiction, unlike the Commission's 2016 proposal. In practice, this means that Northern member states will have to perform regular asylum procedures when the country responsible does not cooperate in the take-back procedure. This transfer of jurisdiction is the flipside of the failure to fundamentally reform the previously applicable criteria on asylum jurisdiction established in the now repealed Dublin III Regulation. Notwithstanding the absence of deep structural reform, this chapter argues that EU institutions and member states may succeed in delinking internal border controls from secondary movements.

New rules in the revised Schengen Borders Code Regulation, in conjunction with the reformed Dublin criteria in the Asylum and Migration Management Regulation, amount to an agglomeration of half-hearted structural reforms, complex legislative prescriptions, deference to state preferences, and procedural safeguards whose robustness remains to be tested.

Doing so requires reinforced efforts to implement the new rules as well as rebuilding inter-state trust.

Introduction

The resilience of the Schengen area has been shaken in recent years by terrorism, the COVID-19 pandemic, and migratory movements. High numbers of irregular arrivals have given rise to a linkage between the revitalisation of Schengen and the reform of EU asylum policies. However, despite their comprehensive nature, the New Pact on Migration and Asylum and the Schengen Borders Code reform needed to go further in addressing the core issues troubling the area of free movement. Rather, the changes amount to an agglomeration of half-hearted structural reforms, complex legislative prescriptions, deference to state preferences, and procedural safeguards whose robustness remains to be tested. Overall, this combination of diverse measures represents a typical supranational compromise.

The underlying reason for the linkage between Schengen and Dublin is the breakdown of mutual trust between Northern and Southern member states, as demonstrated by the repeated reintroduction of internal border controls, among others. This has led to two contrasting narratives about the underlying problem.

The dilemma is that both are correct and can reinforce each other. While Southern states would point to the unfair Dublin criteria and lack of solidarity amid high arrivals, politicians further North have lamented the weak asylum systems in the South and the failure of Dublin transfers to the responsible member state.

The inability to reduce or prevent secondary movements became a key point of contention that policymakers have been hard-pressed to resolve.

Returning to a more stable Schengen system is rendered no less complicated by the fact the Dublin and Schengen systems remain intertwined, which could give rise to further politicisation in the future. Romania and Bulgaria's full accession to the Schengen area outside seaports and airports, for example, remains blocked for fear of increased numbers of asylum applicants due to weak external border controls. For this reason, the amended SBCR must be read in conjunction

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with the new Asylum and Migration Management Regulation (AMMR), which replaces the Dublin III Regulation.[1]

A small but critical element in this discussion concerns the transformation of Eurodac into a more detailed database tracking individuals on the move, rather than being used solely to count applications. Provided that individuals are registered upon first entry, this change could help to achieve a better understanding of the secondary movements taking place.

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Nevertheless, there is a danger that the reform package adopted in the first half of 2024 will prove insufficient for overcoming the deep-seated deficiencies in the legislative design and administrative implementation that underlie the breakdown of mutual trust between member states. Were this to happen, the widespread relief about a 'historic' political agreement on the new legislation could turn out to be short-lived. In the absence of structural reform, the risk of 'more of the same' is real. To prevent that outcome, stakeholders should acknowledge the added value, but also the limitations of the new legislation in terms of countering extended periods of internal border controls and secondary movements. On that basis, EU institutions and member states should focus on administrative implementation and rebuilding inter-state trust through a combination of enforcement, practical initiatives, and political trust-building.

Hallmarks of the legislative reform package

Two overarching aspects stand out when examining the impact of the adopted reforms on the functioning of the Schengen system: the complexity of the reformed SBCR and the essential linkages between the SBCR and other New Pact reforms, particularly the AMMR, which replaces but only marginally amends the so-called Dublin system of responsibility allocation.

As to the former, the new legislation amends the Regulation on the Schengen Borders Code (EU) 2016/399, meaning that the original text and the amendments must be read jointly

in a consolidated version. The amendments are laid down in highly complex provisions. One can easily miss decisive elements or be appeased by promising language, even though the legal substance remains meagre.

As to the latter, the revision of the Schengen Borders Code was not part of the 'package approach' under which the New Pact was negotiated, though the trilogue negotiations were completed at around the same time. Whereas the provisions on secondary movements in the AMMR will apply from June 2026 onwards, the SBCR, as amended by the Regulation (EU) 2024/1717, will start applying on 10 July 2024. This means that, for close to two years, the Dublin III Regulation will remain applicable at the same time as the reformed SBCR.

'Schengen' and 'Dublin' have a close—but burdensome—relationship, even though they constitute, legally speaking, two separate bodies of legislation. This official separation is the consequence of the thematic scope of the opt-outs of Ireland and Denmark and the association agreements with Norway and others. However, it does not undo the political, historical, and legal linkages based on the objective of achieving an area without internal border controls 'in conjunction with appropriate measures' in the realm of asylum.[2] The latest reform ultimately reinforces the statutory connections.

The following sections examine the legislative changes, including; the extended time limits for internal border controls, the promotion of technology as an alternative to internal border controls, a new procedure for swift transfers in response to irregular movements within the Schengen area, the response to secondary movements, the potential of further legislation on border surveillance, and travel bans during a pandemic.

INTERNAL BORDER CONTROLS: LEGALISATION OF EXISTING STATE PRACTICES

A resurgence of 'temporary' border controls has been witnessed within the Schengen area for prolonged periods of time and for diverse reasons, including terrorism, secondary movements, the COVD-19 pandemic, and the war in Ukraine.[3] In some cases, internal border controls have been maintained for several years, despite the six-month threshold enshrined in the previously applicable 2016 SBCR.[4] The Court of Justice interpreted this time limit strictly in a 2022 judgment.[5] Nevertheless, several countries, including Austria, France, and Germany, have

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since reinstated internal border controls in more or less open defiance of the judgment. Rather than infusing greater willingness to comply with the existing rules, the judgment seems to have fed the appetite for legislative change. As such, the new rules will effectively legalise former state practices, as the amendments on the activation threshold, the time-limits and supervision procedure illustrate.

Such wording aims at limiting excessive state practices, although judges can be expected to grant governments some leeway when assessing these abstract conditions. The list of examples is not exhaustive, meaning that other public policy and security threats than the ones mentioned explicitly in the amendment can be relied upon.

Activation threshold: Abstract references to 'public policy' and 'public security' previously gave rise to uncertainties as to whether a pandemic and secondary movements, or, rather, the social, economic, and administrative consequences they have, could qualify as valid reasons for introducing such controls.[6] The new legislation overcomes these uncertainties through a list of examples, which do not, however, present a carte blanche. Secondary movements will only cross the activation threshold when they present an 'exceptional situation' characterised by a 'sudden large-scale' influx which puts a strain on the overall capacities of 'well- prepared' national authorities and, at the same time, is 'likely to put at risk the overall functioning' of the Schengen area.[7] Such wording aims at limiting excessive state practices, although judges can be expected to grant governments some leeway when assessing these abstract conditions. The list of examples is not exhaustive, meaning that other public policy and security threats than the ones mentioned explicitly in the amendment can be relied upon.

Maximum time limit: In a reversal, EU institutions extended the maximum period of 'temporary' internal border controls from six months to two years. Doing so effectively sanctions previous—illegal—state practices. In 'exceptional circumstances', member states may even extend border controls for a 'further final' six months, albeit subject to enhanced procedural oversight, including a mandatory European Commission recommendation on the legality of that move.[8] That does not mean, however, that controls for more than 2,5 years are not possible.

In line with case law, new threats, such as terrorism instead of secondary movements, may justify the seamless continuation of internal border controls, based on the assumption that another period of up to 2,5 years has begun.[9]

Supervision procedure: Anyone reading the almost 2,500 words governing the reintroduction of internal border controls will come across numerous conditions and limitations, which could be considered as major constraints by the lay reader.[10] They constitute a laudable attempt at preventing excessive state practices through complex

ex ante and *ex post* notification, consultation, and reporting requirements. However, the supervision procedure does not change the ultimate authority of national governments to decide whether to reintroduce internal border controls—an important difference to the need for supranational authorisation to activate the derogations laid out in the Crisis and Force Majeure Regulation.[11] It remains unclear whether such procedural oversight by the EU institutions, which does not prevent member states from introducing border controls unilaterally, will be more effective than the 2013 reform of the SBCR, which relied on a similar strategy, albeit with limited success. The Commission, in particular, took a hands-off approach, sparking debates as to its willingness to formally enforce compliance (see more below).

ALTERNATIVES TO INTERNAL BORDER CONTROLS: WISHFUL THINKING?

The original Schengen Convention was based on a *quid pro quo* logic: in exchange for the abolition of internal border controls, national authorities could rely on 'flanking measures' to compensate for the absence of border controls. These alternatives have been promoted by the Commission to convince member states not to resort to internal border controls, resulting in a Recommendation, adopted in 2023,[12] and reinforced efforts by the Schengen Coordinator. The new legislation builds upon these initiatives by streamlining the provisions on police checks in border areas, introducing the transfer procedure discussed below, and highlighting the significance of monitoring and surveillance technologies. However, the usage of the latter is not chiefly a question of supranational law-making, but depends on states' willingness to apply them.

The effectiveness of the alternatives depends on what governments want to achieve with internal border controls. If the primary objective is to tackle the public policy or security threats listed in the SBCR, the alternatives would suffice, provided they deliver in practice. If governments used reinstatement as a 'control signal'[13] to counter public scepticism about efforts to address security threats and persisting deficiencies in the field of asylum – whether real or amplified through political rhetoric – internal border controls will be more symbolic than practical. However, this would not render border controls any less relevant or consequential. Arguably, it is this signalling effect that underlies the resurgence of border controls and the keenness to erect walls and fences, both within the Schengen area and beyond.[14]

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Considering the practical and symbolic importance of borders in the European project, the growing tendency of 'closing off' is detrimental to the regions and citizens on both sides of internal borders, and to the EU. The symbolism national governments wish to achieve through internal border controls represents a distrust in the EU to effectively respond to secondary movements. Such internal border controls motivated by symbolism might be much harder to discontinue, since doing so might be perceived as a sign of weakness of public opinion.

SWIFT TRANSFERS AT INTERNAL BORDERS: 'RETURN LIGHT'

To respond to secondary movements while trying to preserve the borderless area, the reformed SBCR foresees a new procedure for the transfer of persons apprehended in border areas. From now on, it will be possible to implement transfers within 24 hours based on a streamlined procedure, following a short hearing assessing the legality of stay and the individual's intent to apply for asylum.[15]

Non-governmental organisations may rely on the best interests of the child to challenge the swift transfer of unaccompanied minors and families, who are not exempt from the transfer procedure.

These expedited returns with reduced procedural safeguards do not presuppose the reintroduction of internal border controls and may serve as one of the alternatives discussed above. Especially in the context of secondary movements, it is important to distinguish between the introduction of internal border controls and ensuing police powers. State authorities may not simply refuse entry or swiftly return anyone entering without authorisation, as they must comply with the procedural requirements in the Return Directive and the Dublin III Regulation, which will be replaced by the AMMR as of 2026.

Several countries have long resisted these obligations. Police practices have been applied by France and Slovenia at their borders with Italy, Spain, and Croatia. These countries have essentially 'pushed back' third-country nationals who wish to make an application for asylum.

Germany and Austria have also seen political and legal debates about the potential refusal of entry of asylum applicants at internal borders. The new procedure for the transfer of persons apprehended in border areas responds to their calls for more flexibility.

Crucially, they presuppose inter-state cooperation and cannot be used by member states without the consent of the neighbouring country. The final text, however, holds that a generic bilateral cooperation framework between member states is sufficient; swift returns are thus not limited to scenarios of joint police patrols, as the Commission had proposed.[16] This renders it easier to revert to the new procedure, which, however, requires an inter-state cooperation framework.

Asylum applicants and beneficiaries of international protection are exempted explicitly, thus rendering the new transfer procedure irrelevant for secondary movements, at least on paper. When applying the exception, it is important to recognise that third-country nationals are asylum applicants from the moment they express a wish to apply for asylum to any state authority, including border guards.[17] In practice, the competent authorities may miss or misinterpret the wish to apply for asylum, as happens regularly in the countries mentioned above.

While guarantees for asylum applicants remain intact, the new legislation effectively introduces another exception from the procedural safeguards for refusing entry based on the Return Directive.[18] Any application of the new rules presupposes that state authorities verify that individuals do not have a legal authorisation to enter the member state in question. If that is the case, they will receive a transfer decision based on a standard form, with potential grounds of refusal to be added in writing.[19] Such formalistic reasoning is widespread for visas and refusal of entry at the external borders and has been accepted by the Court of Justice of the EU (CJEU) to be compatible with the Charter, subject to some caveats.[20] Individuals have a right to appeal before domestic courts, but such appeals do not have suspensive effect, meaning that they do not hinder the actual transfer.[21] Non-governmental organisations may rely on the best interests of the child to challenge the swift transfer of unaccompanied minors and families, who are not exempt from the transfer procedure.[22]

TRANSFER OF RESPONSIBILITY: LIMITED MODIFICATIONS

While public debates often focus on the structural unfairness of the Dublin criteria, seemingly technical provisions on the transfer of jurisdiction for specific asylum applicants as a result of secondary movements are less visible. The new legislation outlaws them officially.[23] Nevertheless, by way of example, an asylum applicant for whom Italy or Spain would officially be responsible will retain the legal authority to apply for asylum a second (or third) time in other member states, such as France, Austria, Germany, or the Netherlands, after having moved there irregularly. These destination countries can issue a take-back decision in accordance with the present Dublin III Regulation (EU) and the AMMR that will apply as of June 2026. However, these countries will officially have to assume responsibility if applicants do not comply with the take-back decision or if states do not enforce it within six months.[24] This happens regularly, as reflected by the high number of first instance decisions in destination countries compared to states of first arrival, where many applicants do not remain until the completion of their asylum procedure.[25]

Minor changes to the provisions on the transfer of jurisdiction concern scenarios of absconding, which were generously redefined to the advantage of the destination countries.[26] The cessation of responsibility under the 'first country of entry' criterion, meanwhile, was redefined to the advantage of countries of first arrival.[27]

Once the AMMR begins to apply, take-back procedures will also be streamlined, including by limiting the scope of legal remedies. In emergency scenarios, governed under the Crisis and Force Majeure Regulation, it will become possible to extend time limits for transfers (to the benefit of destination countries) and to suspend take-back procedures (to the benefit of countries of first entry), depending on which country is facing such a situation.[28]

MORE STICKS, AND NO CARROTS, AGAINST SECONDARY MOVEMENTS

As part of the New Pact reforms, new sanctions are being introduced to deter secondary movements.

In particular, the recast Reception Conditions Directive (RCD) envisages that asylum seekers moving unlawfully to a member state different from that of their asylum will no longer benefit from the rights guaranteed by the Directive there. In other words, reception conditions will be guaranteed only in the state responsible, albeit subject to a fourfold caveat.[29]

The recast Reception Conditions Directive envisages that asylum seekers moving unlawfully to a member state different from that of their asylum will no longer benefit from the rights guaranteed by the Directive there. In other words, reception conditions will be guaranteed only in the state responsible, albeit subject to a fourfold caveat.

First, the withdrawal will apply only once a transfer decision has been notified, not automatically when someone files another asylum application. Secondly, the general scheme of the RCD indicates that the withdrawal of reception conditions will end with the transfer of jurisdiction, which is usually after six months. Thirdly, Article 21 RCD and Article 18 AMMR can be interpreted in a way that member states will be required to take an administrative decision assessing each individual case, which might prove time-consuming in practice.

Fourthly, exceptions for minors, access to emergency healthcare, and the EU Charter of Fundamental Rights (the 'Charter'), could be used as grounds to challenge the legality of withdrawal. It remains an open legal question whether the CJEU will accept complete withdrawal under the condition that social benefits are available in another member state. The CJEU accepted that outcome for EU citizens, without discussing the impact of the Charter.[30] It is worth highlighting, in connection to this, that German courts have held the same in light of the far-reaching constitutional guarantee of human dignity under the condition that Germany provides support during a two-week period and pays for the voluntary return to the country where social benefits are available.

Finally, there are minimal incentives to comply with the take-back decision. They include the option of considering 'meaningful links' during relocation under the Solidarity Pool established by the AMMR and the discretionary clause.[31] On that basis, asylum applicants may be allowed to be transferred to or stay in the member state of their preference. However, member states retain unfettered discretion on whether to activate this option, meaning that applicants cannot demand to stay in the member state of their preference.

BORDER SURVEILLANCE: BRINGING LAW INTO MUDDY WATERS

While checks on persons at crossing points are densely regulated, the legal framework for surveillance between official crossing points is much less developed. This is all the more significant as controversial state practices vis-à- vis people trying to cross borders mainly occur during the surveillance of the external 'green' land and the 'blue' sea border. In this respect, the SBCR reaffirms the option for the Commission to adopt delegated acts and introduces an urgency procedure for adopting them. These rules may be used to govern select aspects of border surveillance.[32] The entry into force of a delegated act does not suppose an active vote by the Council and the European Parliament in favour of the new rules. Rather, both institutions can oppose the new rules, meaning that majority requirements are reversed. They become effective unless the Council and the European Parliament actively voice their opposition. Silence is interpreted as consent.[33] On that basis, the Commission will be able to adopt abstract rules on controversial questions, including the behaviour of state officials during Search and Rescue (SAR) operations by coast guard vessels or the treatment of migrants apprehended in forests and other remote locations. It is conceivable that the Commission might even introduce mandatory fundamental rights monitoring in those situations where the Screening Regulation and the provisions on asylum border procedures do not already foresee such monitoring.[34]

In a symbolic move, the new legislation endorses surveillance by 'all types of stationary and mobile infrastructure'[35] — a thinly veiled reference to fences which have spread along EU external borders in recent years.[36] It also contains a coded reference to an ECtHR judgment, which found Spanish pushback practices to be compatible with human rights.[37] That judgment was limited in that

In a symbolic move, the new legislation endorses surveillance by 'all types of stationary and mobile infrastructure' — a thinly veiled reference to fences which have spread along EU external borders in recent years.

it did not discuss stricter obligations on access to asylum enshrined in the Asylum Procedures Directive. Indeed, the CJEU recently reaffirmed that pushback practices following an application for asylum will always violate EU legislation even if they are compatible with the European Convention on Human Rights.38 Vague provisions in the revised SBCR do not change that outcome from a legal perspective.

Nevertheless, governments may try to rely upon the new provision politically to counter accusations of wrongdoing.

COVID-19: REACTIVE LAW-MAKING AND SILENCE ON OTHER SCENARIOS

During the COVID-19 pandemic, member states agreed on an entry ban for third-country nationals on the basis of 'soft law' measures coordinating administrative practices when implementing the 2016 SBCR. This external travel ban rested on shaky but defendable legal grounds. EU institutions built upon this experience by authorising the Council to adopt implementing legislation to further define the scope and permissible measures.[39] It is worth noting that the provision covers 'large-scale public health emergencies' only and therefore cannot be used to respond to other public policy or public security threats. This is politically relevant, as several countries have emulated the model of the external travel ban during the pandemic to significantly restrict the entry of Russian nationals over the past two years.[40] Despite adding new provisions, EU institutions missed the opportunity to establish a supranational procedure for such external travel bans, including a definition of those third-country nationals not covered by it.

Looking ahead, if the Commission is committed to improving compliance, it will have to fully assume its supervisory role, together with other means of fostering compliance.

Conclusion and forward-looking reflections

Trust is a prerequisite for a functioning area of freedom, security, and justice. The EU faces a fundamental problem if member states lose trust in the effectiveness of supranational legislation due to substantial differences between law and practice over an extended period. In this respect, core aspects of Schengen and Dublin have proven dysfunctional: internal border controls; irregular secondary movements; and failure

of the take-back procedure. This chapter puts forward three strategies to remedy these shortcomings, involving the promotion of compliance, reinvigorating the original political momentum behind the abolition of internal border controls, and, in the longer-term, addressing the structural weaknesses that the half-hearted legislative reforms have failed to address.

FOSTERING COMPLIANCE AND ENFORCEMENT

Recent reform measures have produced a strategy to overcome the entrenched deficits of the Schengen and Dublin systems by focusing on implementation. That is apparent in the reliance on evidence-based policymaking, administrative capacity-building contingency planning, and legal supervision. Both the AMMR and the new Schengen governance revolve around an annual policy cycle with risk assessments, reliable indicators, reporting obligations, contingency planning, and strategies at the national and European levels.[41] Money from the EU budget and administrative support by the EU Asylum Agency (EUAA) and the European Border and Coast Guard Agency (Frontex) are supposed to further increase capacities on the ground.

By contrast, supervision of national practices by the Commission has been treated with caution. In the past, the Schengen Coordinator and Commission officials may have behind closed doors tried to encourage states to properly implement Dublin rules and to abandon internal border controls. These efforts have had limited success, at least so far, in overcoming deep-seated compliance and enforcement deficits with regard to Schengen and Dublin. In both respects, the Commission has refrained from publicly reprimanding recalcitrant governments by means of political pressure ('naming-and-shaming') or infringement proceedings before the CJEU. That passivity could be explained by the desire not to complicate the negotiations on the New Pact. Looking ahead, if the Commission is committed to improving compliance, it will have to fully assume its supervisory role, together with other means of fostering compliance.

Recommendations:

- The Commission should not shy away from initiating infringement proceedings in scenarios of open defiance by member states. At the very least, it should take seriously the supervision procedure for internal border controls and asylum management under the revised SBCR and the AMMR.
- Capacity-building, including through the EU Asylum Agency and Frontex, can foster compliance and pre-empt some incentives for secondary movements and should therefore be prioritised in the implementation of the revised SBCR.

REBUILDING INTER-STATE TRUST

Agreement on legislative reform was an important intermediary step to overcome the breakdown of mutual trust between Southern and Northern member states.

To sustain that political momentum, it will be critical to foster administrative compliance and enforcement. Otherwise, reciprocal accusations between member states will resurface sooner or later. If that were to happen, governments might be tempted to unite behind a simple goal, namely, to prevent disputes between them by reducing the number of arrivals by means of cooperation with neighbouring states in the Western Balkans, Northern Africa, and with Turkey.[42]

In this context, EU institutions could possibly succeed in de-linking internal border controls from the effectiveness of

the asylum legislation. Institutional fora at EU level should aim at building political momentum in support of border-free travel among ministerial and expert meetings in the context of the 'Schengen Forum' and the 'Schengen Council'. This would remind governments of both the economic benefits of border-free travel and the paramount symbolic value of the Schengen area for EU citizens and the Union. If successful, the result could be paradoxical: a more flexible legal framework, adopted this past spring, might result in fewer—not more—internal border controls. Such an outcome is not unthinkable considering that Schengen had originally been created by national governments perceiving open borders among the member states to be in their collective interest.

Recommendations:

- Stakeholders, politicians, civil servants, and the EU institutions should, whenever possible, strengthen initiatives which unite governments behind a common vision, including measures other than cooperation with third countries.

- EU institutions and member states should reinvigorate the original political momentum behind the abolition of internal border controls to advance the interests of states and citizens. Citizens and politicians in border areas can be critical to building and sustaining these efforts.

PURSUING FURTHER LEGISLATIVE REFORM

Political will on the side of EU institutions and member states may not be enough to ensure a departure from the status quo for the simple reason that the very idea of stable asylum jurisdiction in an area without internal frontiers may be the 'original sin'[43] of the EU rulebook. Whether the AMMR's Solidarity Pool is enough to compensate for the structural unfairness of the responsibility-allocation system remains to be tested, as it is governments that decide autonomously about the type of solidarity contributions.[44] But if the past is any indication, even a quota-based mandatory relocation scheme may not have remedied this deficit as applicants may have fled the responsible member state.[45]

Many of the multiple 'push' and 'pull' factors influencing secondary movements were and will remain beyond the direct reach of states in the newly reformed system: ethnic and family networks, labour market opportunities, or disparate welfare states.[46] These factors help explain why we can expect secondary movements to continue after the New Pact reforms and the revision of the SBCR, albeit to a lesser extent.

There is a flipside to the choice of not substantially amending the Dublin criteria, which is discussed less frequently but becomes especially relevant when considering the likely possibility of secondary movements continuing in the future. Once the option of mandatory relocation was abandoned, there was no realistic alternative other than to retain the permissibility of multiple asylum applications and the transfer of jurisdiction in response to secondary movements.

Frontline member states would have never agreed to a reform leaving them with indefinite responsibility for asylum applicants entering the EU irregularly via the external borders.

Diplomatic euphoria about the 'historic' legislative break- through represented by the New Pact and the amendment of the SBCR, which can be understood after years of complex negotiations and divisive debates, should not hide the failure of structural reform. Addressing the design deficits enshrined in EU legislation would be the ideal solution in this context. While there may not be sufficient political appetite by member states and the European Parliament for

further reforms to the Common European Asylum System (CEAS) or, for that matter, to the SBCR, this will not detract from the remaining flaws in both. Failure to address these structural weaknesses will likely continue to undermine trust between member states, other than causing economic and political damage to the EU.

Any structural reform will have to address the double weakness of the Schengen area in the SBCR and Dublin system, to be replaced by the AMMR as of June 2026.

Also, the criteria on asylum jurisdiction and the weakness of the Solidarity Pool would have to be addressed, while secondary movements would have to be prevented more effectively than in the past. That is what the Commission had proposed in 2016, before the New Pact reverted to a less ambitious approach in the absence of political support for more radical reform. A return to the 2016 proposal in the future is not least the case because a hypothetical alternative solution of 'free choice' for asylum seekers, or regulated mobility subject to conditions such as economic self-sufficiency, have so far had no realistic chance of being politically accepted.[47]

Recommendations:

- Member states and the Commission should make the Solidarity Pool work, thus mitigating the impact of the structurally unfair Dublin criteria on asylum jurisdiction.
- The Commission should put political pressure on countries of first arrival to cooperate in take-back procedures under the Asylum and Migration Management Regulation. At the same time, it should insist that countries of destination comply with the rules on internal border controls.
- In the medium run, further legislation chance should be considered, once better implementation has helped rebuild inter-state trust between Northern and Southern member states.

Diplomatic euphoria about the 'historic' legislative breakthrough represented by the New Pact and the amendment of the SBCR, which can be understood after years of complex negotiations and divisive debates, should not hide the failure of structural reform.

[1] Maiani, Francesco (2024), "Responsibility-determination under the new Asylum and Migration Management Regulation: plus ça change…", *EU Migration Law Blog*, 18 June 2024.

[2] See Article 3(2) TEU; and further Thym, Daniel (forthcoming), "Schengen-Dublin-Nexus: the Return of Legal Linkages", in Philippe De Bruycker, Fabian Lutz, Jorrit Rijpma and Daniel Thym (eds.), *The Law of Schengen. Limits, Contents and Perspectives after 40 Years*, Cheltenham and Camberley: Elgar.

[3] See Carrera, Sergio, Davide Colombi and Roberto Cortinovis (2023), "An Assessment of the State of the EU Schengen Area and its External Borders", Brussels: Study for the European Parliament, PE 737.109, pp. 25-38.

[4] See the former Article 25(4) Schengen Borders Code Regulation (EU) 2016/399.

[5] See Joined Cases C-368/20 & C-369/20 *Landespolizeidirektion Steiermark & Bezirkshauptmannschaft Leibnitz* EU:C:2022:298.

[6] For the pandemic, see Case C-128/22 NORDIC INFO EU:C:2023:951, paras 124-127; generally Thym, Daniel (2023), *European Migration Law*, Oxford: OUP, pp. 258-262.

[7] Article 25(1)(c) Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

[8] *Ibid.*, Article 25a(5)-(6); the co-legislators did not accept a Commission proposal of indefinite prolongation.

[9] See *Landespolizeidirektion Steiermark* (n. 4) paras 71, 79-81.

[10] See the revised Articles 25 – 27a Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

[11] See, in this book, the chapter by Alberto-Horst Neidhardt.

[12] See Commission Recommendation (EU) 2024/268 on cooperation between the member states with regard to serious threats to internal security and public policy.

[13] Hollifield, James F., Philip L. Martin and Pia M. Orrenius (2014), "The Dilemmas of Immigration Control", in ibid. (eds.), *Controlling Immigration*, Redwood City: Stanford UP, pp. 3, 27.

[14] See Brown, Wendy (2010), *Walled States, Waning Sovereignty*, Brooklyn: Zone Books.

[15] Such hearing is implicit in Article 23(1)(1)(d), (1)(2) Schengen Borders Code, as amended by Regulation (EU) 2024/1717; case law on the right to be heard under Article 43(2)(a) Charter of Fundamental Rights reaffirms the need for a basic screening; see Thym (n. 5), p. 186.

[16] Article 23(1)(1)(c) Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

[17] See Case C- 36/20 PPU *Ministerio Fiscal* EU:C:2020:495, paras 52-68.

[18] Article 23(2) Schengen Borders Code, as amended by Regulation (EU) 2024/1717, effectively overturns Case C-143/22 *ADDE and Others* EU:C:2023:689; the additional exception under Article 6(3) Return Directive 2008/115/EC for pre-existing bilateral agreements had covered several countries before the latest SBC amendment already.

[19] *Ibid.*, Part B of Annex XII.

[20] See Joined Cases C-225/19 and C-226/19 *Minister van Buitenlandse Zaken* EU:C:2020:951, paras 44-47; and Case C-584/18 Blue Air EU:C:2020:324, paras 82-86.

[21] Article 23(3) Schengen Borders Code, as amended by Regulation (EU) 2024/1717; judges have confirmed that suspensive effect is only required if there is a real risk of illegal refoulement, something which will not usually be the case for transfer between EU member states; see Case C-233/19 *CPAS de Liège* EU:C:2020:757, paras 61-66.

[22] It remains subject to debate whether the Charter applies to swift transfers in accordance with Article 51(1) TFEU, since the new provision does not require Member States to use that procedure, meaning that they do not necessarily 'implement' Union law when doing so. Alternatively, 'only' national constitutions, the ECHR, and international law would apply.

[23] See Article 17(1), (4) Asylum and Migration Management Regulation (EU) 2024/1717; on the status quo, see Thym (n 5) 316-319.

[24] *Ibid.*, Article 46.

[25] See the EUROSTAT datasets 'migr_asydcfsta' on first instance decisions and 'migr_asywitha' on implicitly withdrawn applications; other leave that state after the first instance decision.

[26] *Ibid.*, Articles 2(17) and 46(2).

[27] *Ibid.*, Articles 33 and 37.

[28] See Article 12 Crisis and Force Majeure Regulation (EU) 2024/1717; See, in this book, the chapter by Alberto-Horst Neidhardt.

[29] See Articles 18 Asylum and Migration Management Regulation (EU) 2024/1717; and Article 21 Reception Conditions Directive (EU) 2024/1346.

[30] While the European Court of Human Rights has obliged states to provide basic needs to asylum applicants, it has not dealt with a scenario where such basic needs are available in another member state in law and in practice. Such a scenario might possibly be accepted under similar conditions than in the German case law, i.e. provisional support and a train or bus ticket to the state responsible.

[31] *Ibid.*, Articles 34(2) and 67(2).

[32] See Articles 23(5) and 37a Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

[33] *Ibid.*, Article 36(5).

[34] See also, in this book, the chapter by Evangelia (Lilian) Tsourdi.

[35] See Article 13(4) Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

[36] Euronews/AP, "Poland plans to fortify border with Belarus amid security concerns", 27 May 2024.

[37] *Ibid.*, Article 5(1a), read in light of Council doc. 6331/24 of 13 February 2024, No. 6, which had referred to ECtHR, judgment of 13 February 2020 [GC], Nos 8675/15 & 8697/15, *N.D. & N.T. v. Spain*.

[38] See Case C-392/22 *Staatssecretaris van Justitie en Veiligheid* EU:C:2024:195, paras 50-52.

[39] Article 21(1) and Annex XI, Schengen Borders Code, as amended by Regulation (EU) 2024/1717.

[40] See Thym, Daniel (2022), "Border Closure and Visa Ban for Russians", Odysseus Network, EU Immigration and Asylum Law and Policy, 17 October 2022.

[41] See also, in this book, the chapter by Philippe De Bruycker.

[42] See, in this book, the chapter by Andreina De Leo and Eleonora Milazzo.

[43] See Tsourdi, Evangelia (Lilian); Cathryn Costello (2021), "The Evolution of EU Law on Refugees and Asylum", in Paul Craig, Gráinne de Búrca (eds.), *The Evolution of EU Law*, Oxford: OUP, pp. 793, 805-807.

[44] See, in this book, the chapter by Philippe De Bruycker.

[45] See Maiani, Francesco (2017), "The Reform of the Dublin System and the Dystopia of 'Sharing People'", *MJECL*, Vol. 24, p. 622.

[46] See the open access publication Thym (n. 39), pp. 131-137.

[47] See the open access publication Thym, Daniel (2022), "Secondary Movements", in Thym, Daniel: Odysseus Academic Network (eds.), *Reforming the Common European Asylum System*, Baden-Baden: Nomos, pp. 129, 137-13

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Following the green light by the European Parliament in May 2024, the Council voted in favour of the New Pact on Migration and Asylum. After years of disagreements on the reform of the Common European Asylum System (CEAS), the co-legislators were ultimately able to achieve a compromise on the legislative package. The reform paves the way for a new generation of EU asylum and migration laws. Many initially hoped that the reforms could also open a new chapter for the EU's policies in this area. Yet, uncertainty around the implementation of the new rules remains high. Not all member states stand behind the reform package, as the successful but not unanimous vote in the Council showed. With migration as high as ever on the EU and national political agendas on the one hand, and demands for further legislative changes on the other, it is more important than ever to have an in-depth and comprehensive understanding of the reforms' impact.

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