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BLOG SERIES ABOUT THE INSTRUMENTS OF THE PACT ON MIGRATION & ASYLUM

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SESSION 1: UNPACKING THE PACT

1. Genealogy of and futurology on the pact on migration and asylum by Philippe De Bruycker

Alleluia! The white smoke that rose above the European quarter in Brussels early in the morning of 20 December 2023, same as for the election of the Pope, was a signal that the EU policy makers would receive the New Pact on Migration and asylum as a Christmas gift. Following sleepless nights of negotiations under pressure to succeed, combined with fear of failure because there is "no agreement on anything as long as there is no agreement on everything", the EU remained true to itself with the dramatic method it uses to adopt a broad compromise along a package of measures.

To conduct an inventory of what has been exactly adopted under the flagship of the pact is not such an easy task (see here for a recent presentation by the Commission). According to the Commission communication of 23 September 2020 titled "A new Pact on Migration and Asylum", it is actually so extensive that it is difficult to identify its content and limits as it embraces asylum law, borders policy, legal migration, and the fight against smuggling, including the external dimension of those policies. More precisely, the Commission tabled five main legislative proposals together with four soft law instruments respectively on screening, migration and asylum management, asylum procedures, Eurodac and crisis and force majeure. Proposals such as the revision of the single permit directive politically agreed on 12 April 2024 and of the long-term residence directive that is still pending are presented as elements of the pact, and indeed the Commission explicitly quoted them Commission in its Communication of 23 September 2020. Other instruments such as the revision of the Schengen borders Code agreed in February 2024 or the recast of the return directive still pending are formally not considered as being part of the pact, despite their close links with its content. Finally, one has to keep in mind four other instruments, respectively on reception conditions, qualification, resettlement and the asylum agency, that go back to 2016. These instruments will only be formally adopted in 2024 with the reset of the New Pact proposals due to "the package approach" as explained below. On top, the European Parliament enumerates the amendment of the Interoperability Regulation and of ECRIS-TCN Regulation that the Commission proposed in liaison with the screening regulation as being part of the pact, but the other institutions do not quote this very specific instrument.

The inheritance of the 2015 crisis: The first batch of asylum instruments on rights of refugees plus the Asylum Agency

Due to the arrival in the EU territory of about one million persons transiting through Turkey in 2015, the Commission envisaged to reform the Common European Asylum System by tabling in 2016 seven proposals. The first batch of four (see the table below in yellow) were the object of a political agreement already in 2018 but were not formally adopted due to the package approach, as all instruments need to be adopted simultaneously as part of an overall compromise agreement, and still have to be officially endorsed by the Council:

i. The Qualification Regulation defining the persons eligible to international protection and their rights aiming at further harmonisation to avoid divergent practices of national asylum administrations in charge of recognising protected persons (see here for a first comment);
ii. A revision of the Directive on Reception Conditions to guarantee that asylum seekers benefit from them only in the responsible Member State (see here for a first comment);
iii. The regulation transforming the European Asylum Support Office (EASO) in a European Union Asylum Agency (EUAA) to give it more power, in particular regarding monitoring the way Member States apply EU asylum law (see here for a first comment);
iv. A Regulation establishing a Union Resettlement framework providing financial support to Member States when they resettle refugees from third countries in the EU (see here for a first comment).

On the contrary, three other proposals related respectively to the reform of Dublin regulation (for a comment see here), the recast of the asylum procedures directive, as well as an amendment of the Eurodac Regulation also tabled by the Commission in 2016 were not the object of a political agreement. This was due to strong divergences among Member States in Council regarding the issues of balancing responsibility and solidarity, as well as reforming asylum border procedures. Thus, this first attempt to reform the Common European Asylum System failed despite the policy earthquake that the 2015 crisis represented. Only the Regulation 2021/2303 on the EU Asylum Agency was formally adopted in 2021 on the basis of a mini-deal cutting the specific instrument off from the package approach due to the inclusion of a sunrise clause (article 73) foreseeing that the monitoring mechanism would not enter into force in its entirety without a revision of the Dublin Regulation.

The Pact relaunch of 2020: The second batch of instruments on borders plus Dublin & Solidarity

It is only with the arrival of a new Commission composition after the 2019 European elections that the legislative work resumed and led to the presentation of the pact on

migration and asylum on 23 September 2020 (see here for a study of the Commission proposals including a history of the roots of the pact). The choice of the term "pact" refers to the attempt of the Commission to overcome the divisions between Member States in Council with early compromises in the proposals already including concessions to different groups of Member States having divergent views, respectively Northern Western Member States favouring responsibility, Southern Member States (the Med Group, in particular Italy and Greece) favouring solidarity and Eastern Member States (in particular the V4 called the Visegrad group) opposed to relocation of asylum seekers.

This second batch is made of the following instruments (see the table below in blue):

i. A Screening Regulation formalising Member States' procedures for the identification of migrants in line with the hot spot approach (see here for a first comment);
ii. An Asylum and Migration Management Regulation (AMMR) perpetuating the Dublin system on responsibility allocation but including a brand-new system of solidarity among Member States (see here for a first comment);
iii. Two, instead of one, regulations as explained below imposing (mandatory) border procedures for asylum (see here for a first comment) and for return at the external borders of EU Member States;
iv. A revised Eurodac Regulation extending the purpose and scope of this existing database in order to fight better irregular migration by including illegally staying third country nationals (see here for a first comment);
v. A Regulation on situations of crisis and force majeure allowing Member States to derogate from certain rules under exceptional circumstances, including instrumentalisation of migration by third states, and foreseeing additional solidarity measures in these cases (see here for a first comment).

Two last elements must be mentioned for the sake of clarity:

Firstly, a specific Regulation on a Return Border Procedure has been adopted separately from the Asylum Procedure Regulation due to its specific territorial scope, as the former is part of the Schengen acquis while the latter is not. This has been the object of a lengthy opinion of the Legal Service of the Council. The same is true regarding the Screening Regulation that is accompanied by another specific regulation amending the ECRIS and Interoperability Regulations for the same reasons.

Secondly, the proposal for a Regulation Addressing Situations of Instrumentalisation in the Field of Migration and Asylum tabled by the Commission in 2021 after Belarus allegedly manipulated migrants to push them towards the Polish border, initially not

considered as part of the pact, has been merged with the Crisis and Force Majeure Regulation.

All in all, the pact is made of 1,425 pages of A4 format that can be consulted here on the Odysseus website.

Table of the 10 instruments that are part of the pact in the large sense

	COMMISSION PROPOSALS	YEAR	INSTRUMENTS ADOPTED	YEAR
	First batch made of 4 instruments on Rights of Refugees + Asylum Agency part of the pact in a large sense			
1	Qualification	2016	Regulation	2024
2	Reception Conditions	2016	Directive	2024
3	Asylum Agency	2016 & 2018	Regulation 2021/2303	2021
4	Resettlement Framework	2016	Regulation	2024
	Second batch made of 7 instruments on Borders + Dublin / Solidarity at the core of the pact in a strict sense			
5	Screening	2020	Regulation ScreeninRegulation Screening	2024

6			Regulation amending ECRIS & Interoperability Regulations	
7	Asylum and Return Border Procedure	2016 & 2020	Regulation Asylum Procedure Regulation Return Border Procedure	2024
8	Asylum & Migration Management (including "Dublin IV" and solidarity)	2020	Regulation AMMR	2024
9	Eurodac	2016 & 2020	Regulation	2024
10	Crisis and Force Majeure	2020	Regulation Crisis & Force Majeur including instrumentalisation	2024
11	Instrumentalisation	2021		

The negotiations of the pact

There was a lot of political pressure on the European legislators to adopt the Pact before the European elections of June 2024 to prove to the electorate that the EU can deliver on migration and asylum, crucial issues of the political debates. A failure would have been a signal that the EU cannot manage what is considered as one of the major challenges that may determine the results of the elections to a significant extent in several member States.

The beginning of the legislative process was marked by a conflict between the Parliament and the Commission because the latter's proposals were not accompanied by impact assessments, which led the European Parliamentary Research Service to produce its own substitute assessments. To guarantee that there will be progress with the negotiations, the European Parliament and the Council agreed on 7 September 2022 a roadmap foreseeing the organisation of regular meetings between the two institutions to evaluate the progress of the legislative process in view of its conclusion in February 2024. Although the content of the pact was discussed during three years (September 2020 until December 2023), the bulk of the negotiations took place at the end 2023 after the Council managed to adopt finally in June 2023 common positions on the proposals for the AMMR and for the Asylum Procedure Regulation. This allowed the start of the trilogues with Parliament and Commission. Negotiations surprisingly accelerated in December 2023 after three days of intense discussions that led to an agreement between the co-legislators on 20 December.

A coalition of 161 NGOs called upon the members of the European Parliament to vote against the pact by arguing that "*it will have devastating implications for the right to international protection and greenlights abuses across Europe including racial profiling, default de facto detention and pushbacks*". There is also a widespread idea that the Council that had defined precisely its red lines, is the "winner" of the legislative process. However, this impression on the outcomes of complex negotiations concerning numerous elements should be cautiously checked to determine if and to what extent it is true.

The texts agreed did not become available before 9 February once the Coreper confirmed the political agreement with the Parliament. The pact has already been adopted by the plenary of the European Parliament on 10 April with the support of the three main political groups (Centre-right (EPP), Socialists (S&D) and Liberals (Renew)), with a few rebels among them. The formal adoption by the Council is expected to take place within the next few weeks (probably within May 2024). The new instruments will enter into force 20 days after their publication in the Official Journal of the EU expected before the summer 2024, but will start to apply only two years afterwards, so normally around the end of the first semester of 2026.

Continuity with the past

While the Commission presented the pact as a fresh start, its proposal regarding the successor of Dublin shows on the contrary a perfect continuity with the past. Same as Tomorrow and James Bond, Dublin never dies. The Commission tried in full bad faith to argue that Dublin was abrogated but this is only true from a purely formal legal point

of view asRregulation Dublin III 604/2013 is not essentially repealed, but actually copied in the new AMMR. Even if there are a lot of small changes to the variety of criteria determining responsibility and the functioning of transfers (a reason why specialists of the area could use the wording "Dublin IV"), the basic principle that is applicable in practice in most cases does not change: the Member States of first entry remains responsible for the asylum applications introduced on their territory by third country nationals entering the EU for the first time.

The regulation on screening is more of a novelty, even if it formalises existing Member State practice. Its object is to organise in seven days the identification of persons (identity and nationality, security and public health risk, cases of vulnerability) to orient them to the adequate procedure: asylum (border or normal) procedure or return. One may wonder if the main goal of the legislator is not to ensure that the fingerprints of all persons will effectively be taken and introduced by border Member States in the Eurodac database leading to the application of the criterion of first entry. One point that will be discussed is the absence of a formal identification decision that people could appeal. The system is premised on the idea that identification is a preparatory administrative act that can be challenged afterwards within the applicable asylum or return procedure.

Novelties for the future

There are four important innovations introduced by the Pact, particularly a solidarity mechanism embedded in the Dublin system:

1. The system of governance of migration and asylum. The key word is Management in the new Regulation that stands for Asylum and Migration Management Regulation (AMMR). The EU pretends to manage migration and not to suffer anymore passively the flows, being dependent upon the willingness of migrants and the actions of smugglers. This is exactly what the President of the European Commission meant when she said that "Europeans will decide who comes to the EU and who can stay, not the smugglers. Member States are therefore requested to prepare national strategies based on a European strategy integrating the internal and external dimensions of migration and asylum policies.

This interaction between the national and European levels will lead to a kind of method of coordination between the EU and its Member States that the Commission had proposed without success twenty years ago. The European and annual strategies that are part of an "annual migration management cycle" remind the Schengen and the borders policy cycles or even the European Semester annual cycle of economic policy coordination. It becomes clear, as the idea of management appearing in the title of the

AMMR indicates, that the EU goes further than adopting legislative instruments in line with its classical function and will start dealing with the implementation of the migration and asylum policies on the ground. Being only at an embryonic stage compared to the European Employment policy that gives a prominent role to the Council tasked by making recommendations to Member States about the implementation of their national policy, it remains to be seen how the annual migration management cycle will develop. One weakness appears already. Except of the classical general monitoring and evaluation clause under article 69 of the AMMR and the monitoring function attributed to the EU Agency for Asylum, there is no reporting and evaluation phases included in the policy cycle. This lacuna contrasts with the Schengen cycle that, based on the Schengen evaluation mechanism leading to recommendations followed up by a monitoring phase to check their effective implementation, involves each year the Schengen Council in a discussion and report about the state of implementation of the Schengen roadmap.

2. The creation of a solidarity mechanism. This is certainly the major novelty as solidarity has been missing for 34 years , i.e. since the adoption of the Schengen and Dublin 1990 conventions that placed the burden of border controls and asylum applications upon Member States located at the external borders without discussion because these early Conventions incorporated only the views of Northern Western Member States. The legislators made the basic choice of keeping rather than amending the premises of the Dublin system. Therefore, the solution was to inject solidarity. It is well known that the EU tried without success to implement relocations on a voluntary basis. Due to the extremely limited results of this option, the AMMR opts clearly in favour of mandatory solidarity. To accommodate the concerns of Eastern Member States (in particular the Visegrad Group), this mandatory mechanism is built upon flexibility. Member States must implement solidarity, but they are allowed to choose among three types of solidarity: relocation of asylum seekers, financial contributions for projects and alternative measures. It does not seem that this flexibility satisfies Hungary, Poland and Slovakia that continue to oppose the pact just after its adoption, while Lithuania has announced that it would prefer to pay than to relocate. Solidarity is one of the elements that will remain at the core of the political debate. The key question is if the mechanism will produce enough solidarity to convince the border Member States to take over their important legal responsibilities as they must identify all migrants, and proceed at the border in the case of those falling under this procedure. An annual minimum of 30,000 relocations and € 600 million is set by the AMMR, but only the implementation of the system will tell us in the future whether what will be enough. The idea often mentioned to impose a fine of € 20,000 per asylum seeker that the Member States would refuse to relocate does not appear in the text adopted. A controversial element relates to the types of measures that the solidarity contributions can fund. These measures can

include the strengthening of external borders, and it will be interesting to see if the Commission will support within this framework the building of walls, contrary to what has been up to date its doctrine regarding the use of European funding. Considering that solidarity measures should aim at fighting irregular migration rather than reinforcing Member States' asylum systems, NGOs oppose that solidarity measures can be implemented outside the EU in third countries

3. The imposition of border procedures. The idea is to implement asylum and return procedures at the external borders to avoid that migrants can abscond. Border procedures remain an option for Member States, but become mandatory in some cases, such as for asylum seekers whose recognition rate is below the European average of 20%. The Regulations foresee that 30,000 places for border processing must be created in the entire Union divided in the different Member States through a complex distribution key. Asylum procedures, including appeals, should be completed within 12 weeks which is a real challenge knowing how lengthy they are normally in the EU. Free legal counselling (but not assistance or representation) as defined by article 16 of the regulation on a common asylum procedure will be ensured even at first instance level, that is the processing before the administration. This is a progress that will need to be evaluated against the fact that the concerned persons will be detained. Detention is precisely the most controversial issue. Even if the Asylum Procedure Regulation obliges euphemistically Member States to require applicants to "reside" at or in proximity to the external border (see article 54, §1), people will logically be detained as the aim is precisely to avoid absconding. This will give rise to litigation as the amended reception conditions directive prohibits automatic detention and imposes the recourse to alternative measures.

For the rest, the Regulation fails to simplify asylum procedures as the least that can be said is that the rules remain extremely complex. It is clear that there will be controversies about the compatibility of some provisions with human rights, in particular regarding the limited time to appeal and the curtailment of automatic suspensive effect.

4. The regulation on crisis and force majeure, including instrumentalisation. This instrument allows Member States to use derogations to some common rules due to exceptional circumstances. Civil society organisations are afraid that this instrument will be abused by some Member States to declare the asylum situation as a crisis. They have also criticised this instrument as they consider the exceptional circumstances as humanitarian rather than a migratory crisis, so that measures should be taken to ensure the basic needs of migrants instead of derogations to basic rules such as the prolongation of the period foreseen for the registration of asylum applications and for the length of border procedures.

One more episode of a long series

Rather than a fresh start as it has been labelled by the Commission, the pact is one more episode of a long series. It completes the Common European Asylum System with a third generation of rules after the minimum standards of 2003/2005 and the second generation of 2011/2013 that were meant to finalise it. This set of new rules unplanned by the treaties proves that the asylum policy is far from being achieved and this will still be the case with the pact.

There is of course progress in favour of more Europeanisation with several elements such as :

- the adoption of regulations that do not anymore need to be transposed like the previous directives, even if some of their provisions are not detailed enough and will require the adoption of complementary national legislation by the Member States;
- The procedural autonomy of Member States is reduced with the asylum procedure regulation, but this instrument requires an in-depth analysis to evaluate to which extent these procedure(s) is/are now really common to all Member States;
- Asylum becomes progressively a more common policy with the introduction of the coordination method by the AMMR that will allow the EU to enter the area of policy implementation, going far beyond classical legislative harmonisation;
- The fact that a more or less important part of the funding necessary for the implementation of the pact will come from the EU is a step in the same direction, in particular regarding the provision of legal counselling that could be entirely EU funded as it has been announced.

Despite these steps towards more EU integration, the success of the pact will depend upon its implementation. This can of course be said about every policy, but it is particularly true in this case. On the one hand, frontline Member States will need to make important investments to develop infrastructures, recruit and train personnel as well as buy technical equipment in order to render functional border procedures. This is an important challenge as the examination of asylum applications under this procedure will have to be finalised within 12 weeks (appeal included!). In addition, return border procedures are also meant to be completed in 12 weeks even though it is difficult to understand why they would function quicker than normal return procedures. On the other hand, the rest of the Member States will have to show enough solidarity even if the levels of solidarity will be discretionary. Discretion emerges as the major rule in a complex game involving several political and administrative players as defined by the AMMR: other than the Commission, the Council will be assisted by two new bodies

composed of Member States representatives: a High level Solidarity Forum and a Technical Level Solidarity Forum, the overall being orchestrated by the new function of Solidarity Coordinator from the Commission.

As one can see, the adoption of the pact is not the end, not even the beginning of the end, but perhaps the end of the beginning as Churchill said. If its adoption has obviously been a long and difficult step, it is also without any doubt not the last one. It has been rightly described as historical by the President of the Commission and of the European Parliament, in particular due to the adoption of the solidarity mechanism. However, only the future will tell us if this is really the case as implementation of the pact will be crucial. This phase may prove to be as difficult as the adoption phase, if not even more challenging, despite the fact that there will be no transposition phase as almost all instruments adopted are regulations instead of directives.

The EU and its Member States have two years in front of them to prepare themselves before the new regulations will have to be applied in practice in the course of 2026. As announced in a communication of 12 March 2024, the Commission will present a Common Implementation Plan in June and do gap analyses for Member States in close cooperation with them. They will afterwards have to adopt their own national plan to make sure that everybody is ready to implement the new regulations in 2026. The level of preparation of Member States in view of the operationalisation of the pact and the first years of its implementation will tell us if its adoption corresponds to a real support from their side, or rather to a way to get rid of a legislative package pending since too long. The negative votes of Poland and Hungary and the abstentions of Slovakia and the Czech Republic in the Council when it adopted the instruments of the new pact on 14 May are not a good sign. It appears that the pact has not allowed to rebuild trust with the Member States of the Visegrad group. It remains to be seen if this will lead them to obstruct the implementation of the solidarity mechanism in the future.

Two scenarios for the near future plus one for the long term

The first scenario is success. Border procedures function miraculously. Secondary movements diminish.Trust among Member States is re-established based on the pact that is viewed as a compromise serving the interests of all of them. Solidarity among the Member States becomes effective. The latent climate of crisis around migration and asylum issues diminishes progressively. Finally, widespread violations of EU law with a lack of reception conditions, lasting internal border controls, and even pushbacks in violation of the principle of non-refoulement come to an end.

The second is disaster. Borders procedures are unmanageable within 12 weeks. Inhuman and degrading reception conditions in centres located at the borders mirror

the Greek precedent of the hotspots. Litigation about de facto detention increases and renders the political debate more difficult. Secondary movements perpetuate, and solidarity is not applied. Member States distrust each other more than ever contrary to the logic of a pact. Disrespect for EU law continues and Northern Member States envisaged to reintroduce internal border controls within the Schengen area against frontline Member States.

Of course, no one knows which scenario will become real, and reality may also well be in between. But what will happen is finally more Europe. Under the first scenario because the pact is only a first step towards more integration. Under the second scenario, Member States, after another deep crisis that could be worse than that of 2015, will eventually realise and have to accept that only the EU level can allow them to manage – as much as this is possible in the real world – the phenomenon of migration and asylum.

Time will come when the need for a single asylum space will be recognised. A space where financial solidarity would be implemented through the EU budget, rather than on the basis of intergovernmental agreements between Member States like under the pact. A space where there would no longer be a need for a Dublin-like responsibility determination mechanism, and where issues such as internal transfers between Member States of asylum seekers or illegal migrants, secondary movements and internal border controls would simply lose their relevance because the area of freedom, security and justice would have become truly common. Transforming Frontex and the EUAA into federal-like agencies, thus centralising to a certain extent the provision of public goods like border control and asylum, will be at the core of this transformation that has already started to take place, surreptitiously but surely. Indeed, Frontex and the EUAA steer their way year by year, month by month, day by day, thought by thought as Leonard Cohen says. And post by post, as it did about the proposals for the pact that have been the object of a book, the Odysseus Network will contribute to the debate by a series of publications on its blog until the early fall 2024 paving the way to a European conference about the pact planned for 17 and 18 October 2024.

2. Secondary Movements: Lack of Progress as the Flipside of Meagre Solidarity by Daniel Thym

Complaints about secondary movements lie behind recurrent complaints by 'Northern' governments, in the same way as their 'Southern' peers express their frustration about the lack of meaningful solidarity. Secondary movements in this sense concern irregular onward movements of asylum applicants and beneficiaries of international protection. Whereas the exceedingly complex and half-hearted provisions on solidarity in the New Pact receive much academic and political attention, the contents and implications of the

new rulebook for secondary movements is often neglected despite its practical and political significance.

Both themes had been intricately linked during the negotiations: their interaction presented the Gordian knot any compromise would have to cut. The end result fails to deliver much progress. Inspection of the small print will demonstrate that 'more of the same' is the motto of the day. The status quo remains essentially intact once we pierce the veil of legislative innovation. That is why the new legislation will be no game changer on secondary movements, mirroring the daunting outlook on solidarity.

Secondary Movements as an Everyday Reality

Statistics about secondary movements are unreliable (here, p. 4-6). Nevertheless, plausible indicators demonstrate that many move northwards. First, discrepancies between the number of asylum applications and administrative first instance decisions indicate that many do not stay in countries of first arrival (the mismatch is even higher if we include refusal on formal grounds at first instance, such as implicit withdrawal). Second, secondary movements occur after the completion of the asylum procedure; during 2023, Germany took no less than 16.500 asylum decisions on applicants who had received international protection in Greece (here, p. 14), out of 25.000 positive decisions in Greece that year. Third, it is widely known that the take back procedure under the Dublin system has never functioned particularly well (here, p. 157-163). Again, German data shows the extent of dysfunctionality. Italy was obliged to take back 15.514 applicants last year, but only 11 returned (here, p. 23), mostly voluntarily according to media reports; the ratio of success stood below 0.1 %. As a response, the German authorities have called upon EUAA to support its Dublin units in a desperate attempt to achieve better outcomes.

These snapshots deliberately focus on the lived experience of secondary movements, rather than the legitimate sense of frustration about the structural unfairness of the Dublin rulebook. The impasse of the policy debate has always been that both narratives are correct. For years, reciprocal complaints by countries of destination and first arrival about the absence of 'solidarity' and 'responsibility' have marred any debate about the future of EU asylum policy. To overcome this deep-rooted animosity, the CEAS is in urgent need of meaningful solidarity and better compliance.
A previous reform attempt failed in 2018 because it proved impossible to overcome reciprocal accusations. The Pact has been more successful, partly because the Commission proposed to continue the basic contours of the status quo. That paved the way for a political compromise whose outcome seems unlikely, as we shall see, to change much in practice. The new legislation tinkers with the small print without

changing the structure. Corresponding provisions can be found in different pieces of legislation mentioned hereinafter. On one front, however, we may see substantial change. The revised Eurodac Regulation will track movements of migrants, provided they are registered diligently upon first entry and on later occasions (here, Article 12). This may give us a better picture of the intensity and scope of secondary movements once the new legislation becomes effective in 2026.

Driving Forces behind Secondary Movements

Social scientists teach us that there are no simple explanations why people leave home states, how they choose their destination, and to what extent these preferences change over time. Multiple 'push' and 'pull' factors overlap and their relative weight depends on the circumstances, including networks and 'smugglers' (here, p. 96-110). Secondary movements are, in other words, context-dependent, making it difficult to identify replicable patterns (here, here, here). Any assessment of the driving forces is complicated by the comparatively low level of information on the part of many asylum seekers, which ethnographic research has unveiled, thus rendering symbols, stories, and perceptions as relevant as 'hard' facts.

Notwithstanding these uncertainties, four conclusions help us assess to what extent the new rulebook will help prevent secondary movements. First, asylum seekers tend to have a low level of knowledge about asylum laws, meaning that the statutory small-print of EU asylum legislation, which defines the policy debate, will influence onward movements to a limited extent only. Individuals will not always have heard about the Dublin system. Second, reception and living conditions are relevant. Substandard reception conditions can be a reason for onward movements, while generous welfare states are one element amongst others rendering a country attractive, although migrants will rarely distinguish between social benefits sensu stricto and the general quality of public services, including education and healthcare.
Two other elements are the most relevant. Third, economic prospect and labour market success, real or perceived, vary significantly within the EU; they are undoubtedly an essential driving force. Finally, ethnic and family networks are generally a core factor determining the choice of destination. People go where relatives and compatriots are staying already. By contrast, all Member States are, fortunately, securing physical safety as a matter of principle, thus rendering this factor irrelevant within the EU—in contrast to movements elsewhere, while the social climate and the degree of xenophobia can differ between countries.

For the political debate, the multitude of 'push' and 'pull' factors entails that the EU institutions should strive for a smart legislative design which fosters compliance, instead

of relying primarily on reactive law enforcement (here, p. 134-135). Note that this is not a normative claim to respect the preferences of asylum seekers but a matter of regulatory self-interest. Putting your regulatory faith in an inter-state transfer procedure is an exercise in 'technocratic overreach' in an area without internal border controls (here, p. 103-118). To overcome the dismal performance of the Dublin system, the EU should leave behind the false dichotomy between incentives and sanctions. Both can be combined: the proverbial 'carrots and sticks'. We shall see that the EU legislature concentrates on the former.

'Long Live Dublin': Transfer of Responsibility

It is widely recognised that the basic contours of the Dublin III Regulation will be maintained behind the façade of the Asylum and Migration Management Regulation. This continuity is palpable for the 'Dublin criteria' determining the state responsible for examining an application, but it extends to seemingly technical provisions on the transfer of responsibility. The new legislation reaffirms explicitly that secondary movements are illegal (here, Article 17(4); here, Article 9(2)(h), here, Article 27). At the same time, however, onward movements will be effectively 'legalised' whenever states fail to return an applicant to the state responsible under the Asylum and Migration Management Regulation within a six-month time frame – exactly the same period as at present (here, Articles 37(1), 46(1), (2); and here, Article 29(2)).

The Commission had little choice but to propose such continuity, given that it had decided to leave the 'Dublin criteria' largely intact once quota-based relocation was beyond reach. 'Frontline' Member States would not have accepted the prohibition of multiple asylum applications in different Member States without a fundamental reversal of the 'Dublin criteria'. Despite the grand promise of a 'New Pact', the basic contours of the dysfunctional Dublin system remain intact – in contrast to the innovative design of the Commission's 2016 proposal (here, p. 13-15).

To be sure, there are minor amendments. Responsibility will be transferred after three years when the applicant, or a family member, absconds, instead of 18 months at present (here, Article 46(2)). Crucially, the definition of absconding is broadened significantly to include scenarios where the applicant is absent from a reception centre or fails to present to the competent authorities (Article 2(17)), thus effectively overturing a restrictive earlier CJEU judgment (here, paras 52-65). In scenarios of crisis and force majeure, destination countries benefit from an extended one-year deadline to perform the transfer instead of the normal six months (here, Article 12(2)(d)), whereas countries of first arrival may suspend Dublin transfers to their territory (Articles 12(4), 13) – something they have been doing de facto for years.

Responsibility 'offsets' are a novelty in the arsenal of solidarity measures; they were introduced during the negotiations. As a secondary level instrument, offsets become available when Member States do not pledge enough places for relocation (here, Recital 33, Article 63). Destination countries must officially resume responsibility for an asylum application, thus renouncing the—often hypothetical—option to transfer the person to the country of first arrival. Rules governing the activation of 'offsets' are complex, as they are the result of intense political debates. While ECRE welcomes them for respecting the choice of destination by asylum applicants, they can be described, from a policy perspective, as the pragmatic recognition of the factual situation. They give the transfer of responsibility, which has been an everyday reality in tens of thousands of cases for years, the aura of inter-state solidarity.

Family Networks: Irrelevance of an Essential Motivation

Family networks are, as we have seen, an essential driver for secondary movements. They are also the motivation which may be politically and ethically most compelling, even if relations with siblings and other relatives are not covered by the human right to family life (here, para 94). Against this backdrop, the Commission had proposed broadening the definition of 'family member' to include siblings. In practice, this would have entailed that a Syrian man applying for asylum on a Greek island would have been flown to Belgium where his adult sister is living. That did not happen with the exception of unaccompanied minors (here, Article 25), as well as where states decide voluntarily to assume jurisdiction following a request by the country of first arrival (Article 35(2)). A minor change concerns extensions to reunification with the core family, even if not wider relatives, formed during transit after having left the country of origin (Articles 3(8), 27-28).

Resistance by countries of destination against broadening the definition of family member illustrates how arduous negotiations on secondary movements have been. In practice, many asylum applicants will continue joining relatives anyway, meaning that it can be futile to try to prevent or sanction movements motivated by family ties. EU institutions might have been well advised to recognise the inevitable and invest scarce resources in improving other elements of the erstwhile Dublin system. Like responsibility 'offsets', unification with relatives might have been counted as a solidarity measure (here, p. 135-137). That did not happen, thus reaffirming that the new legislation will probably not help curtailing secondary movements.

Small 'Carrots' Incentivising Compliance

Non-governmental organisations have long argued that preferences should be respected. To do so may even, within limits, define a smart legislative design for the simple reason that it would foster compliance. In 2017, the European Parliament had proposed taking 'meaningful links' into account when implementing a quota-based relocation scheme. The idea survives for relocations under the solidarity mechanism, although its impact is reduced considerably by what is likely to be a limited overall number of relocation pledges (here, Article 67(3)); the same holds for the discretionary clause (Article 35(2)). EU institutions emphasise that respect for meaningful links entails no individual 'right to choose' (Recital 26). An additional responsibility criterion for diplomas obtained in a country before an application for asylum elsewhere is poised to concern few people (Article 23).

Another option is to legalise onward movement after status acquisition. Negotiations on the revision of the Long-Term Residents Directive 2003/109/EC, which will resume in the coming months after an earlier deadlock, will have to decide whether beneficiaries of international protection can obtain long-term residence status after three years, instead of five (here, Article 4(1a)). Another element was integrated into the asylum legislation already: the time period of the asylum procedure counts towards the qualification period for long-term residence if applicants await its outcome in the state responsible (here, Article 40). The practical effects of either amendment will be limited. The acquisition of long-term residence status presupposes economic self-sufficiency, and destination countries retain the authority to refuse legal onward movement on the same ground. Few refugees would benefit as a result, since they would have to find a job in Sweden before being allowed entry in that country on the basis of their Greek long-term residence status. Moreover, why should they leave Greece in the first place after having successfully integrated into its economy? Secondary movements mostly concern people who are not economically self-sufficient.

For the same reason, the existing option to apply for a blue card will cover few people. It permits, by way of example, a refugee residing in Spain to receive an entry visa for Ireland if she is highly qualified and has a job offer (here, Article 3(1), (2)(a), (b)). German statistics show that the level of qualification of people entering via the asylum system tends to be comparatively low; it takes years until they are economically self-sufficient, including in lesser qualified jobs. Provided these data are representative, the idea that labour mobility can be a realistic alternative to secondary movements is illusionary, on a larger scale at least. Having said this, such models might be worth exploring even if they concern a minority. As a member of the German Expert Council on Integration and Migration, I co-authored a report describing regulatory options (here, p. 41-45).

Streamlined Take-Back Procedures

Streamlined procedures are generally welcome. By way of example, most take back requests follow a 'hit' in the Eurodac database and are approved in the form of silence (here, Article 25(2)). 'Frontline' Member States rarely bother to examine incoming Dublin requests in full knowledge that they are often legally correct and that few transfers will take place anyway. That's why it is pragmatic to replace the former 'request' by a 'notification' based on simplified anecdotal evidence and subject to a two-week deadline (here, Article 41). However, this change sounds more far-reaching than it is. 'Hits' in the Eurodac database will remain the primary evidence; they had been subject to a two-week deadline already.

Somewhat more relevant is the extension of the take back procedure to applicants who had been relocated under the solidarity scheme. Experience with the temporary Relocation Decisions of 2015/16 shows that quite a few asylum seekers did not stay in the state to which they have been transferred, indicating that solidarity-based distribution does not work in practice. In addition, Maiani shows that the new rules will cover beneficiaries of international protection, unlike the Dublin III Regulation. Note that neither change guarantees that the take back procedure will be executed in practice.

There are many reasons why transfers fail, including scarce administrative resources of destination countries and the lack of cooperation on the part of applicants. If, by contrast, countries of first arrival fail to cooperate, the Commission may suspend solidarity measures to their benefit (here, Article 60(3)(4)). This option indicates that the legislature did not have full confidence in the effectiveness of the new system. If this turns out to be correct, the tit-for-tat of reciprocal complaints might continue undermining inter-state trust in the post-Dublin world.

The most important modification concerns legal remedies against the transfer decision. Appeals will be confined to family links, new factual developments, and the real risk of inhumane or degrading treatment (here, Article 43(1)). All applicants will apparently be able to start a legal remedy, with only its scope being limited. As a result, the transfer can only be executed after the expiry of the time limit for seizing domestic courts or when the latter have declined a preliminary injunction (Article 43(2), (3)). Doctrinal analyses suggest that the CJEU will accept the decision of the legislation to return to a modified version of the status quo ante under former Dublin II Regulation No 343/2003 by limiting the scope of individual statutory rights to be compatible with Article 47 CFR (here, p. 163-169; and here).

'Wishful Thinking': Highlighting Obligations

It is declaratory from a legal perspective if the new legislation declares secondary movements to be illegal. The small print of the Schengen acquis explains that the absence of internal border controls within the Schengen area does not bring about a legal authority of cross-border mobility, not even for beneficiaries of international protection without sufficient resources (here, p. 316-319). EU legislation puts an emphasis on informing asylum applicants about this illegality and the consequences of non-compliance (here, Articles 18-19). While this may deter some people, information as such is unlikely to have a dramatic effect. Asylum applicants are intelligent enough to grasp the transfer of responsibility as an everyday reality. Secondary movements are poised to continue.

Of critical practical importance are the consequences of non-compliance. The original asylum application in the state responsible will be deemed implicitly withdrawn and any additional application, in the country of first arrival or any another country, will be treated as a subsequent application (here, Articles 41(1)(f) and 55(2) in conjunction with 3(8)). Member States are not obliged, in other words, to start a regular asylum procedure in response to an application after secondary movements.
Unfortunately, rules governing subsequent applicants have been designed without secondary movements in mind in what seems to be a lack of coordination during the drafting process. Subsequent applicants are subject to an admissibility assessment which revolves around the submission of 'new elements' which had not adequately been taken into account on the occasion of the first application (here, Article 55(3)). This proviso does not cover information on persecution or serious harm in countries of origin which has been submitted for the first application which is considered implicitly withdrawn; it will not usually constitute a 'new element'.

Arguably this incoherent drafting should not prevent the asylum authorities from proceeding to the second stage in regular circumstances (see also here, paras 34-43), rather than rejecting the subsequent application as being inadmissible. During the second stage, a regular asylum procedure should be performed. Even if that interpretation was confirmed by the CJEU, the doctrinal uncertainties entail the real risk of misunderstanding and premature inadmissibility decisions, thus undermining the right to asylum enshrined in the Asylum Procedures Regulation.

Controversial 'Stick': Withdrawal of Reception Conditions

Countries of destination will not usually be obliged to provide reception conditions to asylum seekers who have engaged in secondary movements (here, Article 18; here,

Article 21). A fourfold caveat constrains this drastic move. First, the withdrawal becomes effective once a transfer decision has been notified, not automatically when someone files another application. Second, the general scheme of the legislation indicates that withdrawal comes to an end with the transfer of responsibility, usually after six months. Do we expect the Netherlands or Austria to throw applicants out of a shelter upon the notification of the transfer decision, after they had been obliged to provide reception conditions following the initial application?

Third, the procedural requirements are uncertain as a result of incoherent legislative drafting. The wording of the Asylum and Migration Management Regulation hints at the need for an administrative decision to withdraw reception conditions, including an individualised proportionality assessment (here, Article 18(3), (4)). However, the Reception Conditions Directive indicates that withdrawal can be automatic (here, Article 21(2); also here, p. 269-270). In any case, potential legal remedies against withdrawal are governed by domestic laws (here, Article 29). The additional exception for substandard reception conditions in countries of first arrival is legally superfluous, since a take back decision will not usually be delivered in such scenarios (here, Articles 18(4), 16(3)).

Finally, it remains an open question whether complete withdrawal is compatible with 'a standard of living in accordance with Union law, including the Charter, and international obligations' (here, Article 21(1)). ECtHR judgments did not reflect upon whether reception conditions can be withdrawn if they are available in law and in fact in another country (here; here). The CJEU accepted that outcome for EU citizens, albeit without discussing the implications of the Charter (here, paras 88-90; also here). A potential middle ground has been upheld by German courts in light of the constitutional guarantee of human dignity in judgments on EU citizens: authorities must provide support for an interim two-week period and pay for voluntary return to the country where social benefits are available. That rule will be extended to Dublin cases within Germany in the coming months in a swift implementation of the new Reception Conditions Directive.

Conclusion

'Wishful thinking' has defined the debate about solidarity and responsibility for years. Insistence on structurally unfair 'Dublin criteria' contrasts with the reality of secondary movements. Non-compliance similarly defines the lived experience of ineffective transfer procedures. We can expect that the post-Dublin world will look similar. Secondary movements will continue and they will often be 'legalised' following the transfer of responsibility, contrary to the solemn promise that the 'New Pact' will overcome the structural imbalances which have haunted asylum policy for years.

The Commission is correct to focus on implementation these days. Even so, bona fide implementation might turn out to be insufficient for the simple reason that the new legislation fails to address the 'original sin' of the erstwhile Dublin system: allocating asylum jurisdiction to one country in an area without internal frontiers. While the basic contours of the legislation stay intact, several amendments epitomise the desire to prevent secondary movements through quite some sanctions and limited incentives. In light of the drivers discussed at the outset, these 'carrots and sticks' are unlikely to have a lasting impact. It seems inevitable that we will see 'more of the same' with regard to secondary movements.

SESSION 2: RESPONSIBILITY VERSUS SOLIDARITY

3. The new Solidarity Mechanism: the right "insurance scheme" for the CEAS? by Francesco Maiani

Introduction

As the Commission observed in 2020, "[t]here is currently no effective solidarity mechanism in place". This is the cause of many woes for the Common European asylum system (CEAS): geography, historical legacies and varying levels of attractiveness result in Member States facing highly asymmetrical burdens in implementing EU migration law. Absent an effective scheme guaranteeing a "fair sharing of responsibility", per Art. 80 TFEU, CEAS law tends to be applied in light of national interests, with dire consequences for its integrity. Member States faced with large and/or indeterminable liabilities may outright defect as evidenced by instances of "waving through" or, more tragically, of illegal push-backs at the external and internal borders.

The Dublin system is part of the problem, not the solution, and if anything the Asylum and Migration Management Regulation (EU) 2024/1351 (hereafter AMMR) will strengthen its burden-concentrating effects through a mix of anti-secondary movement rules, shortened deadlines for take charge requests, facilitated take backs, and the introduction of longer-lasting, "stable" responsibility.

Any hopes of having a more equitable and better-functioning CEAS therefore hinge on the new solidarity mechanism introduced by the AMMR. The following lines try to tackle its key aspects successively. Special attention will be devoted to the way in which the new provisions attempt to reconcile the "mandatory" character of the mechanism with its "flexibility" (see recital 22).

The "Annual migration management cycle": establishing the Pool

Part II of the AMMR – laying down a "Common framework for asylum and migration management" – comprises two Chapters of unequal importance. Chapter I seeks to establish a "comprehensive approach" to migration, under which the Member States must adopt national strategies and, building on those, the Commission must adopt a five-year "long-term European asylum and migration management strategy". Despite the high hopes expressed by the preamble (see recitals 2-11), it is doubtful that the whole exercise will matter in practice. Indeed: before, during and after the 2015 crisis

the EU was swimming in reports, strategies and wish-lists of the kind intended here, none of which appeared to contribute much to alleviating the deep-seated problems of the CEAS.

By contrast, the "annual migration management cycle" laid down in Chapter II might matter some, or much, since it is the foundation on which the solidarity mechanism is built. That cycle aims, in essence, at the yearly adoption of an Annual solidarity pool (ASP), whose implementation is considered in the following sections.

The first move belongs to the Commission, which must adopt three acts by October 15 of every year:

- An annual report assessing the situation over the past 12 months and forecasting trends (art. 9 and 10).
- A decision (art. 11) identifying the Member States "under migratory pressure", "at risk" of migratory pressure, or "facing a significant migratory situation". These are the Member States that may later benefit from the ASP and/or be exempted from contributing to it as detailed below. Art. 1 (24) defines "migratory pressure" as a situation where the arrivals or applications of third-country nationals are "of such a scale that they create disproportionate obligations" on a Member State in the EU context, and do so even on a "well-prepared asylum, reception and migration system". Per art. 1 (25), "significant migratory situations" are those where current and previous annual arrivals lead a "well-prepared" system to reach the limits of its capacity. Given the open-endedness of these definitions, and the breadth of relevant indicators (see art. 9-11), it is not immediately obvious which Member States the Commission will apply them to.
- A proposal for the Council decision establishing the ASP (art. 12). Based on the annual report, the proposal must identify the annual relocations and financial contributions needed. These must be at least 30'000 and 600'000'000€ respectively, save "in exceptional situations". Should different numbers be proposed, the ratio of one relocation per 20'000€ contribution must still be respected in order to preserve the "equal value" of the various contributions (recital 15). The Commission may also propose "alternative" measures such as operational support depending on observed needs (see art. 56(2)(c) AMMR). Finally, to "facilitate" the pledging exercise examined below, the Commission must also calculate the "indicative" contribution of each Member State based on the population/GDP key of art. 66 AMMR.

The next step, and the heart of the process, is the pledging exercise held by the Member States within the "High level solidarity forum" (art. 13 and 57(3)). The Forum will "consider" the Commission documents and "come to a conclusion" on the overall reference number for each solidarity measure "based on the Commission proposal". Member States must then pledge their contributions, respecting the "mandatory fair share" level of contribution resulting from the application of the aforementioned key (see also Annex I).

Finally, by the end of each calendar year, the Council adopts the decision formally establishing the ASP. The decision is based on the Commission proposal, but contrary to the ordinary rules requiring unanimity (art. 293 TFEU) the Council may deviate from it by qualified majority. Nor does the Commission proposal bind the Forum, which must merely "consider it" and reach a conclusion "based on" it.

While the Commission proposal is "weak" in the sense described, the conclusions of the Forum fully pre-determine the substance of the Council decision. Indeed the overall reference numbers and the contribution due by each Member State must be "in accordance with the pledging exercise" (art. 57(1) AMMR).

A few observations on the decision-making process:

- The minimum numbers of 20'000 relocations and 600'000'000€ laid down in art. 12 have the sole effect of binding the Commission, not the Forum. Therefore, the guarantee of "minimum thresholds" ensuring "predictable planning by contributing Member States and […] minimum guarantees for the benefitting Member States" (recital 15) is not fully reflected in the law and will only be effective if the Forum *de facto* follows the proposals of the Commission (see also *infra* on responsibility offsets).
- Even though the formal decision-making power rests with the Council, it is ultimately for the Forum, i.e. for the Member States collectively, to set the overall level of solidarity. Faced with insufficient pledges, EU institutions can only reconvene the Forum in an iterative process that, ultimately, seems to hinge on peer pressure (see art. 13(4) AMMR).
- In this context, important questions are left unanswered: is the Forum to "come to a conclusion" by unanimity, by consensus, or by (an unspecified) majority? What if a Member State should pledge less than its due? The latter question, of course, is somewhat moot if – as the words "coming to a conclusion" suggest – the Forum operates by consensus.

Another key point is worth stressing: while overall numbers are ultimately for the Forum to decide, and "fair shares" are determined through a key, each Member State explicitly retains "full discretion" as to the *type* of contributions that it intends to pledge (art. 57(4)).

This means that while overall numbers are specified for each type of contributions (see Art. 56 and 57(3)), each Member State may decide to pledge, e.g., only financial contributions and not relocations – in other words, to contribute applies instead of the expected oranges (on the modest legal consequences of low relocation pledges, see below on "responsibility offsets"). Of course, this flexibility makes it necessary to establish a conversion key between apples and oranges, otherwise it becomes impossible to ascertain whether the pledged contributions tally up to the "fair share". In the absence of alternatives, the candidate for this role would seem to be the "equal value" ratio established in art. 12(2), i.e. 1 relocation per 20'000€ (see recital 15). As for alternative solidarity measures, they "shall be counted as financial solidarity" and their value determined on a case-by-case basis. Under art. 57(4), it is up to the pledging Member State to assign such value. However, should the benefitting Member States not make use of the alternative measures pledged, they will indeed be converted into financial contributions at the declared value. Member States would therefore do well to assign realistic values to the contributions they pledge.

Implementing the Pool: role, components, mechanics

Once established, the Pool "shall serve as the main solidarity response tool for Member States under migratory pressure" (art. 56(1)). Made up of State-to-State contributions (art. 6(2)(e)), it is additional to what the Regulation calls the "Permanent EU Migration Support Toolbox", which includes operational assistance by EU Agencies and funding through the Asylum, Migration and Integration Fund (art. 6(3) and 65(2)). Even though the Regulation encourages Member States to use support elements from the Toolbox "in conjunction" with the Pool, and to provide information in this respect whenever activating measures under the Pool, the two are to work independently from each other and, in particular, using the Toolbox is not to become a precondition to receiving support from the Pool (see recital 32, and art. 58(2) and 59(2)(b)).

As noted, the Pool itself consists of three categories of solidarity contributions – relocations, financial contributions, and alternative solidarity measures – as defined in art. 56(2).

Financial contributions are paid by the contributing States to the EU budget and made available to benefitting States *via* the relevant EU Funds (art. 58(2) and 64).

Alternative solidarity measures, once pledged and integrated into the Pool, must be "based on a specific request" of the benefitting State. As said, if not requested in a given year, they are to be converted into financial contributions (art. 57(4) and 65).

Relocations and their *Ersatz*, responsibility offsets, are discussed below.

Process-wise, solidarity contributions are granted on request. The Member States "under migratory pressure" per the Commission decision access the Pool directly and become thereby "benefitting Member States" (art. 2 (19) and (24), 11 and 58). Member States that consider themselves to be under migratory pressure, but are not identified as such in the Commission decision, may also submit a substantiated request. The Commission assesses the request, taking into account i.e. its own previous decision on whether the State was "at risk of migratory pressure". If it finds in favour of the requesting State, it grants access to the Pool and to the status of "benefitting Member State", unless it or the Council decides that there is insufficient capacity in the Pool or that there are other "objective reasons" for not allowing access. In the former case, the Forum must be swiftly reconvened (art. 59).

The pledges must be executed by year's end with the support of a Technical-level Forum and EU Solidarity Coordinator (see art. 14, 15 and 60 AMMR). There are however a number of *caveats*:

- Benefitting Member States are not obliged to implement their pledged solidarity contributions (art. 60(3)). Furthermore, Member States that are or consider themselves to be under migratory pressure, but do not request access to the Pool, may request a partial or complete deduction from their own pledged contributions. The Council decides following an assessment by the Commission (art. 61). The same goes for Member States that have been determined as "facing a significant migratory situation" or consider themselves to do so (see art. 1 (25), 11 and 62).
- Furthermore, contributing Member States are not required to implement pledges or apply responsibility offsets towards benefitting Member States where the Commission has found "systemic shortcomings" in the implementation of Dublin rules. This may well be a direct operationalisation of the idea that "solidarity and responsibility must go hand in hand", but the present writer finds it difficult to understand why systemic shortcomings in other areas of EU Law (e.g. reception conditions) should not attract the same "sanction".

In particular: the relocation procedure

Relocations – the transfer of eligible persons from a benefitting to a contributing Member States (art. 2 (2) (22) AMMR) – have a special place in the solidarity mechanism, so much so that their implementation is specifically incentivized through lump sums (art. 81(3)) and that their lack or insufficiency entails specific consequences in the form of mandatory offsets, as discussed below. The relocation procedure is inspired by the 2015-17 relocation schemes, although there are important differences.

The eligible persons are applicants, regardless of their nationalities, as well as beneficiaries of protection, if status was recently obtained and if all parties including the beneficiary of protection consent (see art. 56(2)(a) and 67(4)).

Persons constituting a security threat are excluded, just as they are excluded from the application of the Dublin criteria (art. 16(4)), and the existence of reasonable grounds to this effect constitutes the only ground of refusal available to the State of relocation (art. 67(2) and (7)-(9)). For very different reasons, i.e. to prevent relocations to run counter family unity, art. 67(5) also excludes applicants for whom the benefitting State is responsible under the family criteria.

It is up to the benefitting State to identify candidates for relocation, and to "match" them to the Member State of relocation, with the assistance of the EUAA. The only rights of eligible persons are to provide information on their "meaningful links", and to be kept together with other relocated family members if any (art. 67 (3), (4) and (6)). While familiar to Dublin and relocation experts, the policy choice to deny eligible persons a "right to choose" (recital 26) is a prime example of the kind of irrational, taboo-based policy making that has bedevilled the CEAS since its inception. Granting eligible persons, the choice among available relocation places would enormously simplify the process, and effectively prevent secondary movements later on, with no conceivable downsides – at issue is the transfer of persons selected by a Member State, screened for security, and going to Member States that by definition have "free places".

Having denied eligible persons the right to choose, the legislator had itself no choice but to mould the relocation procedure in the complicated likeness of a Dublin take charge procedure, appeal rights included (art. 67 (7)-(13) AMMR).

Post-relocation, beneficiaries of protection are automatically granted the same status. Things are more complicated for applicants:

- If the benefitting State has run a full Dublin procedure, and determined itself to be responsible on grounds other than family ties, the relocation State becomes automatically responsible.

- However, if the benefitting State has merely checked that the family criteria did not make it responsible, but refrained from running a full Dublin procedure, the relocation State must do so, while disapplying some of the criteria. Thus, the hapless applicant may have to undergo a further transfer before accessing an asylum procedure.

This last point is yet another instance of the legislator's disregard for the complexity of transfers, not to mention for the legitimate interests of applicants. True, the stated intention is laudable: to ensure that the family criteria are respected at all times (recital 70). Its implementation is spotty, however, and a "re-transfer" may be ordered also on the basis of criteria that have nothing to do with family unity (e.g. art. 31 and 32).

In particular: responsibility offsets

Responsibility offsets, whereby a contributing State accepts to become the responsible State for an applicant that is present on its territory and should be transferred to a benefitting State, are a one-to-one replacement for relocations (recital 33).

If the relocation pledges set out in the Council decision establishing the ASP are equal or above 50% of the number indicated in the Commission proposal, offsets are optional for all States concerned. The benefitting State may ask for a given number of offsets, and the contributing State will indicate the number it accepts, if any, and identify the applicants for whom it takes responsibility. Contributing States may suggest such a solution to benefitting States (art. 63 (1) and (2), and 69 AMMR).

Under some circumstances, offsets become mandatory for contributing States.

1. This will be the case when pledged relocations fall below the minimum threshold of 30'000 units (see art. 12) or below 60% of the overall number of relocations identified by the Forum, either following the latter's re-convening under art. 13(4), or due to the deductions granted to benefitting States and other States similarly placed during the year. In all such cases, contributing States must take responsibility for a number of applications equal to the difference between the higher of the two numbers indicated above and the relocations pledged, but always within the limits of their "fair share".
2. Offsets will also be mandatory for a contributing State that has not implemented its pledged relocations by year's end. On request of the benefitting State, offsets will have to be granted "as soon as possible" after the end of the year.

Art. 63(8) lays down a number of additional preconditions that must be met for offsets to be possible.

The idea of offsets is ingenious: avoiding the transfer of an applicant from contributing State A to benefitting State B has the same effect as carrying out a relocation from State B to State A, and it's far easier and more economical since the applicant is already present in State A. Because of this, the concept also offers opportunities to obtain an in-kind *Ersatz* from Member States that are unwilling to play the relocation game.

Unfortunately, apart from their complexity and dubious internal consistency, the rules laid down in art. 63 are imperfectly suited for their aims.

First, the mandatory offset mechanisms do not seem apt to elicit more relocation pledges or at least an in-kind substitute from Member States averse to offer relocations, if that was the idea. To avoid the rigors of para. (5), all a Member State has to do is indeed to refrain from pledging any relocations. This may of course contribute towards triggering the thresholds of paras (3) and (4). Even then, if my reading is correct, the "punishment" is collective and recalcitrant Member States are not singled out as those that have to accept offsets. Indeed, it would seem that a Member State having pledged the whole value of its fair share in financial contributions will have nothing to fear (see art. 63(7)).

Secondly, while it is true that paras. (3) and (4) offer some guarantee to benefitting States that they may count on a minimum of 30'000 units between relocations and offsets, that guarantee is everything but ironclad. First, as we have seen, mandatory offsets are only triggered if the 30'000 threshold is transgressed in specific circumstances. Second, mandatory offsets will be *de facto* inoperant if the benefitting State has very few or no incoming Dublin transfers foreseen – a far more common situation than is widely assumed, with Greece being perhaps the prime example.

Concluding remarks

Considering its main features, is the new solidarity mechanism the right "insurance scheme" for the CEAS? Will it allow Member States to implement the *acquis* in full confidence of the fact that they will not incur disproportionate liabilities?

At this stage, clear-cut answers are not possible, only preliminary remarks are.

First, the Regulation establishes a process – a very complex one – whose functioning relies on a multitude of incentives and, crucially, on peer pressure. This is not surprising given the sensitivity of the subject and the difficulty of the negotiations. Complexity is not necessarily a downside, either. To an extent, it is a corollary of flexibility, the latter

being a desirable feature if Member States are all to contribute and pool together their resources.

Secondly, the mechanism is overall more readable and sensible than the one initially proposed by the Commission. Indeed, having ousted "return sponsorships" and included offsets would be enough to say that negotiations improved on the original blueprint.

There are still a number of problems however. The unthinking reaffirmation of the "no right to choose" mantra in the context of relocations, and the hyper-bureaucracy of a procedure capable of including a pre-screening, matching, transfer, Dublin procedure and re-transfer, are perhaps unavoidable mistakes for the current EU leadership, but they are mistakes nonetheless and risk costing this part of the mechanism all of its efficacy. The rules on mandatory offsets conspicuously fail in targeting the "right" Member States, to the extent that they aim to compensate for insufficient relocation pledges. Finally, contrary to what the Regulation suggests, and despite the subtle interplay between the Commission proposal, the pledges and the responsibility offsets, neither the "minimum thresholds" of art. 12 nor any other discernible minimum of solidarity is actually guaranteed. Ultimately, it will still be for the Forum – i.e. for the Member States collectively, "coming to a conclusion" on the basis of unspecified voting rules – to define the yearly *quantum* of solidarity. Discretionary deductions and vaguely or arbitrarily worded conditionalities will make the size of the Pool and its accessibility even less determinable in advance for aspiring benefitting States.

In this last sense one preliminary conclusion is inescapable: on paper, the new solidarity mechanism lacks the predictability making it a viable insurance scheme for the CEAS in the sense described above. But this is merely the end of the beginning, and the development of a solid implementation practice might still endow the mechanism with that desirable quality.

4. Responsibility-determination under the new Asylum and Migration Management Regulation: plus ça change… by Francesco Maiani

"Solidarity" and "responsibility" were dominant themes in the discussions that led to the new Pact. During the crisis, responsibility foundered amidst falling standards and wave-through practices, while solidarity was shown to be tenuous indeed. After the crisis, failure to find an agreed balance between responsibility and solidarity sealed the fate of the 2016 Commission proposals.

In 2020, the Commission went so far as to state that "[t]here is currently no effective solidarity mechanism in place, and no efficient rule on responsibility", and promised a "fresh start" entailing the "aboli[tion of] the Dublin Regulation" and the institution of a new solidarity mechanism.

The new Asylum and Migration Management Regulation (EU) 2024/1351 (hereafter "the Regulation" or "AMMR") keeps both promises, formally speaking: on July 1, 2026, it will abolish the Dublin III Regulation (EU) No 604/2013 (hereafter "DRIII") and introduce new rules on responsibility as well as a new governance framework and permanent solidarity mechanism (see Art. 1 and 83ff AMMR).

Will this have a "transformative impact" and "[set] the stage for fair, efficient, and sustainable migration management over the long term" as claimed? While the proof of the proverbial pudding will be in the eating, I will attempt to gauge the main innovations – or lack thereof – introduced by the Regulation. In this post, I will address the new Dublin rules. A forthcoming post will examine the solidarity mechanism and the governance framework intimately linked to it.

Path-dependent policymaking: "We can Dublin again"

It would be misleading to discuss the innovations of the Regulation without pointing out its path-dependence. The EU legislator has again confirmed the same system that was established by the 1990 Dublin Convention, and that has by common consensus – including per the Commission's own appraisal – performed poorly since 1995:

- The system is still based on "objective" criteria independent from the subjective wishes of applicants (see recital 36 AMMR). Indeed, the idea that applicants have no right to choose their Member States of destination is repeatedly expressed in the legislative package (see e.g. recital 26, Art.

19(1)(c) and Art. 67(3) AMMR; recital 14 of the Reception Conditions Directive (EU) 2024/1346).

- The criteria themselves, and the discretionary clauses, remain by and large the same.
- The outline of Dublin procedures will also remain largely unaltered.

Instead of suggesting that the Dublin III Regulation would be "abolished", EU Institutions might perhaps have borrowed the slogan used by Dublin City Council to invite the citizenry back to the streets after the pandemic: "We can Dublin again". This is, indeed, the fundamental policy choice made in respect of responsibility-sharing.

The scope of the new Dublin rules

Assuming that Ireland opts in, and that Denmark and the four EFTA States elect to remain Dublin associates, the territorial scope of the Dublin system will remain unaltered (see recitals 90-94 AMMR).

All applications made in the territory of the Member States will trigger the application of the system, including those made "at the border or in the transit zones". The fiction of non-entry introduced by Article 6 of the Screening Regulation (EU) 2024/1356 will change nothing in this regard except delaying the application of Dublin rules. Indeed, while under screening, applicants will be entitled to make an application and their data will be stored in EURODAC. At the end of the screening process, they will be able to register the application and trigger the application of Dublin rules (see Art. 9 and 18(1) and (2) Screening Regulation; Art. 38(1) AMMR).

The personal scope of the Dublin system will be significantly extended. Under current rules, applicants and persons whose application has been withdrawn or rejected are subject to Dublin transfers, but beneficiaries of international protection are not. By contrast, under the AMMR, beneficiaries of protection will be subject to take back procedures if they move without authorization to another Member State. Art. 36(1)(c) AMMR makes this explicit for persons admitted under EU or national resettlement schemes (see also Art. 18 and 22 of the new EURODAC Regulation 2024/1358). The applicability of take back procedures to the other beneficiaries of protection results implicitly from Art. 36(1)(b), which refers "an applicant or a third-country national or a stateless person in relation to whom [a] Member State has been indicated as responsible" (emphasis added). This wording removes the textual elements of Art. 18 DRIII that made take back procedures inapplicable to beneficiaries of protection according to the Court of justice. Furthermore, recital 43 AMMR explains that "responsibility" is to be "determined only once, unless one of the cessation grounds […]

applies". Thus, once a Member State will be designated as responsible for an applicant, such responsibility will endure as status evolves until one of the cessation causes exhaustively enumerated in Art. 37 AMMR intervenes (e.g. another Member State grants a residence permit).

Annex I, paragraph 1(e) of the Qualification Regulation 2024/1347 – referring explicitly to the "take back" of beneficiaries – confirms this interpretation, which is also consistent with EURODAC rules whereby the data concerning an applicant are "marked" and stored when protection is granted (see Art. 31 and recital 66 of the new EURODAC Regulation 2024/1358).

Subjecting beneficiaries of protection to Dublin transfers is but part of a broader strategy to fight against their secondary movements (see Art. 27 and 40 the Qualification Regulation), as further detailed in a forthcoming post in this Series.

New duties and the "consequences" of non-compliance

The intention of limiting movement into the Dublin area also inspires a group of other amendments. Under Art. 17(1) and (2) AMMR, applicants will be newly obliged to make and register their application in the Member State of first entry. Under Art. 17(4) they will have to remain there during the take charge procedure, then be present in the responsible State, where the application must be lodged (see also Art. 9(1) and (2)(h), 10(1) and 28(2) of the Procedures Regulation (EU) 2024/1348). Non-compliance will entail, per recital 58 AMMR, "appropriate and proportionate procedural competences". Such "consequences" must be reconstructed from a puzzle of legal provisions scattered across several acts.

According to Article 18(1) AMMR, from the moment that a transfer decision is notified, reception conditions are withdrawn as long as the applicant is not present in the "right" Member State. There are several caveats: Member States must in any case guarantee a "standard of living in accordance with Union law, including the Charter, and international obligations" (Art. 18(1)); victims of trafficking must be exempted (Art. 18(3)); any sanction must take into account individual circumstances and be proportionate (Art. 18(4)).

Bizarrely, Art. 21 of the new Reception Conditions Directive – which applies when the applicant is not present in the responsible State, i.e. in a subset of the cases covered by Art. 18(1) AMMR – foresees the same sanction but without the second and third caveats. Is it a badly drafted reference back to Art. 18 AMMR, or did the legislator wish, for unfathomable reasons, to punish some secondary movements more harshly?

Be that as it may, three comments may be made at this stage. First, reducing the benefits of an applicant based on a transfer decision that is not yet final, and may yet be struck down as illegal, is highly questionable. Second, in light of the caveats above, the potential for administrative complexity, litigation, and inconsistent decision-making is considerable. Third, until the EU ensures dignified living conditions throughout the Dublin area, it is far from self-evident that these provisions will dissuade their addressees from engaging in secondary movements: faced with destitution in the "right" Member State, applicants may find the prospect of a standard of living in accordance with the Charter in the "wrong" Member State quite attractive.

The "hostile environment policy" embedded in Art. 18(1) AMMR is part of a broader array of measures targeting persons engaging in secondary movements. On the one hand, Art. 36(3) AMMR no longer includes the language of Art. 18(2) DRIII to the effect that, on take back, files closed as implicitly withdrawn must be reopened and first instance negative decisions must be amenable to judicial review. On the other hand, Art. 41 of the Procedures Regulation stipulates that Member States must consider as implicitly withdrawn, and thus inadmissible, applications "lodged" in a Member State other than those referred to by Art. 17(1) and (2) AMMR, where the applicant does not remain in that State pending the take charge procedure or transfer. The wording of the provision lacks precision, since Art. 17 dictates where applicants should "make" and "register" an application, not where they should "lodge" one (see Art. 28(2) Procedures Regulation). Assuming that the situations envisioned are indeed those where an applicant does not "make" an application in the "right" State and/or moves away during Dublin procedures, it is unclear why this type of secondary movements should attract such a draconian sanction, and others – e.g. moving away from the responsible State pending the examination of the application – not.

Be that as it may, these provisions weaken considerably the guarantee that Member States "shall examine" the applications made to any of them, and therefore entail a serious risk of indirect refoulement in the operation of Dublin rules. They embed in the fabric of CEAS law the very same "discontinuation" practices that the Commission itself once condemned as incompatible with effective access to status determination.

Touch-ups to the criteria, security cases, and obstacles to transfer

As noted at the outset, the general outline of the hierarchy of criteria remains unaltered. A few changes are introduced to expand responsibility-allocation based on "meaningful links" (see recital 55 AMMR) – a notion hitherto unknown to EU asylum legislation and reminiscent of UNHCR ExCom conclusions No 15:

- The definition of family members will also include family ties formed in transit countries *en route* to the Dublin area, as opposed to only those formed in the country of origin (Art. 1(8) and recital 52 AMMR; see also e.g. Art. 3(9) Qualification Regulation).
- While Art. 9 DRIII foresees the reunification of applicants with family members who are present in a Member State as beneficiaries of protection, Art. 26 AMMR will also cover family members who were beneficiaries of protection, and have been naturalised, as well as family members who have long-term resident status.
- Immediately after the criteria based on possession of a residence document or visa, slightly expanded, Art. 30 introduces a new criterion based on having obtained a diploma in a Member State less than six years before the registration of the application. Art. 1(15) AMMR provides the relevant definition of diploma.

These innovations are welcome, but it is difficult to anticipate their practical impact. In particular, while the possibility to be reunited with long-term resident family members might constitute a relevant innovation, that status is currently "under-used" and "too difficult" to acquire according to the Commission itself.

Recital 54 AMMR addresses the paramount issue of proving family ties. But while it expresses the laudable intention of "allowing for swifter family reunification", the AMMR includes no binding rules preventing Member States from imposing excessive evidentiary requirements. There are recommendations in the recital itself, an obligation to give reasons (Art. 40(6) AMMR), plus an unclear duty to "prioritise" the examination family-based requests. None of this will matter unless the Commission uses its powers under Art. 40(4) to facilitate the recognition of family ties.

Meanwhile, it is worth noting that the legislator has maintained the exclusion of marital relations from the family definition of the dependency clause of Art. 34 AMMR. It therefore remains the will of the legislator, with the apparent blessing of the European Court of Justice, that a severely traumatized or ill applicant be "normally kept or brought together" with her sister, but be kept apart or transferred away from her husband.

Coming to entry-based criteria, two changes deserve mention:

- Under Art. 25(5) AMMR, absent a relative or family member, unaccompanied minors will be attributed to the Member State where they first applied, subject to an individualised best interest determination (see recital 53). This new provision, whose aim is to discourage secondary movements, overrules an old judgment of the ECJ which *de facto* exempted UMAs from unvoluntary take

charge transfers precisely to preserve their best interest. In this connection, it is worth mentioning that under the new EURODAC Regulation children above six – instead of fourteen – will be fingerprinted, and that while "no form of force" shall be used, a "proportionate degree of coercion" may be applied (Art. 14 EURODAC Regulation).

- Again to discourage secondary movements, the irregular entry criterion is maintained and expanded (Art. 33 AMMR). The new provision clarifies that the criterion applies to persons disembarked in the context of SAR operations and, save in these last situations, makes the criterion applicable for twenty months after entry instead of twelve currently.

Two further changes will have a bearing on the application of the criteria:

- Under Article 16(4) AMMR, every applicant will have to undergo a security check, either under Art. 15 of the Screening Regulation, or right after the registration of the first application, or both. Upon finding "reasonable grounds to consider that the applicant poses a threat to internal security", the Member State carrying out the check will become responsible. No other criterion will be considered, and no take charge procedure will be initiated. It is worth pointing out that this does not exclude the applicant from the scope of the Dublin system. Indeed, responsibility will have been determined, the responsible State will have to examine the application, and the applicant will be subject to take back transfers in case of unauthorized movement.
- Like Art. 3(2) DRIII, Article 16(3) AMMR will determine the course of action when it is "impossible" to transfer an applicant to the responsible State on account of the conditions prevailing there. The responsibility rule remains the same, but the new provision does away with any reference to "systemic flaws" and instead states that transfers are "impossible" whenever they entail a real risk of inhuman or degrading treatment. This is welcome, given the recent tendency of the Court to lose sight of this core human rights standard, but it is not a foregone conclusion that the notion of "systemic flaws" will wholly disappear from Dublin case-law.

Procedural "simplifications" and cutbacks in due process rights

"Streamlining" Dublin procedures in a bid for greater efficiency (recital 64 AMMR) is an important *Leitmotiv* of the AMMR.

First, deadlines are shortened across the board. For instance, the ordinary time limit for submitting a take charge request is two months instead of three currently (Art. 38(1) AMMR). Two amendments counter this trend:

- In order to discourage evasion of the Regulation, the time limit to carry out a transfer in cases where the transferee absconds is prolonged – from 18 months to three years – and any form of resistance is equated to absconding (Art. 46(2) AMMR);
- Furthermore, to avoid putting a premium on secondary movements, Member States missing the deadline for requesting a take-back will no longer become responsible. This is a return to the past, since the Dublin II Regulation foresaw no deadline in the matter and introducing one was deemed necessary to make the procedure "more efficient and rapid".

Much is being made of the fact that the current take back procedure "will be replaced by a simple take back notification". Still, the AMMR foresees the possibility for the "notified" State to raise objections based on the same grounds that can today justify the rejection of a take back request (see Art. 41(3) and 46(2) AMMR; see C-228/21, para. 96f). The only change of some substance, in this regard, is the fact that cessation rules are stricter under the new Regulation (see Art. 37(4) AMMR).

Far more important than these technicalities, the AMMR heavily modifies procedural rights of persons subjected to the Dublin system. The right to information and to an interview are expanded, as are special guarantees for minors, and a qualified right to free legal aid at first instance is introduced (see Art. 19 to 22 AMMR). Recitals 38-39 elaborate on the benefits of such bountiful "human rights frontloading".

At the same time, Art. 43 AMMR drastically reduces the appeal rights against transfer decisions: it retains the least protective of the options currently envisaged by Art. 27 DRIII for the suspensive effect of appeals, introduces a strict deadline to submit an appeal, which Member States may set as low as one week, and reduces the scope of the remedy to:

- Risks of inhuman or degrading treatment;
- "Circumstances subsequent to the transfer decision that are decisive for the correct application" of the Regulation;
- Incorrect application of the family criteria.

The one-week time-limit may, or may not, fall foul of the right to an effective remedy depending on how one reads the case-law of the Court of Justice (see Steve Peers' excellent and concise analysis).
The rules on the scope of the remedy do *prima facie* violate that right. True, the Court itself had similarly reduced the scope of remedies against transfers in *Abdullahi*, and when it backtracked in *Ghezelbash*, it did so based on changed legislative intent, not on the Charter. Given that legislative intent has once again changed with the new

Regulation, the Court might revert to *Abdullahi* in one form or another. This would, however, place EU law on a collision course with the ECHR.

Under Art. 13 ECHR, anyone having an arguable claim that her Convention rights have been violated has the right to an effective remedy. Under Art. 43 AMMR transferees may only invoke Art. 3 ECHR. They are not even entitled to invoke the right to family life, which Dublin transfers routinely interfere with and which, bizarrely, recital 62 AMMR expressly mentions. In this last regard, it may be useful to recall that the question of whether a take charge transfer violates the family criteria of the Regulation (Art. 43(1)(c) AMMR) is not coextensive with the question of whether the same transfer violates Art. 8 ECHR.

If Art. 43 AMMR indeed violates Art. 13 ECHR then, recital 62 notwithstanding, it also contravenes Art. 47 of the Charter, which incorporates and exceeds the minimum standard of that provision (see e.g. para. 44 ff of the *Berlioz* judgment).

Even if Art. 43 AMMR could somehow be reconciled with superior law, its introduction will mark a stark reduction in applicants' rights. Save for the grounds enumerated in Art. 43(1), transferees will be deprived of the right to a full judicial review of decisions that affect them profoundly. No matter how serious the errors in the application of the criteria, no matter how grievous the violations of their procedural rights at first instance, they will have no remedy. Seen in this light, the expansion of the so-called procedural "rights" of applicants in first-instance Dublin procedures seems like a cruel jest, to say nothing of the reference to "the rule of law" found in recital 5.

Comment

As far as responsibility-determination in the CEAS is concerned, the adoption of the Pact constitutes everything but a "complete overhaul". Part III of the Asylum and Migration Management Regulation is the evil twin of the current Dublin Regulation.

While the 2013 recast had expanded the rights of the persons subjected to the Regulation, the 2024 recast is starkly regressive. True, there is a timid expansion of criteria based on "meaningful links" and the introduction of legal assistance at first instance. But this is little more than sugar-coating for the bitter concoction of punitive measures aimed at "secondary movers" and for the drastic cutback of transferees' right to a judge. Overall, the new rules multiply the risks of human rights violations and endanger the *raison d'être* of Dublin rules, i.e. to guarantee access to an asylum procedure to every person seeking protection in the EU+. Every effort will have to be expended to promote a human-rights compliant implementation of this flawed body of

rules. To this end, even the torrent of self-absolutory statements found in the preamble may be of some use.

Will the many "challenges" of the Dublin system be addressed at least, as recital 40 posits? It is far too early to say, but there is every reason to doubt it. As noted, the system is fundamentally unchanged. It will be as complex to implement as its predecessor, and it has little chances of winning the hearts and minds of applicants. Nor is it safe to assume that the "consequences" it threatens to secondary movers will daunt them into obedience, so long as the factors driving secondary movements remain unaddressed.

The new Dublin rules might even aggravate the burden-concentrating effects inherent in the system. Indeed, this might well be the combined effect of new duties to apply in the first State of entry, shortened take charge deadlines, take back procedures expanded to beneficiaries of protection and restricted cessation clauses. This lends an even greater salience to the question of whether the new solidarity mechanism, which will be examined in an upcoming post, has the potential to promote a fair sharing of responsibility among the Member States.

5. Funding the New Pact on Migration and Asylum: Symbolic Politics or Structural Shifts in the Policies' Implementation Design? by Lilian Tsourdi

Initially limited and labelled as 'symbolic politics', EU migration funding has steadily grown, and intricate management arrangements have developed for its disbursal and control. Parts of EU migration funding consist of national programs under shared management. Still, several components of EU migration funding, such as emergency funding or the funding that will become available in the future through the newly adopted Solidarity Pool, are essentially crisis response measures trying to cater for structural needs. The New Pact on Migration and Asylum instruments pay greater attention to implementation and governance aspects of the EU's migration policies, including its funding component. The current Multi-Annual Financial Framework (MFF 2021-2027) frames the financial aspects of the New Pact instruments. However, the Pact instruments present innovations that seek to both mobilise and boost existing resources.

Against this backdrop, I provide, first, a brief critical overview of the funding component of the EU's migration policies prior to the Pact. Next, I analyse the main elements of the current MFF 2021-2027 that frame the funding component of the EU's migration policies. This is followed by a scrutiny of two key developments under the New Pact: i) an innovative approach to boosting migration implementation capacities, which is, however, based on a conception of solidarity as counterweight to migration pressures, and, ii) border processing as a potential blueprint for structural forms of EU migration funding. On this basis, I conclude on the interplay between funding and implementation under the New Pact.

Funding and Policy Implementation Prior to the Pact: From Symbolic Politics to the Permanence of Emergencies

EU funding targeting migration policies was originally exclusively geared to asylum, with the adoption of a European Refugee Fund in 2000. It was initially extremely limited, with an allocation of only €216 million over a four-year period, leading academic commentators to label it 'symbolic politics'. A specific financial envelope was foreseen for the case of emergency, but it was linked exclusively with the activation of the EU Temporary Protection Directive. As that instrument was not activated, Member States could not access that dedicated amount. The European Refugee Fund was renewed for the 2005 to 2010 period, containing a slightly enhanced financial envelope, and largely following the initial design.

With the adoption of the 2007–2013 multi-annual financial framework, the EU undertook a substantial overhaul of Home Affairs funding, which led to the establishment, alongside a revamped European Refugee Fund (2007 ERF) of the following funding lines: the European Integration Fund, the European Return Fund, and the External Borders Fund. A major development during that period was the expansion of the scope of the financial reserve for emergency measures in the new European Refugee Fund Decision so that it covered, not only as before temporary protection, but also 'situations of particular pressure' (ERF 2007, Recs 21 and 22, and Art 5(1)–(2). Emergency funding came with strict requirements though, such as a 6 month implementation limit [ERF 2007, Recs 21 and 22, and Art 5(2)–(3)]. This made emergency funding difficult for Member States to absorb, for example, in 2010 Greece only managed to use only 6 per cent of the emergency funding available to it.

The set-up of the Home Affairs funding in the 2014–2020 multi-annual financial framework marked a departure from previous funding periods. Six funds were merged into two: the Asylum, Migration and Integration Fund (AMIF 2014) and the Internal Security Fund (ISF) (see here, and here). A single set of administrative rules included in a 'Horizontal Regulation' (meaning applicable to all the different funding instruments), regulated the implementation of both the AMIF and the ISF funds. The overall amount available, while more extensive than previous funding periods, still remained modest. For example, the global resources (that is, the funding for the entire period from 2014–2020) initially available for AMIF 2014 amounted to €3,137 billion [AMIF 2014, Art 14(1)], accounting at the time of its adoption for a mere 0.29 per cent of that MFF.

The funding instruments of the 2014–20 multi-annual period contained innovative elements. For example, the process for the activation of emergency funding was simplified, doing away with the 6 month implementation limit, while emergency assistance could amount to 100 per cent of the eligible expenditure for Member States [Horizontal Regulation, Rec 15 and Art 20(2)]. In addition, moderate design improvements led to a relative simplification of the management processes. One characteristic example was the elimination of the obligation for Member States to draw up annual programmes. Instead, funding operated on a multi-annual planning cycle, thus avoiding some repetitive paperwork for Member State authorities.

During the period of increased arrivals in 2015–2016, the need for structural forms of funding became ever more apparent. By structural forms of funding, I am referring to predictable forms of large-scale EU financing, that either fully cover implementation expenses (compensatory logic), or at least largely cover these expenses. Even Member States with stronger national economies, such as France, Germany, and the Netherlands, had recourse to emergency funding to implement their obligations. Moreover, several Member States demanded for the first time the activation of the Civil

Protection Mechanism for migration-related purposes. This process allows for the pooling and transfer of non-financial resources and depends on the voluntary contribution of Member States. The non-financial resources consisted of items such as tents, blankets, etc. that were vital for emergency humanitarian assistance for those arriving. Items were undersupplied compared to demand. A further development was the creation of an intra-EU humanitarian aid budget line. This budget line, which draws from the general EU budget, is not specific to migration. However, its first activation related to the refugee crisis: several tranches of money were released for projects in Greece, mainly supporting reception capacity.

Overall EU funding still covered only a limited portion of national spending in the EU's migration policies. The pre-determined share available to Member States was largely based on absolute indicators, such as number of asylum seekers or number of protected persons per Member State, that failed to account for relative pressures (e.g. AMIF 2014, Rec 37 and Annex I). In addition, Member States were required to set up intricate management and control systems at national level as part of the shared management model that demanded human and financial resources for their effective operation. It is typically for this reason that absorbing EU funding 'costs'. Member States whose administrations were facing disproportionate pressures, or newer Member States with less technical know how, faced greater difficulties in absorbing EU funds.

Therefore, while expanding, EU migration funding was not able to cater for structural implementation needs under the MFF 2014-2020, while increased arrivals prompted overreliance to a patchwork of emergency funding lines instead of the emergence of more structural forms of funding that can ensure legal certainty and predictability.

The Multiannual Financial Framework and Migration 2021-2027: Empowering Policy Implementation but No Radical Overhaul

There is no radical overhaul in the philosophy or scope of EU migration funding in the current MFF which also frames the New Pact instruments. An enhanced financial envelope for these policies compared to the previous period, ie €25,7 billion, was initially foreseen for the budget heading relating to migration and border management. Expenditure for these policy areas is still a minor share of the EU budget (2.1 %, excluding the resources from the Next Generation EU recovery instrument), but these allocations represent a significant increase in relative terms, as compared with the 2014–2020 period. These amounts were further increased during the mid-term review of the MFF by €2 billion.

The following architecture in terms of funds has been adopted: an Asylum Migration and Integration Fund (AMIF 2021), and an Integrated Border Management Fund made of

two components: the Border Management and Visa Instrument (BMVI), and the Customs Control Equipment Instrument (CCEI). In addition, a Horizontal Regulation concerning several funds under the cohesion policy and the migration policies funds regulates the implementation of all those funds.

AMIF 2021 continues to disburse part of the funding in the form of national programs (roughly 60 % of the fund) that it calculates based on a fixed amount that it augments in the case of Cyprus, Greece, and Malta (AMIF 2021, Annex I). Thereafter, it boosts this fixed amount through a number of absolute indicators, such as the number of protected beneficiaries, the numbers of asylum seekers, the number of legally residing third-country nationals, or the number of third country nationals subject to a return order (AMIF 2021, Annex I). These absolute indicators cannot account for the relative pressures these numbers represent for different Member States.

The BMVI also broadly follows the same logic for disbursing the amounts under the different national programs (BMVI, Annex I). It again foresees a fixed enhanced amount for the benefit of Cyprus, Greece, and Malta. The fixed amount is boosted by taking into account i) the length of external land borders and external sea borders of individual Member States weighted at 70 %; ii) the workload at external land and sea borders weighted at 30 %, that it ascertains through a number of absolute indicators, such as the number of crossings of the external borders at border crossing points. Since the sharing methods of the BMVI factor in the length of their external borders, they account better for the position and capacities of individual Member States as they. Nonetheless, the absolute indicators the fund employs to ascertain the workload once again do not account for the relative pressures experienced by the different Member States.

Both the AMIF 2021 and the BMVI, however, foresee an additional element of flexibility, which is the thematic facility. This is part of the funding which is not pre-allocated to national programs. Under AMIF 2021 it represents roughly 30 % of the overall available amount under the fund. Member States and the EU can direct the thematic facility under AMIF 2021 to actions such as emergency assistance, resettlement and humanitarian admission, and to additional support to Member States contributing to solidarity efforts (see, e.g. AMIF 2021, Art 11 and Rec 44).

Overall, despite the boost in existing resources and the increased flexibility through the thematic facility, the design of EU funding comes only marginally closer to a compensatory logic and to structural interventions under the new MFF. A significant part of the financing for the operationalisation of these policies is still to be drawn from national budgets, following the logic of policy implementation by Member States. In terms of EU funding, there have been no changes to better account for subnational

needs, for example mirroring the distribution methods of the EU's cohesion policy. National programs are decided and administered at central government level.

Funding the New Pact: Towards the Emergence of Structural Forms of Funding?

The implementation design of the New Pact instruments was subject to the limitations imposed by the current 'budgetary ceilings' of the MFF 2021-2027. An immediate passage to a compensatory logic through the EU budget would have therefore been impossible, even in the theoretical scenario that there was enough political support to back such a policy shift. Instead, the Pact instruments establish an innovative mechanism to financially boost implementation capacities through a solidarity as counterweight to pressures conception framing (i). In addition, the co-legislators in the Pact reflected on the implications of the concrete operationalisation of the policies more explicitly than in previous harmonisation rounds, also tying this with the financial implications of policy implementation. An illustrative example of this trend is border processing (ii).

i) An Innovative Boost to Migration Implementation Capacities Limited to Solidarity as a counterweight to pressures.

The New Pact instruments do not fundamentally redesign the baseline implementation paradigm. According to the Asylum and Migration Management Regulation (AMMR), under 'normal' circumstances Member States are expected to operationalise their national asylum and external border control systems and related obligations largely relying on their own financial and operational resources and personnel. What is available on a permanent basis is the so-called Permanent EU Migration Support Toolbox [AMMR, Art 5(3)]. This toolbox encompasses elements that carry a solidarity potential, such as operational support through EU agencies, EU funding, and the Civil Protection Mechanism. Therefore, there is an explicit recognition of EU funding as a permanent staple of migration policy implementation. In terms of EU funding, however, the Toolbox refers to the existing resources as outlined in the current MFF. It does not add to those resources. The toolbox also contains vaguely phrased elements, such as 'enhanced diplomatic and political outreach', or 'supporting effective and human rights-based migration policies in third countries'. The latter reflect the migration-development nexus policy thinking, whose impact is indirect at best, let alone empirically contested.

In addition to the Permanent Toolbox, the AMMR creates a more predictable operationalisation of inter-state solidarity through a structured annual policy cycle. A different blog post in the series analysed in detail the entire cycle. In this post I scrutinize only the elements that relate to funding and links with policy implementation. The solidarity cycle is meant to result in identification of Member States under migratory

pressure, at risk of migratory pressure or facing a significant migratory situation that can benefit from solidarity measures. The rest of the Member States are then called to support beneficiary Member States through solidarity-related pledges which they are then meant to realise.

It is in this framework, that the Pact injects 'fresh money' for migration policy implementation, that is funding beyond the limitations of the current MFF. The AMMR achieves this in the following manner. One of the three envisaged types of solidarity contributions are financial contributions, meaning financial transfers from national budgets to the EU budget as externally assigned revenues to benefit Member States that have access to the Solidarity Pool a given year (AMMR, Art 64). Initial negotiating agreements between the co-legislators foresaw direct financial transfers between Member States. However, such a system would have led to administrative overload, while diminishing transparency and traceability of funds. Therefore, redirecting the amounts to the EU budget constitutes a more principled approach. That is contributing Member States will direct the financial amounts to the EU budget, and thereafter the full array of norms and principles that frame EU funding will apply. Benefitting Member States can deploy these amounts to boost either their own capacity, or third country capacities, in the areas of asylum, migration, or border management. The fact that these financial amounts can target actions in third countries illustrates once again a policy mindset influenced by the migration-development nexus discourse. It also points to externalisation tendencies, to the extent that amounts will target boosting the border control capacities of third states.

The third type of solidarity contribution in the annual pool also links with additional (financial) capacities for policy implementation. Notably, Member States can offer so-called 'alternative contributions' such as capacity building, staff support, and equipment (AMMR, Art 65). Member States retain full discretion in choosing between different types of solidarity measures that are considered 'of equal value'. However, if they pledge alternative solidarity measures, they should indicate their financial value based on objective criteria. The AMMR does not provide further indications as to such criteria. Moreover, if a specific benefitting Member State has not asked for alternative measures, these should be converted to financial contributions instead. In this sense, also 'alternative contributions' might need to be translated to financial contributions.

Through these innovative means, the New Pact boosts funding capacities for policy implementation, surpassing the limitations of the ceilings under the current MFF. However, there are limitations to this approach. Firstly, it is still exceptional situations of 'pressure' that trigger solidarity measures gathered under the framework of the Solidarity Pool, including additional financial contributions. Therefore, solidarity is framed as a counterweight to pressures, and the New Pact retains a vision of palliative

and to an extent emergency-driven solidarity. This approach fails to recognise the structural needs of Member States in implementing the EU's migration policies. In addition, the currently envisaged additional amounts are modest, namely at least €600 million for financial contributions annually. While this amount is meant as an annual minimum and not a ceiling, it gives an initial sense of measure of the expected volumes of additional contributions. Finally, overreliance in financial contributions as a solidarity means could limit the overall solidarity potential of the AMMR, a line of argument that I have developed more fully here. Still, the establishment of the mechanism itself is an interesting policy and legal innovation in boosting implementation capacities.

ii) Funding Border Processing: A Blueprint for Structural Forms of Migration Funding?

The New Pact establishes screening, border asylum processing, and border return procedures as part of a new seamless process at the EU's external borders. Other authors in this series (see here, here, here, and here), as well I elsewhere have analysed fully the constitutive elements and implications of these new processes. This blog instead highlights the implementation implications of border processing, and their links with funding.

The Asylum Procedure Regulation (APR) establishes the notion of adequate capacity [APR, Art 46] referring to the number of persons who must go through the asylum border proce-dure and return border procedure at any given moment. In simple terms, the APR establishes that throughout the EU, capacity to examine 30,000 asylum applications in the border procedure at all times should be maintained. The capacity of each *individual* Member State is then calculated through a formula that takes to account migration pressures ([APR, Art 47]. Given the indicators adopted, Member States at the external borders attract enhanced obligations. Adequate capacity is meant to operate on an inflow/outflow basis. The APR establishes what happens when adequate capacity is reached and stipulates an annual maximum of applicants that Member States are meant to assess through border procedures.

Ascertaining levels of responsibility in border processing through objec-tive indicators marks an improvement compared to the current situation where this is a matter of disputable self-assessment by Member States on their levels of capacity. Objective assessments have the potential to enhance mutual trust, predictability, and transparency. However, the new rules also raise the question of whether Member States at the external borders have the infrastructure and person-nel to fulfil their responsibilities, and how they could effectively be supported in the rules' operationalisa-tion.

Funding is key in supporting Member States to operationalise their responsibilities. The APR explicitly mentions AMIF 2021 (APR, Rec 11), while the Screening Regulation and the Border Return Procedures Regulation (BRPR) mention the BMVI (Screening Regulation, Rec 23; BRPR, Rec 18). The Pact instruments refer to amounts made available through the national programming component of the EU funds, as well as through the Thematic Facility. In fact, AMIF 2021 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 follow-ing the MFF mid-term review (APR, Rec 11) that was explicitly also aimed at the implementation of the New Pact border processes. Once the Solidarity Pool under the AMMR begins to operate, it will make available further amounts to support border processing.

Overall, while more robust forms of EU funding than previously are foreseen, including through the AMMR 'fresh money' injections, it is not certain what percentage of the actual spending will be covered by EU resources. In addition, there is the risk that Member States will disproportionately gear EU funding to border procedures, the operational component of which is more clearly outlined, to the detriment of other aspects and objectives of national asylum systems.

Concluding remarks

Funding in the EU's migration policies is no longer merely symbolic politics. At the same time, the EU still has a long way ahead to achieving structural forms of funding. The instruments of the New Pact could not in and of themselves radically revamp the implementation design as they were restrained by the *status quo* of the MFF 2021-2027. They do, however, contain innovations. The instruments outline concretely, and for the first time, on an objective basis, implementation obligations linked with processing at the EU's borders. Moreover, they boost resources for policy implementation by inserting 'fresh money' in the system through the national budgets in the form of externally assigned revenues. This financial component is, however, framed as solidarity as a counterweight to pressures. In addition, currently envisaged amounts are modestly ambitious. Still, this policy and legal experiment could be delinked from solidarity, as well as numerically boosted. Eventually, it could be the precursor of structural forms of migration policy financing that would be embedded in the MFF. Until then, the Member States will need to rely on solidarity as a counterweight to pressures, and emergency measures to enhance policy implementation capacities, that is to rely on imperfect fixes.

SESSION 3: AT THE BORDER

6. Mix and Match. Detention, "De-Facto Detention" or just Restrictions of Freedom of Movement in the New Pact by Ulrike Brandl

Introduction

The rules in the New Pact on Migration and Asylum provide for obligations and possibilities to carry out asylum and return procedures in multi-purpose facilities situated in border areas. The hot spot approach set up in 2016 in Italy and Greece and later in a modified version in Hungary will be extended to other Member States.

Persons in the screening Procedure and certain categories of applicants for protection and persons in return procedures are not allowed to leave the border area. Restrictions of the freedom of movement and detention should guarantee the factual control over these persons.

The creation of border centres and the fiction of "non-entry" defined in Art. 6 Screening Regulation (see below) is an expression of the political consensus to restrict the entry of persons who do not fulfil the entry requirements. Border procedures and return procedures should lead to quick decisions in asylum and return procedures and should enhance that a higher number of rejected applicants for protection either voluntarily leave the State or are deported.

It will not always be easy to distinct, whether the obligation to stay in the border area is a restriction of freedom of movement or a restriction of personal liberty. Commentators (see here) and an impressive number of NGOs (see here p. 9,) here and here) describe the situation as de facto detention. This newly invented non-legal term points to blurred lines between various forms of confinement.

This blog highlights core questions concerning detention/de facto detention of the various categories of persons and analyses challenges for the protection of their fundamental rights.

The complex legal basis for detention in EU Law, reasons for detention

The provisions forming the legal basis for detention at the borders, during asylum procedures and in return proceedings are contained in several legal acts. The Screening Regulation, the Asylum and Migration Management Regulation (AMMR) and the

Regulation establishing a return border procedure are new legal acts allowing detention for specific purposes. The new Reception Conditions Directive (RCD) contains slightly amended rules in comparison to the RCD still in force. The provisions in the RCD build the general basis for detention of applicants for protection including border procedures (Art. 10-14). The RCD refers to other legal acts and vice versa. The Return Directive (RD) is still applicable including its rules on detention for persons in the return procedure.

The reasons allowing detention are similar, but not identical. As in the previous legal acts the intention to prevent persons from absconding is a core reason. Illegal stay in the country concerned and secondary illegal movements to other Member States should be avoided. In all legal acts, detention is allowed where the protection of national security or public order so requires.

According to the Screening Regulation, all irregular migrants will be subject to a screening of their identity, security risk, vulnerability and health. Art. 8 (7) Screening Regulation refers to detention in the screening procedure and stipulates that the guarantees of the RD apply to persons who did not file an application for protection (see here). For applicants for protection the RCD applies.

The AMMR covers detention in the admissibility phase of the status determination procedure and provides for detention for the purpose of carrying out "Dublin" transfers to the competent Member State in its Arts. 44 and 45 (see here in detail for the "Dublin" rules about the determination of responsibility in the AMMR). Member States may detain persons to ensure transfer procedures where there is a risk of absconding or where the protection of national security or public order so requires. Detention is also allowed where persons avoid or hamper the preparation of the transfer process.

The Art. 10 (4) RCD permits detention to verify the identity or nationality of an applicant, to determine elements on which the application for international protection is based and which could not be obtained in the absence of detention, in particular where there is a risk of absconding, and also to decide, in the context of a border procedure on the applicant's right to enter the state in accordance with Art. 43 Asylum Procedures Regulation (APR). Applicants may not be detained for the sole reason that they file an application for international protection.

The Regulation establishing a return border procedure contains rules about the continued detention of persons who were detained during the asylum border procedure and who no longer have a right to remain. The continued detention should prevent their entry into the Member State concerned.

The Screening Regulation, the AMMR and the RCD are part of the Pact, whereas the RD and the Regulation establishing a return border procedure are formally not, but closely linked to it (see here). The latter one is part of the Schengen acquis (see the opinion of the Legal Service of the Council here).

Legal guarantees for detained persons, minors and families with children

The new rules provide for extended possibilities to detain persons, they however do not amend the (procedural) guarantees. Detention may be imposed only as a measure of last resort (Art. 10 (1)) RCD) as already interpreted in CJEU case law (*J. N.*, § 61) if it proves necessary based on an individual assessment of each case and if other less coercive measures (alternatives to detention) (see below) cannot be applied effectively. Detention must be necessary for reasons enumerated in the legal acts and proportionate.

Also, the prohibition to detain persons for the sole reason that a person is either subject to a transfer procedure (Art. 44 AMMR) or a return procedure (RD) is confirmed. According to Art. 11 RCD detention should be as short as possible. The rules however also allow continued detention for different purposes. As border procedures and return procedures are carried out at the borders and the persons must be present there for the whole period, detention will be possible for the whole period.

Detention has to be ordered in writing and the decision has to mention the reason(s) (Art. 11 (2) RCD). Art. 11(3) RCD requires that a speedy judicial review must be provided where detention is ordered by administrative authorities. Art. 11 (3) RCD includes new time limits. The review has to be decided in 15 days (maximum 21 days) and the applicant has to be released if no judgement has been adopted within 21 days. Applicants shall immediately be informed in writing. Following the first judicial review detention shall be reviewed by a judicial authority at reasonable intervals of time. If detention is held to be unlawful, the applicant has to be released immediately.

In the event of judicial review of the detention order provided for in Art. 29 (3) and (5) RCD, applicants must be granted access to free legal assistance and representation. Whereas several new legal acts show shortcomings regarding legal counselling or assistance (see for details here), the RCD provides for free legal assistance and representation in judicial proceedings challenging detention. Furthermore, detained applicants must be informed about the rules applied in the facility. Member States may derogate from that obligation in duly justified cases and for a reasonable period of time which shall be as short as possible.

The RCD contains special rules for minors and for families with children. Though minors as a general rule shall not be detained, exceptions are allowed. They may be detained

if detention safeguards their best interests. For accompanied minors, detention is allowed where parents or main care-givers are detained. Unaccompanied minors may be detained, where detention safeguards the minor. Such situations however are hardly imaginable. Detention of minors has been a controversial issue in the negotiations but was finally allowed in these specific situations.

The CJEU specified procedural guarantees in cases interpreting the RCD and the RD. In *J. N.* (§ 61) the CJEU held that the RCD places significant limitations on the Member States' power to detain a person. In return and expulsion proceedings a comprehensive right to be heard must be guaranteed. In the *Khaled Boudjlida* judgement, the CJEU decided that the right to be heard includes that detained persons must be able to present their position on the legality of the stay, on the possible application of Articles 5 and 6 paragraphs 2 to 5 of the RD and on the modalities of the return before a return decision is issued (§ 51, 52). These guarantees also have to be respected in detention cases based on other legal acts with identical or comparable provisions.

The Court also clarified that the RD does not apply to applicants for international protection during the recognition procedure at first instance and during an appeal procedure (see § 49 *Arslan judgment*.

Detention in the border facilities during border procedures

A quick overview over border procedures

Border proceedings require the persons' stay in border facilities. The mandatory use of border procedures for certain categories of applicants will severely restrict the freedom of movement of these persons in general, many of them will be formally detained.

A quick overview over border proceedings is necessary to highlight why it is predictable that the use of detention will increase and to point to the fact that it will not be easy to distinguish between detention/alternatives to detention and mere restrictions of freedom of movement.

Depending on the circumstances border procedures are either obligatory or may be conducted for those who apply for international protection. The APR stipulates mandatory border procedures for certain categories of persons, mainly for those likely not in need of protection (see here and here). These are cases where applicants are nationals of states of origin with a low recognition rate (according to the latest available yearly Union-wide average Eurostat data, 20 % or lower). Obligatory border procedures have to be conducted if applicants are considered to have intentionally misled the authorities, if there are reasonable grounds to consider them a danger to national security or public order and if applicants had been forcibly expelled for serious reasons

of national security or public order under national law. For other categories of migrants, border procedures may take place.

The final decisions in these procedures, including admissibility and appeals procedures, combined with a return decision, should be made within twelve weeks. These time limits are intended to lead to quick decisions and prevent people from remaining in the respective state if their applications have been rejected. Once the application has been rejected, it should also be ensured that rejected applicants either leave the state and the territory of the Member States voluntarily or can quickly be deported.

Another important aspect is that applications in the border procedure must or may be decided in an accelerated examination procedure provided for in the APR (see here and here). The accelerated procedure is obligatory if the applicant has only raised issues that are not relevant for granting international protection, has made clearly inconsistent or contradictory or clearly false or obviously improbable representations or representations which contradict relevant and available country of origin information. Furthermore, accelerated procedures are mandatory regarding applicants who are nationals of States of origin with a low recognition rate (see here).

Detention and human rights obligations

A core question will have to be decided, presumably by national courts and the CJEU and the ECHR. Is the confinement at the border a restriction of personal liberty or a mere restriction of freedom of movement? To analyse this question, the "fiction" of non entry and its consequences might be helpful.

The "fiction" of non-entry

According to Art. 6 of the Screening Regulation, persons at the borders have not yet entered the territory of the Member States. The intention is that certain rights do not have to be granted to these persons. The legal fiction of non-entry (considering these persons to have not formally entered the territory of the relevant member state, regardless of their physical presence) is a novelty in EU law and cannot be explained in the context of this blog in all its consequences. A few observations show that in human rights treaties and refugee law, this concept of limiting rights by the fiction of non-entry is also a novelty. It also contradicts the jurisprudence of the ECtHR and other regional courts. In case-law, the jurisdiction of the respective State is consistently affirmed. The rights contained in the ECHR and other human rights treaties have to be guaranteed to all persons under the jurisdiction of a State.

Already in 1996, the ECtHR ruled in *Amuur v France* (§ 52) that a person in an airport transit area was already under the jurisdiction of the Member State as France had

effective control over the applicants. France had argued that in international zones at airports the French jurisdiction under Article 1 of the ECHR was not given. At that time, the scope of the jurisdiction of a State in many areas had not yet been clarified by the case law of the ECtHR. Since then, the jurisdiction has also been affirmed in relation to border controls and the prevention of entry. This applies also to border control facilities and border fences (see *N.D. and N.T. v Spain*, § 54 et seq.) Jurisdiction of a State also exists for actions taken on ships and aircraft under the flag of a State (see *Medvedyev and Others v France* § 66 et seq. and *Hirsi Jamaa and Others v Italy* §§ 81 et seq. Consequently, Member States have to respect the rights guaranteed in the ECHR.

Is the confinement at the border a restriction of personal liberty or a mere restriction of movement?

During the border proceedings, the applicants will have to stay in the border facilities, thus their freedom of movement is restricted. As they are not legally staying in the state, Art. 2 Prot. 4 ECHR and Art. 12 Covenant on Civil and Political Rights (CCPR) are not applicable. Both provisions guarantee freedom of movement to everyone "lawfully within the territory of a State". For those deprived of their personal liberty Art. 5 ECHR and Art. 9 CCPR apply. The RCD in its Art. 2 (9) and the other legal acts however define detention as the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement. The definition is identical to that contained in legal acts in force.

The ECtHR and the CJEU had to decide if restrictions qualify as deprivations of liberty in various situations where persons were not allowed to leave border areas. It is quite likely that the Courts will not deviate from the mainly constant jurisprudence (see here).

In the *Amuur case* the ECtHR ruled that the submission of the French Government stating that applicants for asylum in an airport transit centre were not detained but could leave France at any time, was a purely theoretical possibility and concluded that they were deprived of their liberty (§ 48). In subsequent case law, the Court confirmed this interpretation and ruled that the state to which the respondent state claimed there was a possibility of return must be willing to accept the person. The Grand Chamber (GC) deviated from this interpretation in the *Ilias and Ahmed case* and did not consider the detention of applicants in a transit centre on the border between Hungary and Serbia to be a deprivation of liberty (§ 210-249). The GC concluded that the persons were able to leave the transit centre for Serbia and were therefore not deprived of their liberty. However, in this judgement, the Grand Chamber also ruled that the return violated Article 3 of the ECHR and that Serbia was not a safe third country for the applicants. Serbia was not prepared to accept the persons and no other State was obliged or prepared to accept them. In a later judgement the ECtHR returned to its previous

interpretation and ruled that the obligation to stay in Hungarian border centres was an unlawful deprivation of liberty *(R.R. v Hungary*, § 74-83 and on the merits § 87-92, *H.M. v Hungary*, § 29-32*).*

This amended jurisprudence might have been influenced by the jurisprudence of the CJEU. In the *FMS and FNZ* judgment the Court held that transit zones are tantamount to detention camps (see for a detailed analysis here (Please link to Boldiszar Nagy, A pyrrhic victory) and here).

The Court referred to the conditions in the border transit centre and qualified the obligation to remain permanently in a restricted and closed transit zone, which could not be legally left, in any direction whatsoever, a deprivation of liberty "characterised by 'detention' within the meaning of those directives", § 231). The Court concluded – in sharp contrast with the *Ilias and Ahmed judgement* of the GC that applicants "cannot leave the zone voluntarily in any direction" (§ 230).

The judgement was issued before the ECtHR's judgement in the *R.R. case* and might have influenced the amended interpretation by the Strasbourg Court. To sum up, both Courts assess that severe restrictions of movement amount to a deprivation of liberty.

Alternatives to detention or the same for all?

There is a category between detention and restriction of movement labelled as alternative to detention. The reasons for detention would allow confinement. The legal acts however require that states use more lenient measures (alternatives to detention) if they can be applied effectively (to reach the goals of detention). Allocation of persons to certain premises (often combined with reporting obligations) proved to be the alternative to detention so far imposed by Member States. Another possibility would be the deposit of a financial guarantee, or a simple obligation to stay at an assigned place. Both options have not been frequently used in practice. It seems to be nearly impossible that there will be a real difference between the restriction of movement to a border area and an alternative to detention in that area. States however might be creative and invent two different types of restriction or – and that is more likely – impose de facto detention for all.

The European Union Agency for Asylum will develop guidelines on various practices as alternatives to detention, that could be used in the context of border procedures (see here). It will be interesting to see if there are differences to the situation of persons who just stay in the border area and how these alternatives may look like.

Looking ahead

According to the new rules, persons, who are not allowed to enter, including applicants for international protection must stay in the newly created premises at the borders. Keeping persons in these premises will presumably lead to a confusing legal and factual situation. A jungle of norms (see here) regulating restrictions of the freedom of movement and detention in various legal acts will be combined with a factual jungle where migrants have to stay in the border facilities for various purposes. The legal acts adopted as part of the Pact mirror that Member States' focus on increased border controls led to the introduction of the screening of persons crossing the external borders and mandatory border procedures. The difference to the previous situation is that it is likely that persons in all stages of the procedure will be present in the capacity centres at the borders as previously only in hot spot areas in Italy and Greece.

National courts, the CJEU and the ECtHR will most likely clarify if detention and restrictions of freedom of movement can be justified. Meanwhile States will create capacity centres, use border procedures, detain or de-facto detain persons. Much will depend on the national implementation and the organization and control of border facilities. Also, national courts will have a decisive role enforcing the protection of human rights of detained persons.

7. EU Screening Regulation: closing gaps in border control while opening new protection challenges by Lyra Jakulevičienė

The New Pact on Migration and Asylum introduces screening of third country nationals at the external borders (hereafter Screening Regulation, Regulation). The initial objective of this new instrument is to speed up the asylum and return procedures. But will this new procedure at the borders facilitate the processing of asylum and return cases, or will it serve as a control measure and raise more legal issues?

The screening procedure will involve six elements: (a) preliminary health and vulnerability checks; (b) identification or verification of identity based on information in European databases; (c) registration of biometric data (fingerprints and facial image) in the databases; (d) security check through a query of relevant national and Union databases; (e) screening form containing information on the person; (f) referral to the asylum or return procedure.

Civil society organisations have argued (here and here) that the screening procedures will increase cases of pushbacks, detention and constrain access to examination of merits, as it will be implemented together with the 'non-entry' fiction making it easier to remove persons as if they are outside the EU law reach. Against this backdrop, this blog post explores to what extent the instrument facilitates the asylum and return procedures or rather generates legal problems and if the latter is the case, whether there is an effective remedy against these concerns. It will do so by focusing on the shift of approach towards asylum seekers; possible implications of screening and use of 'non-entry' fiction, including access to the asylum procedure; procedural guarantees; reception conditions; and remedies.

Asylum seekers stripped off their protected group status?

The Screening Regulation includes a fundamental shift in approach and resulting standards of treatment of protection seekers because it eliminates the fine line that international and EU law draws between this protected group and other migrants. This is explicitly reflected in the changed purpose of the Regulation, from its initial objective to speed up the asylum and return procedures and identify individuals, to the current objective – to strengthen border control and identify persons who pose threats to internal security (Art. 1).

Asylum seekers' irregular entry is due to their compelling reasons for departure and thus protection needs override the entry requirements (Art. 31 of the 1951 UN Convention Relating to the Status of Refugees, Art. 6(5) (c) of the Schengen Borders Code, European Court of Human Rights (hereafter ECtHR) judgments in M.S.S. v Belgium and Greece; Tarakhel v Switzerland [GC]; etc.). However, the entire screening phase is focused on persons not fulfilling the entry requirements, referring in various EU materials to "all irregular migrants" category. For example, despite the fact that the Schengen Borders Code (hereafter SBC) allows derogation from entry requirements due to international obligations, the Screening Regulation explicitly excludes asylum seekers from this privilege for the purpose of screening (Art. 5(3)).

This approach may in itself create legal gaps, constraints on the rights of these persons and prospects for litigation. It may be detrimental to the correct understanding of different standards that are applicable to asylum seekers and other migrants in the EU, in particular when the border guards have to deal with these persons at the borders. European caselaw on pushbacks, analysed later in this blog, highlights the existing problem that border guards do not always differentiate between protection seekers and other migrants, and instead treat them in the same manner. The approach employed by the Regulation might aggravate this concern.

Screening beyond the external borders

The Screening Regulation will apply to four groups of third country nationals: (a) migrants who have entered in an unauthorized manner, (b) asylum seekers who entered without authorization; (c) persons disembarked after a search and rescue operation, and (d) persons illegally staying within the territory having crossed an external border of the EU in an unauthorized manner (Art. 3 and 5). Thus, besides those apprehended at the borders, under the fourth category screening will also apply to persons within the territory of the country, despite initial rejection of this option by the European Parliament. Critics consider such expansion of screening to inland to encourage discriminatory policing and difficulties upon apprehension in proving authorized entry that had occurred long ago (e.g. ECRE position, 2023, p. 29).

Considering that the Regulation envisages screening to be conducted also in alternative locations within the territory of the state (Article 7(1)), and combined with application of 'non-entry' fiction (as analysed further), this option may lead to emergence of special zones throughout the territory of the EU that are allegedly outside the regular application of EU law. More specifically, the screening at the territory rather than only at the borders may expand exceptions to safeguards to procedures within the territory, previously applied at the borders only.

Secondly, screening in the territory may expand already challenging practices of verifications on the basis of appearance, sometimes referred to as "racial profiling", recently condemned by the ECtHR (e.g. Wa Baile v. Switzerland, 2024). In practice, several countries have been using apprehension in the territory and applicants found it difficult to prove their legal presence and in some instances were expelled. The provision in the Regulation is vague and its implementation details are far from clear, thus it may likely create new legal risks with limited safeguards for individuals to prove the legality of their stay.

Screening procedures and pushbacks

Europe has witnessed increased use of pushbacks at the land borders in recent years. However, it is only in 2024 that the Court of Justice of the EU (hereafter CJEU) has pronounced for the first time on the legality of pushbacks in X v. Staatssecretaris van Justitie en Veiligheid. It held that the practice of pushbacks at the external borders of the EU, which effectively removes persons seeking to make an application for international protection from the territory of the EU or removes them from that territory before an application made on entry has been examined, is contrary to EU law (para. 50). The Court considered access to the asylum procedure as one of the cornerstones of the Common European Asylum System and as part of fundamental right enshrined in Article 18 of the EU Charter of Fundamental Rights (hereafter EU Charter) (para. 51). It also ruled on various obstacles as running counter to the objective pursued by the EU legislation of ensuring effective, easy, and rapid access to the asylum procedure. For instance, the Court rejected as illegitimate a requirement to submit asylum applications (declaration of intent) at the embassy in a third country before entry to an EU Member State (Commission v Hungary, 2023, paras. 51-52).

Guarantees for access to asylum procedures at the borders following unauthorized entry may not always be present as can be seen from certain practices of the Member States (hereafter MS, MSs) that have been condemned by the ECtHR (M.K. and Others v. Poland; M.A. and Others v. Lithuania). In these cases, the border guards did not accept asylum applications at the border and turned down the applicants from the territory without any examination of the risks in the countries of origin that the applicants alleged. Recently, in January 2024, the ECtHR held Hungary accountable for pushing back without investigation a minor asylum applicant to Serbia (K.P. v. Hungary). Will the screening increase similar incidents at the borders?

The Screening Regulation cannot be dissociated from the Asylum Procedures Regulation (hereafter APR), which provides for a possibility to refuse entry with regard to the

applicant whose application is rejected in the context of the border procedure (recital 70). This means that refusal of entry may happen only in the border procedures that follow the screening. It appears that formally, the screening as such should not lead to a rejection of the applicants at the borders. However, information gathered during the screening will impact further procedures as discussed further.

Further we will analyse whether the 'non-entry' notion applied during screening would potentially contribute to denial of entry or inhibit other rights of asylum applicants.

Proliferation of 'non-entry' notion

The Screening Regulation overly relies on the notion of legal fiction of persons being physically in the territory albeit not authorized to enter the territory of the MSs during the screening process (Art. 6) (this situation has been called 'fiction of non-entry'). This concept is mentioned also in the APR (Art. 54(4)).

Civil society and commentators have argued that the "non-entry" creates a legal vacuum and its use raises several human rights concerns (European Parliament). To what extent does this concept correspond to potential legal problems? The application of this notion during screening is formulated in mandatory terms ("shall not be authorized to enter the territory of a Member State")(Art. 6), and also in border procedures after the screening (Art. 43 (2) of APR, save a few exceptions). The concept was traditionally applied to persons in transit zones of airports, sea ports, usually in a border control, and not an asylum context, but recently it has been expanded to land border zones or even inland. The notion has been used to justify carving an exceptional regime and lowering guarantees provided by the EU law on access to asylum procedures, standards of detention, reception and some others to persons who are considered not yet present on the territory. We claim this justification lacks legal merits and thus raises potential for legal problems.

The European courts confirmed long ago that there is no such thing as "no man's territory", thus even if the persons are outside the territory of the state, the authorities acting on behalf of the state must protect their human rights. For instance, safeguards against detention should apply to asylum-seekers in transit zones (CJEU, FMS and others, 2020), or removal of an applicant to a third country without examining the merits of the application, must include review of access to adequate asylum procedures (ECtHR, M. K. v. Poland, 2020). The right to apply for asylum must be recognised even if the person is staying illegally on that territory and irrespective of the prospects of success of such a claim (CJEU, Commission v Hungary, para. 43; X v. Staatssecretaris van Justitie en Veiligheid, para. 51).

Furthermore, EU asylum and migration law do not exempt the MSs from applying EU law in certain zones, such as, at the external border, territorial sea and the transit zones (e.g. Art. 2, APR). There should be no legal vacuum as a result, as this notion would not effectively relieve states from their obligations under the human rights instruments or the EU Charter as concerns the treatment of third country nationals within their jurisdiction. Therefore, the notion of non-entry cannot be used to deny access to the asylum procedure. Could it then inhibit other rights of the applicants for asylum?

There could be several implications of applying such notion: (a) increased use of detention; (b) reduced application of reception and other standards. Firstly, the notion could be used to justify extensive resort to detention as Article 5(1)(f) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) allows it to 'prevent their unauthorised entry into the country', albeit for a short period of time. While the final version of the Regulation does not include automatic detention envisaged previously, it is questionable how without detention the MSs will ensure that applicants remain at the disposal of the authorities (required by Art. 6 and 7(1)), or which less coercive alternative measures could be used at the borders.

Secondly, the notion of 'non-entry' may in effect imply establishment of exceptional regimes where standards will be limited and access to rights restricted. The Regulation and other instruments of the Pact allow MSs to derogate from essential standards to delay the registration of asylum applications (Art. 27(7) APD), reduce reception conditions (Art. 8(8) on standard of living) or apply them only after the screening has ended (Art. 26 (2) APD).

Considering that persons will have to be available to the authorities not only during the 7 days of screening but could potentially continue in the border procedures for 12 or more weeks, this could lead to overcrowding at the borders. As we have seen in the hotspots previously, this in itself will downgrade the human rights standards (see, e.g. ECtHR, J.A. and others v. Italy, A.D. v. Greece, 2023). The CJEU pronounced such practices as constituting serious flaws in the reception systems (X v. Staatssecretaris van Justitie en Veiligheid, para. 57). Note, that screening will also apply to vulnerable persons.

Thus, while the concept of non-admission may be practical for operational purposes it will likely raise further legal risks and operational difficulties.

Options of remedies against screening results

NGOs claim that greater numbers of people will be refused access to procedures through a "briefing form" which cannot be challenged, while states will have wider options to decide that cases are inadmissible, preventing hearing on the merits of the case (ECRE, 2024). To what extent is the absence of a right to appeal against the result of screening problematic in practice?

Firstly, will the outcome of the screening be a decision? The Regulation envisages the screening to end with a screening form completed by the authorities, to be transmitted to asylum or return authorities respectively (Art. 17-18). In contrast with the initial text, the possibility to immediately refuse entry has been deleted and a new guarantee included for the applicant to be able to indicate if the information in the form is incorrect (Art. 17(3)). These changes seem to eliminate the prejudicial element in the outcome of the screening and present it as an initial phase of further procedures, where referral depends purely on the factual information. Will it indeed be the case?

The APR provides for a more flexible use of the border procedures, making it mandatory for asylum claims that are: i) clearly abusive (misleading authorities, withholding information), ii) constitute a security or public order threat, or iii) concern nationalities with a low recognition rate for international protection (below 20% with some exceptions) (APR, recital 60, Art. 45(1)), thus the screening process will lead to a choice of procedures (inadmissibility or accelerated procedures). Considering that the border procedure could be initiated based on nationality or security information only (Recital 60 APR), or non-cooperation of the applicant, such screening referral could amount to automatic exclusion of low merit cases or information collected could be used to channel applicants to fast-track procedures with lower procedural guarantees. Thus, even if the screening does not lead to immediate refusal of entry and does not constitute a decision on its own, it will directly impact the subsequent procedure, possibly containing lower procedural standards and substantively affecting the rights of the person, as analysed in another blog post in these series by Vincent Chetail.

At the same time, the result of the border procedures would always be subject to an appeal (Art. 67 of APR), thus the risk of refusal of entry without a remedy is low. However, there are shorter time limits for appeal and no guarantee for automatic suspensive effect of such appeals , although it may be separately requested (Art. 68 of APR). The SBC contains a similar guarantee that entry may only be refused by a substantiated decision stating the precise reasons for the refusal and with the right to appeal against a border guard's decision to deny entry, although without suspensive effect (Art. 14(2) and (3)).

The lack of suspensive effect of the appeal may raise legal issues under the standards established by the EU Charter (Art. 47(1)), ECHR (Art. 13), and the case-law of the European courts. For the remedy to be effective, besides other requirements, it should have a suspensive effect on the expulsion decision (e.g., ECtHR, A.M. v. the Netherlands, para. 66, M.K. and Others v. Poland, paras. 219-220 and others). The CJEU also found that a remedy cannot be considered effective with no automatic suspensive effect when there are substantial grounds to believe that the person would be subject to ill-treatment if removed (e.g., Abdida, Gnandi, FMS).

So how realistic are appeals at the border? An important aspect to ensure effectiveness of a remedy, as pronounced by European courts, is the availability of information and legal assistance at the border. ECtHR takes into account if the applicant is in detention, where such access is even more limited (ECtHR, S.H. v. Malta, 2022, paras. 80, 82, 85, 89). The access to persons during the screening for organisations and persons providing advice and counselling could be limited where necessary objectively for the security, public order, or administrative management of the facility (Art. 8(6)). Though such access should not be severely restricted or rendered impossible, this issue is left for the discretion of national authorities. Such provision may lack effectiveness when applied in practice, as significant obstacles of access were noted in practice (e.g., ECtHR, D. v. Bulgaria, 2021, paras. 124, 134, ECRE, 2017, p. 5; EUAA, p. 210).

Last, but not least, will the lack or limitation of a judicial remedy following the screening be remedied by the envisaged fundamental rights monitoring mechanisms by independent monitors at the borders, which is significantly enhanced with safeguards in the Regulation (Art. 10)? While monitoring will certainly contribute to observance of human rights at the borders, the authority of such measure is not yet clear. MSs are to adopt relevant provisions to investigate allegations of non-respect for fundamental rights, initiate the referral to start civil or criminal proceedings, and ensure that investigations are effective and without undue delay (Art. 10(1-2)). However, the immediate impact of the monitoring mechanism for remedying restrictions to access to the asylum procedures is limited.

Conclusion

The final text of the Screening Regulation represents a genuine effort to equip it with various guarantees to ensure that applicants for international protection do not fall between the procedural cracks. The Regulation eliminates a number of risks but at the same time opens the window for various restrictions of rights that can cause legal problems. Screening blurs the distinction between protection seekers and other migrants, contributes to fast-track procedures with limited guarantees, increased

instances for detention and other restrictive practices due to application of 'non-entry' notion. While the Regulation will likely meet its primary objective to increase control of third country nationals and indeed keep persons easily available for return, the potential for litigation might impact the length and complexity of procedures. Although screening will not lead to a decision, its input for further decisions is direct, while the effectiveness of remedies remains questionable.

8. The Impact of the 2024 CEAS Reform on the EU's Return System: Amending the Return Directive Through the Backdoor by Madalina Moraru and Carmen López Esquitino

The 2024 EU asylum and immigration reform did not include a recast of the 2008 Return Directive. Although the European Commission proposed a recast of the Return Directive in 2018, negotiations between the European Parliament and the Council have been deadlocked for the past four years, preventing any amendments. Given this stalemate and the focus in the Pact on combating illegal migration and improving the efficiency of the EU's return policy, parts of the recast proposal have been incorporated into various instruments of the 2024 reform. These changes introduce exceptions and derogations from the common return procedure, challenging the Return Directive's role as the main EU legal framework for returning third-country nationals staying or entering irregularly in the EU.

First, the return decision must be part of the asylum rejection decision, reducing Member States' autonomy to issue separate decisions. Second, based on the Commission's initial recast proposal, the 2024 Return Border Procedure Regulation introduces a streamlined return process for third-country nationals rejected in border asylum procedures, allowing for extended detention and curbing voluntary departure options. Third, the revised 2024 revised Schengen Border Code includes a broad derogation from the principle of direct return of irregularly staying third-country nationals, introducing a new transfer procedure.

These scattered derogations from the common return procedure are likely to reduce procedural and human rights protection as set out in the Return Directive. This policy approach is not surprising given the Member States' criticisms of the Directive as an ineffective framework for effective returns, due to the judicial enhancement of returnees' rights. This post analyzes how the common return procedure will be impacted by the key return-related amendments in the 2024 reform.

The Seamless Link between Return and Asylum: added value and potential challenges

Under the Return Directive, Member States have procedural freedom to **combine decisions ending legal stay** (such as rejection of asylum applications or visa withdrawal) with **return-related decisions** (like return, removal, or entry bans), as long as individual safeguards are respected (Article 6(6)). The recast Return Directive

proposal aimed to limit this freedom, requiring to issue return decisions immediately after decisions ending legal stay, including asylum rejections. Due to the recast's stalemate, this obligation was reintroduced in the 2020 Pact (Article 35a). The **2024 Asylum Procedure Regulation** maintains the link between asylum and return through optional and mandatory procedures.

First, Article 37 of the **Asylum Procedure Regulation** mandates that return decisions must accompany asylum rejections when claims are inadmissible, unfounded, or withdrawn. Both decisions should be issued simultaneously, either within the same administrative act or in separate but concurrent decisions.

Second, the seamless link is introduced also for the appeal phase. Article 67(1) last paragraph of the **Asylum Procedure Regulation** establishes that return decisions must be appealed jointly with asylum rejections in the same proceedings, with appeal time limits between five and ten days. If return decisions are issued as separate acts, they can be appealed separately.

Third, Article 68 extends the automatic suspensive effect of asylum appeals to return appeals when procedures are combined. However, in inadmissible or unfounded asylum claims, suspensive effect must be requested individually by the applicant or competent courts can decide on it ex officio.

In cases of ex officio assessment of the suspensive effect of appeal, Article 68(5) of the **Asylum Procedure Regulation** requires the conferral of defense rights. Appellants are entitled to interpretation services during hearings and free legal assistance if requested. They cannot be removed from the Member State until the request is resolved. Applicants must also be informed promptly about their rights during the appeal process. However, Member States can deny the right to remain in cases of abusive appeals. The implementation of this provision will be challenging given the discretion allowed when interpreting what is an abusive appeal (CJEU, Arslan), though unaccompanied minors are exempt. This attempt at procedural harmonisation has its advantages in terms of ensuring procedural efficiency and effective access to legal remedies. The separation of asylum from return procedures and institutions has in practice led to a number of negative results. Firstly, it has led to procedural inertia due to lack of inter-institutional access to documents, particularly between judicial or quasi-judicial institutions adjudicating on returns and administrative authorities on asylum (see CPAS Seraing and CPAS Liège). Next, it has led to rule of law issues due to conferral of adjudication of return appeals to institutions not fulfilling the requirements of Article 47 EU Charter (chapter of di Pascale in Moraru et all 2020, and FMS). It could thus be argued that the maze of procedural intersection between asylum and return procedure has been

simplified. However, the main challenge will be to ensure that the combined procedure will fully respect the protection of the principle of non-refoulement which does not admit any derogations (M and others).

Key Legal Principles Guiding the Future Application of the Combined Asylum and Return Procedure

While the CJEU found this compressed model permissible under the Return Directive (Gnandi) its implementation has been found by the European Parliament to fall short of good administration obligations, rights of defence, and *non-refoulement* guarantees (see the chapters by Ilareva and Slama in Moraru et all 2020). Among the reasons for this deficient play-out of the combined model, the European Parliament study referred to 'risk of *refoulement* which is not systematically assessed by the authorities on their own initiative when contemplating the issuing of a return decision' (EP Resolution, p 23). The asylum procedure assesses violations of the principle of *non-refoulement* only on limited grounds, eluding a full assessment of the risk of refoulement in compliance with Articles 2, 3 ECHR, Article 19 of the Charter and Article 5 Return Directive. In order to ensure the protection of these absolute fundamental rights, the third-country national 'must be able to express his/her point of view on the legality of his or her stay; [express] facts that could justify the authorities to refrain from adopting a particular return related decision; [express] facts that justify exception(s) to the expulsion; [express] social circumstances of the irregular migrant, including the best interests of the child, family life and the state of health of the third-country national concerned and risks of *non-refoulement*.' (see Mukarubega and Boudjlida).

A return border procedure: main characteristics and its relationship with the common return procedure

Another novelty introduced by the Pact is an expedited return procedure at the borders, governed by the 2024 Return Border Procedure Regulation (RBP Regulation). The *raison d'être* of the return border procedure is mainly to guarantee the continuity between an asylum procedure carried out in a border context and a return mechanism that follows the same system (Recital 7). As such, the RBP Regulation makes the return border procedure of *mandatory application* to third-country nationals whose application was rejected in the context of the asylum border procedure (Article 1(1)). The return border procedure shall have a maximum duration of 12 weeks (an extra period of up to 6 weeks is allowed in times of crisis), including the finalisation of appeals lodged against first instance return decisions (Article 6(1)(a) RBP Regulation and Article 51(2) 2024 Asylum Procedure Regulation). The return of individuals not subject to the border procedure will continue to be carried out via the common procedure of the Return Directive.

Positively, the RBP Regulation introduces new important procedural guarantees and refers to certain crucial fundamental rights provisions enshrined in the Return Directive. Nevertheless, the border regime curtails the figure of voluntary departure and risks resulting in widespread detention.

A logic of containment – an aggravated risk of widespread detention

Grounded in a logic of containment which relies on the "fiction of non-entry", Member States *shall* restrict third-country nationals' freedom of movement or deprive them of liberty during the return border procedure. Accordingly, returnees' *freedom of movement shall be restricted* to locations at or in proximity to the external borders or transit zones, or even within the territory (Article 4(2) RBP Regulation). Although the RBP Regulation declares that *deprivation of liberty* can only be imposed as a measure of last resort, on the basis of an individual assessment and if no less coercive measures can be applied (Article 5(1)), the overall system introduced by the instrument risks leading to widespread deprivation of liberty

In this regard, the RBP Regulation introduces two broad detention grounds. First, *Member States may continue the detention of third-country nationals deprived of liberty during the asylum border procedure for the purpose of preventing entry into the territory, preparing return or carrying out removal* (Article 5(2)). The majority of asylum seekers in the EU will be channelled to the Asylum Border Procedure, and detention during such procedure may be more easily justified since being subject to the asylum border procedure itself constitutes a detention ground (Article 54(1) Asylum Procedure Regulation and 10(4)(d) 2024 Reception Conditions Directive). Therefore, since the RBP Regulation allows for continued detention while progressing from the asylum to the return stage, the majority of returnees will also be deprived of liberty during the return procedure. Moreover, the wording of Article 5(2) suggests that the detention grounds will not be re-assessed when a person is channelled from the asylum to the return procedure, allowing thus for automatic detention. Second, *rejected asylum seekers who were not deprived of liberty during the asylum border procedure may be detained on three grounds: if there is a risk of absconding, if they avoid or hamper return, or if they are a risk to public policy, and public or national security. The latter constitutes an additional detention ground compared to those allowed under the common return procedure, resulting therefore in further deprivation of liberty* (Article 15(1) Return Directive and 5(3) RBP Regulation).

In addition, there is a risk of *de facto* detention. The Commission held in the past that border procedures were to "be used only in exceptional circumstances, since they imply

detention". Hence, what in theory should be a restriction of movement, in reality could be a deprivation of liberty given that the difference is one of degree and intensity (ECtHR, Guzzardi v. Italy) and that contemporary migration governance increasingly blurs the lines between both (Cornelisse, 2022).

Voluntary departure – a more restrictive regime than in the common return procedure

The obligation to implement return decisions through voluntary departure as a first step derives from the EU general principle of proportionality and fundamental rights (CJEU, Zh. and O.). The RBP Regulation undermines such principle and creates a more restrictive regime than that of the common return procedure.

In the border procedure, the obligation to confer a voluntary departure period is only "activated" if returnees request it. This can render the obligation to grant voluntary departure meaningless as third-country nationals might not be able to make such request, particularly since the RBP Regulation, does not expressly mention that Member States shall inform returnees about voluntary departure. Moreover, the strict upper limit of 15 days for departing voluntarily (Article 4(5) RBP Regulation) might impact on the effectiveness of voluntary departure since time limits are often too short in practice (EMN, 2018). Furthermore, the RBP Regulation introduces a crucial novelty compared to the Return Directive. Whereas the latter contemplates the *possibility* of not granting a voluntary departure period or of shortening it (Article 7(4)), the RBP Regulation eliminates the option of shorter voluntary departure and introduces a *mandatory refusal* of voluntary departure (Article 4(5)). Thus, the regime introduced by the RBP Regulation departs from the approach of the Return Directive i.e. the prioritisation of voluntary departure.

Procedural guarantees – enhancing the effectiveness of judicial review

On the one hand, the same requirements regarding the form for issuing a return decision apply to the common and border return procedures (Article 12 Return Directive and 4(3) RBP Regulation). On the other hand, the system of remedies against return decisions in the border context constitutes a positive development as it contributes to the effectiveness of judicial review. Indeed, while a return decision in the ordinary procedure can be appealed before a judicial or administrative authority (Article 13 Return Directive), the review in the border procedure is to be carried out only by a court or tribunal. Moreover, judicial scrutiny is extended to both facts and law in the border procedure, which constitutes a key development in light of the negative consequences of the current legal framework (Article 67(1) Asylum Procedure Regulation).

The RBP Regulation does not regulate many aspects of return and makes a vast number of provisions of the Return Directive applicable (Article 4(3) RBP Regulation). Importantly, the references to the Return Directive mean that certain fundamental rights safeguards enshrined in the instrument shall be also observed during the border procedure, including the mandatory stages for implementing return; guarantees including but not limited to non-refoulement and best interests of the child; as well as detention standards.

Moreover, and crucially, *the border procedure ends if a return decision cannot be enforced within the 12-week limit*. In such case, the Return Directive becomes fully applicable and return is implemented via the common procedure (Article 4(4) RBP Regulation).

Clearly, Member States will have to dedicate vast resources and carry out extensive planning to make border procedures function. In this regard, will they be able to complete the return border procedure within 12 weeks and guarantee adequate reception and detention standards at the borders? If they are not able to comply with these, will they be able to allocate sufficient resources to ensuring a swift channelling from the return border procedure to the common return system? If they cannot overcome these challenges, border procedures will prove unsuccessful not only in efficiency terms, as returns will end up being primarily enforced through the common return procedure, but also in terms of respect and commitment to fundamental rights.

The new Schengen based transfer procedure: added value and potential risks

Article 23(a) of the 2024 revised Schengen Border Code introduces a derogation to Article 6(3) of the Return Directive, whereby Member States can transfer within maximum 24 hours third-country nationals caught without a right to entry at internal borders areas to a neighbouring Member State as long as there is a bilateral cooperation framework allowing for such readmissions. This new provision eliminates the standstill clause on conclusion of readmission agreements between the Member States that was set out in Article 6(3) of the Return Directive. Member States will thus be allowed to swiftly return irregularly staying third-country nationals, and shift the responsibility to comply with the Return Directive upon the receiving Member State not only on the basis of past readmission agreements, but also based on readmission agreements to be concluded from now on. This flexibility has been argued by France to be necessary, especially in cases of reintroduction of internal border controls (see ADDE and others).

The added value of the new intra-EU transfer procedures is that it introduces several procedural safeguards, which were not applied under Article 6(3) Return Directive based

transfer procedures. In practice, transferring procedures based on **historical readmission agreements varied substantially between the Member States in terms of form, length and the nature**. Article 23(a) introduces a common transfer procedure whereby the Member State of transfer must issue written transfer decisions following a certain template. Furthermore, third-country nationals have a right to appeal before a court (Article 23(a)(3)). The appeal is not automatically suspensory of the transfer, but based on the principle of *non-refoulement* it could be decided to have suspensive effect.

Key Legal Principles Guiding the Future Application of the Combined Asylum and Return Procedure

Article 23(a) seems to codify some of the current readmission practices based on bilateral agreements that have not been ratified by national parliaments (1996 Readmission Agreement between Italy and Slovenia), and which have been held to be unconstitutional and hindering the right to asylum (Tribunal of Rome: N.R.G.56420/2020). The major challenge posed by the new transfer procedure is the wide discretionary powers left to the Member States to conclude future readmission agreements in formats that may conflict with the rule of law and the principle of effectiveness of the Return Directive (Pistoia 2024). Article 23 does not refer to readmission agreements but to the wider "framework of bilateral cooperation, which may include, in particular, joint police patrols." Thus, the new transfer procedure extends the scope of derogations from the common return procedure to such an extent that the effective application of the principle of direct return set out by the Return Directive could be endangered (Moraru ***The Interplay between the Schengen Borders Code and the Return Directive*** forthcoming 2024).

Two leading principles that have been developed by the CJEU in the Affum–Arib–ADDE and others line of judgments, should be recalled as regards derogations from the application of the common return procedure in intra-EU border situations. First, in cases when Member States issue refusals of entry at the borders and rapidly transfer irregular third-country nationals based on a readmission agreement, the common return procedure should be applied by the receiving Member State. Second, both the transferring Member State and the receiving Member State are acting within the scope of the Return Directive, which means that both States are bound by the EU Charter of Fundamental Rights when relying on the transfer procedure (for an extensive analysis see Slovenian Administrative Court: Decision I U, 1490/2019).

Mutual Recognition of Return Decisions

Since March 7, 2023, return decisions issued by one Member State are visible to all other Member States through the alert system under SIS. The European Commission has recommended that Member States ensure the mutual recognition of these return decisions. According to the Commission, updating the SIS, alongside mutual recognition, can significantly accelerate and streamline the return process, especially when enforcement can occur immediately—such as when the period for voluntary departure has expired, and all legal remedies have been exhausted. However, when relying on mutual recognition, Member States must still assess compliance with the principle of non-refoulement, whether direct or indirect, if there is sufficient evidence of potential violation (see Ministero dell'Interno).

Conclusions

In conclusion, the Pact introduces significant changes to the EU's return procedures for irregularly staying third-country nationals in different legal instruments of the 2024 Pact, instead of amending the Return Directive. These reforms aim at enhancing procedural efficiency and ensuring legal consistency, yet they present new challenges, particularly in safeguarding fundamental rights and ensuring non-refoulement. The seamless link between asylum and return procedures, the mandatory return border procedure, and the revised Schengen-based transfer procedures reflect a shift towards a more integrated and expedited system. However, the practical implementation of these reforms will require careful monitoring to balance efficiency with the protection of individual rights and compliance with European jurisprudential principles.

9. Navigating the Labyrinth of Derogations: A Critical Look at the Crisis Regulation by Meltem Ineli Ciger

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 (hereinafter Crisis Regulation) establishes a legal framework for Member State responses to exceptional migration-related circumstances, including mass influx of refugees and migrants, force majeure situations such as pandemic, and even politically motivated manipulation of migratory movements. The extensive amendments the Parliament introduced, as well as the merging crisis and instrumentalisation issues, have arguably rendered the Crisis Regulation a labyrinthine framework. The numerous references to other EU Regulations further contribute to its complexity. This post makes a critical, up-to-date legal analysis of the Crisis Regulation, particularly its derogation regime applicable in crisis and force majeure situations (instrumentalisation will be covered in another post by Iris Goldner Lang). It also discusses its potential effectiveness in managing future large arrivals in the EU. I argue that the Crisis Regulation is a mixed bag: while derogations regarding border procedures raise concerns and may violate fundamental rights enshrined in the EU Charter of Fundamental Rights and relevant international instruments such as the Refugee Convention, some positive elements also emerge. These positive elements include a new solidarity mechanism, the possibility of implementing *prima facie* recognition of international protection applications and the possibility of suspending Dublin transfers to the Member States facing exceptional asylum pressures, which can contribute to protecting asylum seekers during mass influx and force majeure situations.

No comprehensive, objective and up-to-date legal analysis of the Crisis Regulation exists (although there is an impact assessment of the initial Commission Proposal). Notably, Peers has clarified critical aspects of the latest Proposal, while comments and critiques have been offered by NGOs such as ECRE, Amnesty and MSF. In contrast, much controversially (see objections by Hathaway and Crisp), the UNHCR and IOM welcomed the adoption of the entire Pact, including the Crisis Regulation. The Crisis Regulation is not black and white. The Regulation, especially those derogations concerning border procedure, are extremely problematic though the foreseen solidarity mechanism, the possibility to grant *prima facie* international protection status to those seeking international protection, and the possibility to suspend Dublin transfers can facilitate responding to large-scale influx and force majeure situations.

- **How does the Crisis Regulation define crisis and force majeure?**

Article 1(4)(a) of the Crisis Regulation defines a crisis (excluding instrumentalisation) with three key criteria. First, the situation must involve large-scale arrivals of third-country nationals or stateless persons entering a Member State by land, air, or sea. This includes those who disembarked after search and rescue operations. Second, these arrivals must render the Member State's **well-prepared** asylum, reception, including child protection services, or return system non-functional (the population, GDP and geographical specificities of the Member State, including the size of the territory, are to be taken into account in this determination). This dysfunction may (not must) be severe enough to potentially cause serious consequences for the overall functioning of the CEAS. As opposed to crisis, force majeure is defined as abnormal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided notwithstanding the exercise of all due care, which prevent that Member State from complying with obligations under Asylum and Migration Management Regulation (EU) 2024/1351 and Asylum Procedures Regulation (EU) 2024/1348.

Compared to the definition of mass influx provided under the Temporary Protection Directive, the Crisis Regulation delivers more explicit and precise indicators to determine when a crisis exists. These indicators are welcome and can facilitate the determination of an exceptional situation of mass influx. Yet, as I have argued previously, the large-scale arrival of refugees and migrants rendering a Member State's return system non-functional should not be accepted as a criterion to determine the existence of a situation of crisis or a mass influx situation since return capacity of the host state alone has nothing to do with the existence of a mass influx and cannot justify derogating from state responsibilities under international or EU law.

Frontline Member States such as Italy and Greece are more likely to ask for the triggering of the Crisis Regulation since they are more susceptible to receiving large numbers of asylum seekers. Nevertheless, if states not at the EU borders face exceptional pressures due to secondary movements or any other circumstances, they may also claim that they experience an exceptional mass influx or force majeure situation and ask for the triggering of the measures foreseen by the Regulation.

- **When does a crisis or force majeure situation exist? A three-step activation/trigger process**

Articles 2-4 of the Crisis Regulation lay out a three-step process triggered by a Member State facing exceptional circumstances. Firstly, the onus falls on the overwhelmed Member State. If a large influx creates a crisis or unforeseen events constitute force majeure, significantly disrupting its asylum response *(Article 2)*, the Member State must

formally request the European Commission's intervention. The Commission cannot act unilaterally *(Article 3(1)).*

Secondly, within a two-week timeframe *(Article 3(8))*, the Commission makes an assessment of the situation based on objective criteria *(Article 3(6)).* For a crisis, the Commission considers if the Member State's well-prepared asylum and reception systems, including child protection, are overwhelmed by the influx, potentially impacting the entire EU system. Force majeure depends on two key factors: unforeseen and uncontrollable events beyond the control of the Member State, and whether these events prevent them from fulfilling their obligations under the EU asylum *acquis*. If the situation qualifies, the Commission proposes relevant measures to the Council, such as derogations from specific asylum procedures as outlined in Articles 10-13, solidarity measures, or the application of an expedited asylum process for particular categories of applicants *(Article 3(1)).* When assessing the situation, the Commission is to consult with the requesting Member State, the relevant Union agencies such as EUAA and international organisations, in particular UNHCR and IOM *(Article 3(1)).*

Finally, the Council holds the ultimate decision-making power: the Council has two weeks to approve or reject the Commission's Proposal (Article 4(3)). The Council decides on the specific derogations to be applied and is expected to establish a Solidarity Response Plan outlining how the affected Member State can be assisted by adopting an implementing decision. Additionally, the Commission may recommend applying an expedited asylum process for specific nationalities or asylum seeker groups *(Article 4(4)).*

- **Derogations available when there is a crisis or force majeure**

The Crisis Regulation includes various ways to derogate from different EU instruments. The Crisis Regulation allows for derogations that include delaying asylum application registration, adapting border procedures, and introducing flexibility within the Dublin (soon-to-be AMMR System) regarding deadlines and procedures for take charge requests, take-back notifications, and transfers. Moreover, not a derogation per se, the Regulation introduces rules to improve solidarity and the possibility to ease the asylum backlog in the Member States, such as following expedited procedures for well-founded applications. In all derogation measures provided under the Crisis Regulation, three primary safeguards apply:

i. Those who are subjected to derogation measures must be informed in a language they understand or are reasonably supposed to understand about the derogations applied, the duration of the measures, and how to appeal asylum applications.

ii. Any special procedural and reception needs of the international protection applicants must be addressed.
iii. Derogations must be **no longer than what is strictly necessary** to address the situation and, in any case, cannot exceed **12 months.**

The Commission and the Council are tasked to constantly monitor and review the situation with regard to the necessity and proportionality of the derogation measures.

- **Delaying registration of asylum applications**

Under Article 27 of the Asylum Procedures Regulation (EU) 2024/1348, the asylum application must be registered within five days (plus three working days if the application is made to an authority entrusted with the task of receiving applications for international protection which is not responsible for registering applications). In a situation of crisis or force majeure, Member State/s can derogate from Article 27 of the Asylum Procedures Regulation (EU) 2024/1348 and **can register asylum claims up to four weeks after those applications are made**. (*Article 10(1)*). Even before authorisation of such derogation under the Council implementing decision, the Member State asking for triggering of derogations provided under the Crisis Regulation can apply this derogation for a maximum of ten days from the day following the request to the Commission (*Preamble para 24*).

Article 10 introduces certain safeguards to ensure asylum applicants, especially those with special needs, can still benefit from certain services. For instance, this derogation can only be implemented for a maximum duration of 6 months, not one year. The Regulation reiterates the duty of Member States to inform the third-country nationals or stateless persons in a language which they understand, or are reasonably supposed to understand, about the measure applied, the location of the registration points, including the border crossing points accessible for registering and lodging an application for international protection, and the duration of the measure (Article 10(5)). Moreover, Member States are asked to prioritise the registration of applications for persons with special reception needs, minors, and their family members. Registration applications that are likely to be well-founded can also be prioritised.

- **Derogations concerning border procedures**

Border procedure applies for certain categories of international protection applicants, including those who pose a security risk, who mislead the authorities by providing false information or withhold information, or who are coming from countries with a low recognition rate (below 20%) in order to quickly assess whether applications are unfounded or inadmissible whereas, persons subject to the border procedure cannot

enter the Member State territory. Under the new Asylum Procedures Regulation (EU) 2024/1348 (see the analysis by Jens Vedsted Hansen), for border procedures, there is a five-day deadline to lodge international protection applications and a 12-week deadline to decide on these asylum applications. If the Member State does not observe these deadlines, then the asylum seeker can enter the territory. Return Border Procedure Regulation (EU) 2024/1349 is to apply for persons whose asylum applications are rejected in the border procedure.

The Crisis Regulation enables Member States experiencing a crisis or force majeure to prolong the duration of border procedure and change or bend the rules on how it operates. First of all, Article 11 (1) of the Crisis Regulation enables Member States in situations of crisis and force majeure to extend the maximum duration of the border procedure for the examination of applications by **an additional period of a maximum of six weeks**. This means **mandatory border procedure can be extended up to 18 weeks** when there is a crisis or force majeure.

Second, Article 11 (2-3) enables Member States to not apply mandatory border procedure for applicants that belong to a nationality or, in the case of stateless persons, a former habitual resident of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 5% or lower (not necessarily 20 % as the usual rule). This means Member States can cease applying mandatory border procedures for most asylum seekers in situations of crisis.

Thirdly, perhaps much more problematically, according to Article 11(4), in situations of crisis (**not force majeure**), Member States may, in a border procedure, take decisions on the merits of an application in cases where the applicant is a national or, in the case of stateless persons, a former habitual resident of, a third country for which the proportion of decisions granting international protection by the determining authority is, according to the latest available yearly Union-wide average Eurostat data, 50 % or lower. Finally, if this situation of crisis is caused by instrumentalisation, Article 11(6) gives discretion to the Member State to decide on the merits of all asylum applications that are made by any third-country national or stateless person with the border procedures with the exception of minors under the age of 12 and their family members, and persons with special procedural or special reception needs.

- **Derogations and deadline extensions concerning take charge requests, take back notifications and transfers in a situation of crisis or force majeure**

The Crisis Regulation introduces flexibility within the Dublin System during situations of crisis by extending deadlines for specific procedures outlined in Article 12. For instance, Member States will have four months, instead of the usual timeframe, to submit a take charge request for an asylum seeker. Similarly, responses to take charge requests and notifications based on Eurodac hits are also extended. The response deadline becomes two months, and the deadline for take-back notifications is extended to one month. Dublin transfers of asylum seekers to Member States facing a mass influx situation can be delayed for up to one year. This delay applies even if appeals or reviews of transfer decisions are ongoing. *(Article 12(3)).*

The Crisis Regulation provides that the suspension of Dublin transfers to overwhelmed states facing a crisis or force majeure situation until the Member State is no longer facing that situation, with exceptions for individual circumstances. *(Article 12(4) and Article 13)* This flexibility extends to relieving Member States facing a mass influx situation from their take-back obligations under the Dublin System. When in a situation of crisis where the mass arrivals of third-country nationals or stateless persons are of such extraordinary scale and intensity that it could create a serious risk of serious deficiencies in the treatment of asylum applicants, the Member State facing that situation is relieved of taking back the asylum seekers. In such cases, responsibility for the asylum seeker might be transferred to another EU country; for instance, the responsibility shifts to the Member State where the second application was registered. *(Article 13(2))* or if no other responsible Member State can be determined, the country where the second application was registered becomes responsible for examining the asylum application. *(Article 13(3))*

- **Which solidarity measures would apply in a crisis or force majeure situation?**

Chapter III of the Crisis Regulation is dedicated to responsibility sharing and providing support to affected Member State/s in situations of crisis. The Council's decision to determine the existence of a crisis or force majeure should also include a Solidarity Response Plan, which indicates the solidarity and support measures required to manage the exceptional situation and the pledges made by the contributing Member States *(Preamble 33)*. According to Article 8 of the Regulation, solidarity and support measures may include a) relocation of applicants for international protection or a subset of international protection beneficiaries; b) financial contributions aiming at actions that are relevant to address the situation of crisis in the Member State concerned or in relevant third countries or c) alternative solidarity measures specifically needed to address the situation at hand. Member States can also support so-called 'third country solutions' to facilitate managing the crisis situation as part of the solidarity measures

since Article 8(1) (b) of the Crisis Regulation allows Member States to make financial contributions aiming at actions that are relevant to address the situation of crisis in relevant third countries.

Member States are free to choose which type of solidarity and support measure or a combination of measures they wish to implement. The EU Solidarity Coordinator is tasked to monitor the implementation of the Solidarity Response Plan and is required to publish the state of the implementation and functioning of the relocation mechanism.

The Crisis Regulation emphasises that vulnerable persons should be given primary consideration for relocation *(Preamble 37)*. In a situation of crisis, a Member State taking responsibility for examining applications for international protection above their fair share will be entitled to reduce proportionally its fair share from the implementation of solidarity pledges under the upcoming annual cycles of Asylum and Migration Management Regulation (EU) 2024/1351 over a period of five years *(Preamble 38)*. Moreover, Member States undertaking relocation as a solidarity measure shall be able to benefit from the usual financial support available under the existing EU instruments.

The solidarity measures foreseen in the Crisis Regulation are mostly linked to the system provided under the Asylum and Migration Management Regulation (EU) 2024/1351, though Member States affected by exceptional circumstances may demand more solidarity contributions and can derogate from some of its regular obligations provided under the Asylum and Migration Management Regulation (EU) 2024/1351. Nevertheless, the effectiveness of the solidarity measures depends on which measures are decided by the Commission and Council and to what extent Member States will be willing to implement these measures and lighten the burden of the Member State affected by the crisis or force majeure situations.

- **Possibility to follow *prima facie* recognition of international protection**

When objective circumstances suggest that groups of international protection applicants from a specific country of origin or from a part of such a country could be well-founded, the Commission may recommend an expedited asylum procedure. For those Member States following this recommendation, expedited asylum procedure would mean: first, for the applications that are accepted as well-founded, there should be no personal interview as a rule (though interviews may be conducted to ensure the applicants fall within the asylum seeker group recommended for the expedited procedures), their applications are to be prioritised, and that examination of the merits of the application should be concluded as soon as possible and no later than four weeks from the lodging

of the application. However, if the applicant is identified by Member States as a threat to national security, the expedited procedure will not apply (Preamble 55-57).

- **Will the Crisis Regulation lead to a violation of the international obligations of Member States?**

A definitive answer about the Crisis Regulation's impact on Member States' responsibilities under international law, especially the Refugee Convention, is impossible. The answer to this question depends entirely on the specific context, the implementation details of the derogations, and the timeframe of their application. Moreover, whether the principles of necessity and proportionality are observed in implementing the Crisis Regulation is among the important criteria to be taken into account.

Mass influx situations, in general, can indeed create various financial, social, and security-related challenges for host states. Due to these challenges, mass influx may constitute a valid reason to derogate from international instruments, including the Refugee Convention and other international human rights conventions. It is acknowledged by Hathaway, Davy (Article 9 Chapter), Edwards, McAdam and Durieux, and myself (see also here) that mass influx situations may give latitude to states to partially suspend implementation of the Refugee Convention in mass influx situations and not to grant several rights provided under the Convention to those refugees fleeing *en masse*. Aside from the Refugee Convention, human rights conventions apply to persons seeking protection in mass influx situations. However, applying these conventions again depends on whether the mass influx situation can be a reason for derogation. Under international law, in truly exceptional circumstances, mass influx situations or a situation of force majeure can provide a valid reason to derogate from certain obligations of states towards those fleeing in mass influx situations under international and EU law (see for a detailed discussion on this by Skordas here and here). Yet, it is essential that a crisis, or force majeure for that matter, is determined in the correct way, and there is no other way to manage a mass influx situation for states except to derogate certain obligations under international and EU law. Thus, as also pointed out by Campesi, it is crucially important that crisis will remain not the norm, but an exception in EU migration governance.

Coming back to the question, let us assume the existence of a genuine crisis or force majeure is established by the Council, justifying the Member States to suspend certain obligations under international and EU law temporarily. Now, we need to delve into the specific derogations introduced by the Crisis Regulation. On the surface, a four-week delay in registering asylum claims during a mass influx does not seem to violate the

core of the right to seek asylum. In reality, registration can take much longer in mass influx situations without group recognition. This delay, since it is only a month-long, likely would not alone erode procedural guarantees for asylum seekers. Furthermore, solidarity measures like suspending Dublin transfers to alleviate the burden-stricken Member State are welcome and legally sound. However**, two new rules raise concerns**: extending mandatory border procedures to 18 weeks during a crisis or force majeure and deciding a considerable number of asylum applications in border zones through accelerated status determination. Extending mandatory border procedures to 18 weeks potentially involves administrative detention, meaning asylum seekers could be detained for up to 4.5 months in border areas simply due to the existence of a mass influx situation. Furthermore, as also noted by ECRE, although special consideration is given to vulnerable asylum seekers in the Crisis Regulation, identifying vulnerable persons and, for instance, conducting proper age assessments for hundreds of asylum seekers in border procedures will be quite difficult. Additionally, asylum applications, especially those from countries with lower asylum success rates (less than 50%), could be decided through expedited procedures. The arbitrary nature of this 50% threshold is a significant problem. How was this percentage determined? These new rules, particularly regarding the border procedure, pose substantial challenges. Ultimate compliance with international law **depends** on practical application (e.g., the effectiveness of expedited procedures and available reception conditions and services at the borders). Nevertheless, **it's difficult to imagine how, in a mass influx situation, with thousands arriving each day, humane conditions and proper procedural safeguards can be maintained for over four months during border procedures** and whether the right to humane treatment and right to liberty and security can be respected for all asylum seekers who are subject to border procedure for a long time.

- **Does the Crisis Regulation add meaningful ways to respond to the large-scale arrival of refugees and migrants in the EU?**

The Crisis Regulation makes clear that it will complement the Temporary Protection Directive (TPD). This is a stark difference from the Commission's initial plan to scrap the Temporary Protection Directive and insert a new protection status called 'immediate protection', which was provided under Article 11 of the 2020 Commission Proposal. The Temporary Protection Directive proved its usefulness in managing mass influx situations in 2022 when it was activated for the first time for the protection of the Ukrainians fleeing the full-scale invasion of Ukraine. Today, the Temporary Protection Directive is still in force, and the Crisis Regulation is to enter into force in 2026. This means after 2026 when a Member State or the EU faces a mass influx situation, there will be various ways to deal with this situation, and four main scenarios come to mind:

i. Activate the TPD and not make use of the Crisis Regulation or
ii. Not activate the TPD but determine there is a situation of crisis and decide on which derogations and solidarity measures will apply and whether to recommend expedited procedures for certain asylum seeker groups,
iii. Activate the TPD and determine there is a situation of crisis and decide on additional measures provided in the Crisis Regulation that will apply (in this case, the Regulation makes clear that Article 11 of the TPD (take back provision in cases of secondary movements of temporary protection beneficiaries) will not apply.
iv. Not activate the TPD or the Crisis Regulation but make use of Annual Solidarity Pool as provided under Articles 58 and 59 of the Asylum and Migration Management Regulation (EU) 2024/1351.

These future scenarios beg the question: will the Crisis Regulation add meaningful ways to manage future large-scale influx situations? This will depend on how the Regulation is implemented and which measures will be adopted by the Council to manage the crisis situations. The Regulation might be quite useful and make a real difference if solidarity measures are adopted to adequately support the Member States facing an exceptional circumstance and if *prima facie* recognition is effectively implemented to lighten the asylum caseload of the Member States. Nevertheless, suppose the Crisis Regulation is only used to keep asylum seekers in the border procedure and reject asylum applications with real merit through expedited border procedures. In that case, the Crisis Regulation will violate fundamental rights, EU law norms and undermine the Refugee Convention.

Conclusion

What's the main shortcoming of the Crisis Regulation? Managing mass influx situations effectively is about identifying those who need protection and offering them swift access to reception and asylum procedures while also lightening the burden on host states and their asylum, reception, and integration capacities. Although the Crisis Regulation through the proposed solidarity measures and the possibility of prima facie recognition of international protection applications can contribute to Member States dealing with the exceptional large-scale arrival of refugees and migrants, the derogations foreseen, be it the extension of asylum registration deadlines or the possibility to keep all arriving asylum seekers in the border procedures for months will not make managing a mass influx much easier but can lead Member States undermining their international and EU law obligations.

SESSION 4: RULES FOR REFUGEES

10. The new EU Reception Conditions Directive: More welfare conditionality for asylum seekers by Lieneke Slingenberg

Almost eight years since the Commission issued the proposal, the recast EU Reception Conditions Directive has finally been adopted. It is the only instrument of the Common European Asylum System that has not been transformed into a Regulation under the new Pact. According to the Commission, full harmonization is not feasible nor desirable, considering the 'current significant differences in Member States' social and economic conditions'. Accordingly, Member States need to transpose the relevant provisions into their domestic legislation. The implementation deadline is 12 June 2026.

I have analysed the 2018 political compromise on the recast reception conditions directive before. In this blogpost I analyse the new Reception Conditions Directive, in comparison to the former Reception Conditions Directive 2013/33/EU, in order to map the changes that are required in domestic law in the Member States. I do not present a full overview of the differences between the two instruments, but focus on the core novelties. I argue that the Directive ensures increased protection for (some) applicants for international protection, for example as regards access to the labour market, representation of unaccompanied minors, and the nature of the material reception conditions. At the same time, the Directive provides Member States more room to subject applicants to a significant degree of state control, for example by increasing the possibilities for excluding applicants from the full set of reception benefits and for limiting applicants' freedom of movement.

Scope of the Directive

Article 3 of the Directive deals with scope and (the English language version) has not been substantively changed. It still holds that the Directive applies to all third-country nationals and stateless persons who 'make' an application for international protection. New is that Article 26 of the Asylum Procedure Regulation now specifies that an application for international protection has been 'made' as from the moment applicants express in person a wish to receive international protection to one of the competent authorities under national law.

There are no further formalities, e.g. as regards a form to be submitted, information to

be provided, or to make the application at a particular place. As the preamble states, the Reception Conditions Directive 2024/1346 applies 'during all stages and types of procedures for international protection, in all locations and facilities housing applicants' (recital 7). The Directive also applies during the screening procedure regulated in the Screening Regulation (see article 4(1)(b)).

However, Member States do not have to provide all reception conditions immediately once applicants make their application. Sometimes Member States merely have the obligation to ensure (access to) the conditions within a certain period of time. The deadlines for such obligations start running from the making, registration or lodging of the application for international protection. This is the case for the following obligations:

Reception condition	**Article**	**Deadline**	**After the application has been**
Provide standard information relating to reception conditions	5(1)	Three days	Made (or within the timeframe for registration)
Designate a representative for unaccompanied minors	27(1)(b)	15 working days (or, exceptionally, 25)	Made
Assessment of special reception needs	25(1)	30 days	Made
Equal treatment with nationals as regards recognition of diploma's, certificates and other qualifications and experience	17(4)(c)	Three months	Registered
Access to the labour market	17(1)	Six months	Registered
Grant minors access to the education system	16(2)	Two months	Lodged

The timeframe for registration and lodging of applications is also regulated in the Asylum Procedure Regulation. The standard deadline for registering applications is five days (Article 27(1) of this Regulation). There are, however, four exceptions to this deadline: 1) when an application is not made to a competent authority, 2) where there is a disproportionate number of applications within the same period of time, 3) when persons are subjected to the screening procedure regulated in the Screening Regulation, and 4) when there is a situation of crisis or *force majeure,* on the basis of the Crisis and

Force Majeure Regulation . Accordingly, the deadline for registering the application varies from five days (in regular cases) to five weeks (in case of screening ánd a situation of crisis or *force majeure*).

For lodging the application, Member States need to invite applicants to a particular place at a particular date. This needs to be done within 21 days from when the application is registered (article 28(1) of the Asylum Procedure Regulation. In case of a disproportionate number of applications within the same period of time, this needs to be done within two months (article 28(5) of the Asylum Procedure Regulation.

While much has been clarified as regards the start of Member States' obligations to provide reception conditions, this is not the case as regards the end of such obligations. Article 3 of the new Reception Conditions Directive lays down that applicants fall under the scope of the Directive provided they 'are allowed to remain on the territory as applicants'. Under the Asylum Procedure Regulation (EU) 2024/1348, applicants have, in general, the right to remain during the first instance administrative stage of the procedure (article 10). Appeal procedures generally have automatic suspensive effect, but there are many exceptions, for example as regards subsequent applicants, applications rejected during accelerated or border procedures, or inadmissible applications (article 68).

If there is no automatic suspensive effect, a court or tribunal needs to decide on the right to remain pending the appeal procedure. Accordingly, whether applicants fall under the scope of the Reception Conditions Directive pending their appeal procedures still depends on whether their appeal has suspensive effect, either by law, or decided by a court or tribunal. To what extent Member States' obligations have changed in this respect depends, therefore, on the evaluation of the rather technical provisions on this in the new Asylum Procedure Regulation (see for a detailed analysis on this point the blog by Steve Peers).

Material reception conditions

Definition

Under the new Directive, material reception conditions now also include 'personal hygiene products', in addition to housing, food, clothing and a daily expenses allowance (article 2(7)). This inclusion is in line with the definition of 'most basic needs' by the CJEU (Jawo) and ECtHR (M.S.S.). Perhaps more relevant is that the Directive now also contains a definition of a 'daily expenses allowance' (article 2(8)). This is defined as 'an allowance provided to applicants periodically to enable them to enjoy a minimum degree

of autonomy in their daily life, provided as a monetary amount, in vouchers, in kind, or as a combination thereof provided that such an allowance includes a monetary amount'. The fact that 'vouchers' are mentioned separately from a 'monetary amount' in this definition means that it is not enough if Member States only provide vouchers. In line with the purpose of 'enabling applicants to enjoy a minimum degree of autonomy in their daily life' it means that applicants should have a minimum amount of cash or a monetary amount on a card that they can freely spend. This is in line with the importance that UNHCR attaches to cash-based support.

Reduction, withdrawal and exclusion

The new provisions on reduction, withdrawal and exclusion clearly show the conditional character of applicants' right to material reception benefits. The new Article 21 now stipulates that applicants are no longer entitled to the full set of material reception benefits from the moment they have been notified of a decision to transfer them to the Member State responsible in accordance with the Asylum and Migration Management Regulation . This is a mandatory withdrawal for Member States, the Directive does not leave any discretionary room in this regard.

Article 23 sets out the criteria for Member States to withdraw all material reception conditions if applicants breach the rules of the accommodation centre or if they conduct violent behaviour. Under the current Reception Conditions Directive 2013/33/EU this is only possible if applicants 'seriously' breach the rules of their accommodation centre or conduct 'seriously violent behaviour'. In the new Directive, this is possible if applicants 'seriously or *repeatedly* breached the rules of the accommodation centre' (italics LS) or have 'behaved in a violent or threatening manner'. This significantly lowers the threshold for withdrawing material reception benefits. In addition, article 23 introduces a new ground for reducing material reception benefits, if an applicant fails to participate in compulsory integration measures.

Accordingly, Member States are required to make access to material reception benefits conditional on whether the applicant is present in the Member State that is responsible for dealing with the asylum application, and are allowed to make (full) access to material reception benefits conditional on applicants' behaviour in accommodation centres.

However, in both cases, Member States are still obliged to ensure applicants 'a standard of living in accordance with Union law, including the Charter, and international obligations' (Article 21 and 23(4), see also Article 20(10)). This raises the question whether Member States can withdraw *all* material reception conditions. In the case of Haqbin, the CJEU ruled that respect for human dignity 'requires the person concerned

not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity'.

The Court concluded in *Haqbin* that withdrawal, even if only a temporary one, of the full set of material reception conditions or of housing, food or clothing would be irreconcilable with this requirement, 'since it would preclude the applicant from being allowed to meet his or her most basic needs'. Importantly, the Court stressed that the provision of a list of private centres for the homeless likely to host the applicant in case of withdrawal would not alter the conclusion. According to the Court, the very fact that the verb 'ensure' is used means that Member States need to guarantee the required standard of living 'continuously and without interruption'.

This means that in order to ensure a standard of living in accordance with the Charter, Member States need to provide applicants access to housing, food and clothing, continuously and without interruption. The fact that applicants who have received a transfer decision are entitled to material reception conditions in the Member State that is responsible is not enough. After all, applicants can lodge an appeal against the transfer decision and in that case the transfer needs to be suspended, in any case until a court or tribunal has decided on a request to suspend the transfer pending the outcome of the appeal (Article 43 of the Asylum and Migration Management Regulation). Accordingly, withdrawing all material reception conditions from applicants who have received a transfer decision but are not yet transferred, would preclude them from meeting their most basic needs and would violate the Charter.

In practice, this will probably mean that withdrawing the daily expenses allowance is possible, but withdrawing the other material reception conditions violates the 'standard of living in accordance with Union law, including the Charter, and international obligations' that Member State need to ensure.

Employment

As regards employment the new Reception Conditions Directive provides for three main changes as compared to the current directive that increase applicants' rights. First, Member States need to ensure that applicants have access to the labour market within six months, instead of nine months. Second, this six-months deadline starts running from the date on which the application is *registered*, instead of lodged. As discussed above, registration takes place 21 days (under normal conditions) or two months (in case of a disproportional number of applications) before the lodging. Third, the new

Directive provides for equal treatment with nationals as regards a number of employment conditions (Article 17(3) and (5) and for access to language and civic education courses (article 18). The former Directive did not provide for this.

Some of the more restrictive provisions as regards access to employment stay intact. For example, access to the labour market is still only provided under the condition that 'an administrative decision by the competent authority has not been taken and the delay cannot be attributed to the applicant' (article 17(1)). This means that case law on the question when delay can be attributed to the applicant remains relevant (see K.S. and others). In addition, Member States may still give priority to nationals and non-nationals with lawful residence (article 17(2)).

The directive also introduces new restrictive provisions, in the form of mandatory exclusions. Under two different circumstances, Member States are not allowed to grant access to the labour market, or, if already granted, need to withdraw. First if Member States have accelerated the examination on the merits of an application for international protection in accordance with Article 42(1), points (a) to (f) of the Asylum Procedure Regulation (Article 17(1). Secondly, Member States need to withdraw access to employment as soon as applicants have been notified of a decision to transfer them to the Member State responsible in accordance with the Asylum and Migration Management Regulation (Article 21). In the case of K.S. and others, the CJEU ruled that under the current Directive, applicants should get access to employment until they are actually transferred to the responsible Member State. In reaching that judgment, the Court referred amongst other to the obligation to respect human dignity and to the Directive's objective to promote applicants' self-sufficiency. Since the new Directive also seeks to promote the self-sufficiency of applicants (preamble recital 50) and 'full respect for human dignity' (preamble recital 75), these new mandatory exclusions from employment raise relevant legal questions. Just as regards the withdrawal of material reception conditions (see above), the complete withdrawal of access to employment might violate the 'standard of living in accordance with Union law, including the Charter, and international obligations' that Member State need to ensure.

Freedom of movement

The current Directive has one provision about freedom of movement, that leaves a lot of discretionary room for Member States to impose all kinds of residence restrictions. The new Directive contains no less than three provisions on this: Articles 7, 8 and 9. On the one hand, this shows the clear emphasis on possibilities for Member States to restrict applicants' freedom of movement. On the other hand, these provisions contain more safeguards for applicants as compared to the current Directive. Another difference

between the two Directives is that for two of the three residence restrictions, the new Directive explicitly stipulates that Member States are not required to take an administrative decision, which hampers the right to an appeal.

Art	Residence restriction	Condition	Admin. decision required?	Safeguards	Consequence of non-compliance
7	Allocate applicants to specific accommodations	In order to manage their asylum and reception systems	No	Benefit effectively from rights MS must take into account objective factors	Losing the entitlement to material reception conditions (Art 7(4)).
8	Allocate applicants to a geographical area within their territory, that they can only leave with permission	For the purpose of ensuring the swift, efficient and effective processing of their applications in accordance with Regulation (EU) 2024/1348 or the geographic distribution of those applicants	No	Effective access to rights Geographical area must be sufficiently large, allow access to necessary public infrastructure and may not affect the applicants' unalienable sphere of private life	Reduction or withdrawal of the daily expenses allowance or reduction of other material reception conditions (Art 23(2)(a)).

9	Decide that an applicant is only allowed to reside in a specific place; they can only reside elsewhere with permission	For reasons of public order or to effectively prevent the applicant from absconding, where there is a risk of absconding	Yes	Necessity condition Decisions need to be proportionate and take into account relevant aspects of the individual situation of the applicant Right to be informed and to an appeal	Losing the entitlement to material reception conditions (Art 9(1)) Reduction or withdrawal of the daily expenses allowance or reduction of other material reception conditions (Art 23(2)(a)) Detention, provided there is still a risk of absconding ((Article 10(4)(c))

The condition that there must be 'access to necessary public infrastructure' is an important one, but is absent in article 9. Accordingly, if applicants are required to take up residence in a particular accommodation centre, this centre does not have to be in an area that allows access to necessary public infrastructure. In connection with the severe consequences of non-compliance in case of a decision based on Article 9, and the broad definition of absconding in the Directive (Article 2(12)), this provision provides Member States with a lot of room to subject asylum seekers to significant state control. In addition, it is important how the term 'reside' in interpreted. According to Merriam-Webster dictionary it means 'to dwell permanently or continuously: occupy a place as one's legal domicile'. This would mean that spending the night somewhere else does not imply a violation to 'reside' in the accommodation centre. However, Article 9(3) of the Directive holds that the applicant 'shall not be required to request permission to attend appointments with authorities and courts if the attendance of that applicant is necessary'. This seems to imply that short periods of absence of the accommodation centre for other reasons do require permission by the authorities. In that case, the situation has very much in common with cases of *de facto* detention.

Special needs assessment

Just as under the current Reception Conditions Directive, Member States must assess whether applicants have special needs. A relevant difference with the current Directive is that the new Directive stipulates that the assessment must be completed *within 30 days from the making* of the application (Article 25(1)). Accordingly, an extension of this deadline is not possible, not on grounds of a disproportionate number of applications nor in case of a situation of crisis or *force majeure* (see above).

(Unaccompanied) minors

As regards (unaccompanied) minors, the new Directive contains more detailed obligations for Member States. Member States need to grant minors access to the education system as soon as possible and may not postpone the granting of that access for more than two months from the date on which the application for international protection was lodged. In the current Directive, Member States are allowed to postpone access to education for *three* months as from the lodging of the application. Since the new Asylum Procedure Regulation now also contains clear deadlines for lodging the application (see above), the obligation for Member States has become stricter and more concrete.

Another difference with the current Directive is that there is a lot of emphasis on equal treatment with nationals for minors. Member States must grant minors 'the same' access to education as their own nationals (Article 16(1)) and as a rule provide education within the general education system (Article 16(2)). Only as a temporary measure and for a maximum period of one month, they may provide education outside the general education system. Likewise, as regards health care, the new Directive obliges Member States to ensure that minors 'receive the same type of health care as provided to their own nationals who are minors' (Article 22(2)).

For unaccompanied minors, a relevant change is that the new Directive introduces strict time limits for Member States to appoint a representative, and a maximum number of unaccompanied minors per representative (Article 24).

Conclusion

The new Reception Conditions Directive creates a number of new obligations for Member States, and makes some of the existing obligations more comprehensive. This is often done in the form of new or shorter deadlines for Member States, for example as regards access to employment, education and assessment of special needs. New obligations include the obligation for Member States to ensure that applicants have access to language courses, civic education courses or vocational training courses and are

provided with personal hygiene products. The new Directive, however, also leaves ample room for Member States to subject applicants to a significant degree of state control, for example by increasing the possibilities for excluding applicants from the full set of reception benefits and by limiting applicants' freedom of movement. In this way, the Directive increases welfare conditionality for applicants, as Member States have more possibilities, or are even obliged, to make access to the full set of reception benefits conditional on applicants' place or country of residence or behaviour.

A standard of living 'in accordance with Union law, including the Charter, and international obligations' should, however, always be provided. Case law of the CJEU suggests that this means that in any case, applicants should always be provided with housing, food and clothing. With its strong emphasis on human dignity, this case law will remain relevant under the new Directive. In this interpretation, the mandatory exclusion of some applicants from employment and material reception benefits is not as strict as the text of the Directive seems to imply.

In situations of crisis or *force majeure*, or when a disproportionate number of persons applies for international protection at the same time, the new Directive does not provide much room for Member States to deviate from their obligations. Member States still need to provide all applicants who made their application for international protection with material reception benefits, health care, an assessment of their special needs etc. The only exceptions that are allowed relate to *when* applicants get access to employment and education (since deadlines for registering and lodging applications can under certain conditions be extended) and to the *mode* of accommodation to be provided (Article 20(10)), which provides Member States with almost the same possibilities as under the current Directive).

To conclude, the new Directive increases Member States' possibilities to subject asylum seekers to significant state control, by making access to the full set of reception benefits conditional on asylum seekers' compliant behaviour. At the same time, however, the Directive, interpreted in the light of relevant CJEU case law, does not leave room for policies of forced destitution. So far, it seems that the CJEU provides more protection against policies of forced destitution than against policies of containment. The question remains, therefore, whether the more comprehensive possibilities for Member States to subject applicants to severe geographical and residence restrictions in the new Directive will be limited in future CJEU case law in the light of human dignity.

11. The Qualification Regulation: a mixed bag, inherited from 2016. by Boldizsár Nagy

Long gestation, piecemeal changes

It took almost eight years (2016-2024) to adopt the text of the Qualification regulation (Regulation (EU) 2024/1347 of 14 May 2024). Its first version, in the form of a directive – emerging from scratch – needed five years (1999-2004), the second variant – still a directive – only two (2009-11).

Was the **long gestation** justified by a thoroughgoing renewal? Certainly not: the 2024 regulation does not introduce conceptual novelties. Transfer of protection to another Member State or intra-EU asylum seeking are not touched upon. Incremental changes were introduced. This blogpost reviews and evaluates the most important ones.

The regulation **aims at harmonisation**, which is ensuring that Member States apply common criteria for the identification of persons in need of protection, and grant and enforce a common set of rights for these beneficiaries. The higher degree of legal certainty and transparency ought to lead to equal treatment across the EU and a decrease of secondary movements between Member States. The form of regulation serves these goals better than a directive, leaving room for more variance among Member States.

The most important incremental changes are clustered into three blocks: rules favourable for those seeking protection, changes increasing state control (reducing chances to enjoy protection) and mixed impact novelties. The overall assessment shows that – unlike in case of many building blocks of the New Pact – the balance of the QR may be positive.

The context of the regulation

There are **two different roots** of the regulation. First: the lessons learnt from the application of the 2011 directive. Second : the collapse of the whole EU asylum system in 2015 and the ensuing fears related to irregular migration motivating the adoption of the New Pact in 2020.

The problems with the 2011 directive and its application were reviewed by the Commission in its 2019 report:

- Divergent recognition rates for same country of origin applications,
- Different interpretation of terms and varied state practices due to the permissive clauses (e.g. in respect of residence permits, social assistance and others),
- Divergent practices in establishing country of origin information,
- Country of origin info versus credibility and individual challenge to the COI info,
- Practical obstacles in accessing rights (employment, education and others).

The assumption is that if these differences disappear then the secondary movements of asylum seekers (and of recognised persons) would diminish, alleviating the fears concerning irregular migration. (Recitals 3, 5 and 8, QR)

The regulation entered into force on 11 June 2024 but is only applicable from 1 July 2026, States must adjust their domestic law and practice in the meantime. Denmark is not bound, Ireland opted in after the adoption.

New rules favouring the beneficiaries of protection.

The 2024 Qualification Regulation contains quite a large number of rules that benefit the asylum seeker and the recognised person.

Criteria for the identification of beneficiaries and persons with special needs

The rules on members of the family are now more permissive: the family need not have existed in the country of origin. It is enough if it already existed before the applicant arrived on the territory. Adult dependent children were added to the category of 'family members' as well as the adult sibling of a minor. This extension of the principle of family unity enhances the psychological wellbeing of the beneficiary, as family members are entitled to residence permit even if they personally do not quality for protection. (Art. 23)

Attention to **gender and sexual orientation** as well as to minors, including unaccompanied minors has greatly increased as reported in another blogpost of this series. Three points to be mentioned here:. First, not only gender identity but gender expression is also to be protected. Second: States must 'take into account' gender, gender identity and sexual orientation when assessing the existence of internal protection alternative. Third: Learning from the *F v Bevándorlási és Állampolgársági Hivatal* and the *A (C-148/13), B (C-149/13), C (C-150/13) v Staatssecretaris van Veiligheid en Justitie* cases recital 42 stresses that applicants 'should not be submitted to detailed questioning or tests as to their sexual practices'.

The attention paid to **minors** has risen significantly. Major changes include the wish to ensure that the same person remains responsible for an unaccompanied minor, including during the asylum procedure and following the granting of international protection. (Recital 16 and Article 33). States are now free to recognise the minor children of a further spouse in the polygamous marriage. (Recital 18). The new para 5 of Article 8 on internal protection lists 'age' as a circumstance that has to be 'taken into account' when assessing the existence of the alternative. The new guarantees require not only that the guardians have the necessary expertise, but also that they keep the confidentiality rules and do not have a criminal record, especially of child related crimes that could raise doubts as to their eligibility. The regulation also requires supervision and monitoring of guardians and a complaint right of the minors.

Whereas the concepts of persecution and serious harm have not changed, it is now clearly stated that discretion and self-denial may not be expected in order to avoid persecution. Reflecting the message of the 2013 ECJ judgment in the X,Y and Z case Article 10, para 3 states, that 'the determining authority cannot reasonably expect [the] applicant to adapt or change his or her behaviour, convictions or identity, or to abstain from certain practices, where such behaviour, convictions or practices are inherent to his or her identity, to avoid the risk of persecution in his or her country of origin.'

Regarding the notion of a **particular social group,** the new text reinforces that the protected characteristics need not be possessed: if the persons are perceived as having them, that (with the perception of the group as distinct) is enough (Article 10, para 1 (d) i). That corroborates the retained rule in Article 10 para 2, according to which it is 'irrelevant' whether the applicant actually possesses the feature attracting persecution.

The emphasis on gender and the extended interpretation of the ground 'particular social group' was recently reinforced by the ECJ in several important judgments. As discussed in more detail here the *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence),* judgment confirmed that women in a country as a whole may be regarded as

belonging to 'a particular social group' and even if the persecution does not occur for one of the five grounds, if protection is denied for one of them, recognition is due.

In K,L v Staatssecretaris van Justitie en Veiligheid, the court accepted that if minors grew up in an EU Member State and they genuinely come to identify with the fundamental value of equality between women and men during their stay then they may be regarded as belonging to 'a particular social group' in their country of origin necessitating protection in the state that otherwise intends to repatriate them.

As for **subsidiary protection,** Recitals 50-52 must be highlighted as they summarise lessons learnt from the jurisprudence of the ECJ, starting with the Elgafaji case. According to the dictum in case of a lower level of indiscriminate violence applicants should be able to show that they are specifically affected due to factors related to their personal circumstances. At the other end of the spectrum where the degree of indiscriminate violence characterising the armed conflict rises to such an elevated level that persons would, solely on account of their presence there, face a real risk of being subjected to serious harm, no individualisation is needed.

The other major interpretative move relies on Diakite which determined that the term 'armed conflict' does not refer to its meaning in international humanitarian law, but to a much broader definition entailing situations in which 'a third country's armed forces confront one or more armed groups, or in which two or more armed groups confront each other.' (Judgment, Para 51.)

The rules interpreting Article 1 (D) of the Geneva Convention – at present mainly applicable **to refugees from Palestine** – remain unchanged, but a new recital 62 incorporates the ever-growing jurisprudence of the ECJ. In order to establish whether 'protection or assistance has ceased to exist for reasons beyond the control, and independent of the volition, of the applicant' the determining authority should 'ascertain whether the applicant was forced to leave the area of operations of the relevant organ or agency, whether the applicant's personal safety was at serious risk and whether the relevant organ or agency was unable to ensure the applicant's living conditions in accordance with its mandate'. A recent judgment in the chain formulating the EU interpretation of Article 1 (D) through Article 12 para 1(a) of the regulation is clear: 'UNRWA's assistance or protection must, in particular, be considered to have ceased vis-à-vis the applicant when, for whatever reason, that body is no longer able to provide to any stateless person of Palestinian origin staying in the [relevant] sector of that body's area of operations … dignified living conditions or minimum security conditions.'

Rights of the protected persons

A clearly positive development is enshrined in Annex I attached to Article 22 on **information** to be provided after recognition. It clarifies that states must inform the beneficiary of protection about the content of their substantive rights and how to access them. Information must include reference to possible sanctions following irregular movements with regard to the calculation of years in accordance with the amended long term residence directive.

The new rules on **residence permits** are largely positive for beneficiaries. Family members are entitled to permits with the same expiry as the protected person, residence permits must be issued as soon as possible but not later than 90 days after recognition, the fee to be paid for it is limited to what nationals pay and renewal should be smooth with no interruption. The difference in the validity remains: minimum 3 years for refugees and 1 year in case of beneficiaries of subsidiary protection which undermines motivation for integration in case of the latter group.

Limiting the rights, increasing the burdens

Three notable types of restrictions appear among the new provisions: those limiting family unity, those requiring compulsory withdrawal of residence permits and those tying social assistance to limitations on the freedom of movement.

Article 23 on family unity obliges States not to issue residence permits to spouses or partners when there are 'strong indications that the **marriage or partnership** was **contracted for the sole purpose of enabling** the person concerned to enter or reside in the Member State'. The regulation goes beyond the Directive on family unification adopted in 2003, which under the heading 'penalties' allows states to deny or withdraw residence permits in such cases, but does not oblige states to apply this penalty.

Married minors' spouses may not derive residence rights if according to the asylum state denial of a residence permit serves the best interest of the minor. Article 3 para 9 allows the asylum state to consider the married minor as unmarried if the minor's marriage would not be in accordance with the national law of the deciding state, especially in respect of the marrying age. This rule raises interesting questions concerning the concept of ordre public, in light of Recital 18 according to which Member State are free to decide whether they wish to apply the provisions on family unity to polygamous households.

Under the Qualification Directive States were free to recognise **family members** as protected persons, thereby going beyond the minimum standards. No longer. According to the QR family members are only entitled to a residence permit if they themselves do

not qualify in their own right as persons to be protected. The regulation no longer contains expressly the earlier obligation of states to ensure family unity (Directive, Article 23/1).

States lost their discretion in deciding whether to **revoke, end or not to renew (in the new terminology: withdraw)** the status of those who upon reasonable grounds may be considered to represent a danger to the security of the Member State of their stay, or who constitute a danger to the community in light of having been convicted by a final judgment for a particularly serious crime. Article 14 of the regulation makes withdrawal of status compulsory. That, however, does not affect the refugee quality of the dangerous person, nor does it entitle the state to dodge the non-refoulement principle but takes away the title to reside and so – in practice – may lead to (illegal) indefinite detention. The compulsory withdrawal supersedes the ECJ's finding in Bundesamt für Fremdenwesen und Asyl v AA, that foresaw that the consequences of the revocation of status be proportionate to the danger posed by the third-country national to a fundamental interest of the society of the relevant Member State (Judgment, Para 53)

The regulation increased the power of the territorial state over the protected person by allowing that access to social assistance be tied to the effective participation in integration measures. (Article 31, paragraph 2) That is a fallout of the Alo and Osso case which prohibited a general restriction on the freedom of movement within the country, but allowed the imposition of residence requirements if the affected beneficiaries were not in a situation comparable to other third country nationals legally residing in the country. The present Article 26 of the regulation makes it clear that freedom of movement within the member State includes the free choice of residence, but that is subject to the 'same conditions and restrictions' as in the case of other legally resident third country nationals 'who are generally in the same circumstances'. This in essence means that without formally imposing a residence requirement, Member States may connect social assistance to participation in integration measures and fix the place of those measures, thereby tying people to their domicile.

Mixed impact rules

According to the Qualification Directive only refugees could be excluded from being 'granted refugee status' if they themselves created the circumstances **sur place** which led to the threat of persecution. The regulation extends this to the 'manufactured' risk of serious harm. The authority may apply the rule already with regard to the first application, not only in subsequent application procedures, as earlier. This increased

burden on the applicant is alleviated by the requirement that states respect both the ECHR and the Charter in addition to the Geneva Convention which means that even in case of lack of protected status the person threatened with persecution or serious harm enjoys protection from refoulement and a minimum of rights. In the Bundesamt für Fremdenwesen und Asyl v JF case the court stressed that even if recognition is denied due to 'abusive intent and abuse of the applicable procedure' the person remains a refugee. (Para 44).

The formulation of the **internal protection alternative** is tougher in the regulation than in the directive as it now makes it compulsory (no longer optional) to apply the category. In exchange more safeguards apply. 'Where the State or agents of the State are the actors of persecution or serious harm, the determining authority shall presume that effective protection is not available to the applicant'. In such a case no examination of the alternative may be conducted, except if the threat is 'clearly limited to a specific geographic area'. (Article 8/2). Para 5 of the article reinforces the position of the applicant, by listing a number of personal circumstances, including health, gender identity, ethnic origin and membership in a national minority which 'have to be taken into account', and requiring that the applicant be 'able to cater for his or her own basic needs'.

Rules on **exclusion from subsidiary protection** have a mixed impact**.** Constituting a danger to the community or the national security is no longer linked to the state in which the applicant is present, which is more onerous to the applicant. At the same time adding 'national' before 'security' leaves less room for exclusion. Applicants also benefit from the new formula, according to which a serious crime in itself is no longer an exclusion ground after arrival: there must be at least a first instance conviction for it. The site of that crime remains unspecified.

The path of beneficiaries of international protection to **long term resident status** under Directive 2003/109/EC has been made easier in the new regulation while new obstacles were also erected. Article 40 of the regulation amends the long-term residence directive and provides that the period between lodging an application and the granting of residence permit after recognition counts fully to the period of five years. This accelerates the access to free movement rights within the Union compared to the previous rule that only counted half of the first 18 months to the five years needed. The trade-off is that a new paragraph is inserted, aimed at limiting secondary movements. The new Article 4/3a of the long term resident status directive, to be transposed by 12 June 2026 prescribes that if a beneficiary of international protection moved from the recognising Member State to another Member State where he or she has no a right to stay or to reside, the period of legal stay in the recognising Member State shall not be

taken into account when calculating the five years. Deterrence from secondary movement is the name of the game.

Conclusion

Whereas the specific instruments of the New Pact unashamedly try to prevent access to territory and access to procedure and have no scruples when responsibility is to be shifted to states outside the Union, the Qualification Regulation still bears the mark of the Geneva Convention which it claims to apply fully and inclusively (Preamble, para 2). As Steve Peers rightly notes in his rich essay, the Qualification regulation intends to 'strike the balance between migration control and human rights protection' (p. 70)

The regulation intends to cure the fragmentation of the Schengen area into national asylum spaces and the competition among the Member States to escape responsibility by adopting a 'uniform status' across the Union (TFEU, Article 78). Its aim is to terminate the great variability in recognition rates and treatment of beneficiaries of protection. The fiction on which all the intra-EU allocation mechanisms rely (including the 'Dublin system', however it is called) presumes that asylum seekers have equal chances in all Member States to be recognised and that once recognised they enjoy the same rights. Therefore, irregular movement during the status determination or after recognition are unwarranted and justifiably entail retorsion if the person nevertheless irregularly resides in another Member State before having become a long-term resident.

Seen against this background, the Qualification Regulation has two apparent effects: on the one hand it offers a more sensitive protection to certain groups, including those threatened with gender-related harm and minors, on the other, by making the evaluation of the internal protection alternative and withdrawal of residence permits compulsory and annulling the years counting towards long term residency of those who irregularly move to another than the recognising state, it drastically limits the freedom of choice of the persons entitled to protection.

12. Vulnerability in the New Pact: an empty promise to protect, or an operational concept? by Catherine Warin and Valeria Ilareva

The New Pact on Migration and Asylum has stirred criticism from civil society organisations sounding the alarm on the risks of human rights violations (see here or here). Academics have also pointed out how the new instruments amplify risks for violations (see e.g. about the Crisis Regulation) and how they are likely to create new obstacles to the effectiveness of the rights of asylum seekers, be it due to the complexities of the provisions on legal support or those of the Asylum Procedure Regulation.

Yet, references to vulnerability and injunctions to provide the vulnerable with special attention or assistance abound in the New Pact. The reform provides an opportunity for developing the 'functional utility' of the concept of vulnerability, i.e. its practical relevance for the protection of human rights and more specifically, here, its relevance for ensuring that the implementation of the New Pact is done in compliance with human rights. In this blog, first, we recall briefly the pre-existing applications of vulnerability in European asylum law, and next we look at how the New Pact addresses individual factors of vulnerability and the diversity of those factors. We then highlight, focusing on the example of gender, the contextual dimension of vulnerability, which the New Pact acknowledges to a certain extent. We conclude that the New Pact allows for a much-needed approach of vulnerability as both individual *and* contextual, i.e. an approach which identifies certain individual characteristics *and* certain contexts (or situations) in which those characteristics become factors of vulnerability. This is essential if we want the human rights of those concerned to be effectively protected.

Background: the increasing use of the concept of vulnerability in the case law on effective protection of asylum seekers and refugees

The ECtHR began using the concept of vulnerability in the early 1980s (*Dudgeon ;* see also *Tomasi*). This concept is particularly relevant in international human rights law, which identifies weaknesses and threatened interests in need of specific protection – exactly what the Geneva Convention seeks to achieve by conferring protection on victims of persecution. In the field of asylum, in the 2011 *MSS* judgment, the ECtHR famously stated that asylum seekers constitute 'a particularly underprivileged and vulnerable population group in need of special protection'. *Tarakhel* reaffirmed this, and distinguished between different degrees of vulnerability within this group, e.g. acknowledging the particular needs of children asylum seekers (pts. 118-119).

This approach was endorsed to a certain extent by the EU legislator: some provisions of the current Reception Conditions Directive (Articles 2(k), 21 and 22) and the current Procedures Directive (Recital 29 and Articles 15, 24 and 31(7)) require the special reception or procedural needs of vulnerable asylum seekers to be taken into account, translating into obligations for national authorities implementing those instruments. However, in the wake of *MSS*, the CJEU did not rush to embrace the concept of vulnerability. The term does not appear in *N.S. and others*, which concerns intra-EU transfers under the Dublin system, nor in *Saciri*, which established that EU law prohibits Member States from depriving an asylum seekers from minimum reception conditions.

It is only more recently that the CJEU started referring to vulnerability in its case law on asylum. *Haqbin* emphasized the vulnerability of a minor asylum seeker. *Jawo* taught us that beneficiaries of international protection 'are typically vulnerable and uprooted' and therefore should not be sent back to the Member State that has granted them this protection, if that were to lead to violations of Article 4 CFREU and of human dignity (paras 46 and 95; see also *Ibrahim* para 93). To assess the risk of such violations, the CJEU stressed the need to take into account the 'particular vulnerability' of the individual. The recent *Changu* judgment highlights the need to care for the special needs of vulnerable persons also in return procedures. The case law thus increasingly emphasises the need to take into consideration the vulnerability of asylum seekers and refugees and their corresponding special needs at all stages of the procedures, as paramount for ensuring respect and protection of their human dignity – in line with Article 1 of the CFREU – and to protect them from inhuman and degrading treatments – as per Article 4 of the CFREU.

Vulnerability as an operational tool in the New Pact

There is no definition of vulnerability in the New Pact instruments, but there is a consistent connection between the identification of vulnerability and the acknowledgement of special needs which the authorities must address. For instance, the Crisis Regulation requires particular attention to be paid to certain categories of third country nationals, especially minors under 12 and their families, and 'vulnerable' persons with 'special procedural needs' and/or special needs in terms of reception conditions. (Recital 49 and Art. 11(7); see also Recital 37 requiring particular attention for vulnerable persons during relocation operations). Similarly, Recital 18 and Art. 13(7) of the Asylum Procedure Regulation connect the need for special procedural guarantees to the existence of a vulnerability: staff must be trained to detect vulnerability signs of applicants who need special procedural guarantees, and must take into account the personal and general context, including vulnerability and special procedural needs. Article 20 of the Asylum Procedure Regulation then mandates an assessment of the need for special procedural guarantees 'as early as possible after an application is made,

ensuring that 'visible signs, the applicant's statements or behaviour, or any relevant documents' are adequately considered. The Regulation creates a presumption that the latter might adversely affect the ability of the applicant to participate effectively in the procedure. This leads to exemptions from accelerated examination procedures or border procedures as outlined in Article 21 of that regulation, allowing for a more thorough evaluation of claims that may be influenced by gender-related factors.

A similar pattern appears in the new Reception Conditions Directive. In Recital 47, where national authorities are asked to have 'due regard to the inherent vulnerabilities of the person as applicant for international protection'. The Directive (see Chapter IV, especially Article 24) then distinguishes between different kinds of vulnerabilities translating into 'special reception needs' (Art. 24) so that the persons identified as having those vulnerabilities are 'more likely' to have such needs (see also in the same vein Arts. 20, 23(4), 50 of the Regulation on Asylum and Migration Management (RAMM) and Recital 7 and Arts. 12(3) and 12(4) of the Screening Regulation). Across the various instruments of the New Pact, we thus find this notion that vulnerabilities must be proactively identified, and that when a vulnerability is detected, it obliges the authorities in all procedures to recognize and adjust to the corresponding needs of the person.

The operational implications of detecting vulnerabilities are amplified by the many connections between the different instruments of the New Pact. For instance, the Screening Regulation (Articles 12(5), 17(1) e) and 18) provides that the elements collected during the preliminary vulnerability check may then be re-used for the vulnerability assessments foreseen in the new Reception Conditions Directive and in the Asylum Procedure Regulation. The RAMM (Article 50) provides for exchange of information on vulnerability for the purpose of providing medical care, which is part of the set of rights which Article 22 of the new Reception Conditions Directive confers on asylum seekers. The results of the preliminary vulnerability check (during the screening phase) may be used for assessing vulnerability in the meaning of the new Reception Conditions Directive and of the Asylum Procedure Regulation (Arts. 12(5), 17(1) e), and 18 of the Screening Regulation). There is an effort from the legislator to ensure some consistency in how vulnerabilities are addressed in the different stages of the procedures established by the New Pact.

The detection of vulnerability thus triggers several legal obligations, translating into practical and operational consequences. Which makes it all the more important to know what 'vulnerability' means.

Individual vulnerability and vulnerability by categories

The absence of a definition of vulnerability in the New Pact is counterbalanced by the inclusion of categories – and lists of categories – of vulnerable persons. The listings are not fully consistent – not between instruments, not even within a single instrument. Take the preliminary checks in the Screening Regulation. Article 12(3) providing for the preliminary 'vulnerability check' requires the identification of third country nationals who might be 'a stateless person, vulnerable or a victim of torture or inhuman or degrading treatment, or having special needs' within the meaning of other instruments of the New Pact. The list is complemented with Recital 38 of the same regulation, where vulnerable profiles are listed in more detail, including pregnant women, elderly, single parent families, disabled, traumatized or unaccompanied minors. The list begins with 'such as' and is therefore an open list. So, the binding provision specifically stresses certain types of vulnerability; and the recital provides a much broader – and not finite – pool of vulnerability factors. This list is often echoed, although not mirrored exactly, in other instruments of the New Pact.

Indeed, some forms of vulnerability are given more attention than others. Children are systematically mentioned as vulnerable persons, which is arguably the result of years of CJEU case law on the rights of the child. The Court has stressed that Article 24 of the Charter integrates the International Convention on the Rights of the Child (CRC) into EU law (case *V.M.A.* , para 63) and that the EU's asylum system must comply with those international and EU standards on children's rights. Both the CRC and Article 24 are cited several times (e.g. Recital 23 of the Procedure Regulation, Recital 15 of the Qualification Regulation) and several provisions state the obligation to take into consideration the best interests of the child (Art. 13 of the Screening Regulation; Art. 22 and 23 of the Asylum Procedure Regulation; Art. 20(5) of the Qualification Regulation).

Overall, guarantees for minors are more detailed than in the previous version of the CEAS. Article 23 of the RAMM provides an enriched list of guarantees for minors; notably, the list of factors to be considered for determining the best interests of the child has been expanded (from four factors in Art. 6(3) of the Dublin III Regulation to six in Art. 23(4) RAMM). There are also detailed procedural guarantees for minors, and even more specifically for unaccompanied minors in the Asylum Procedure Regulation (Art. 22 and 23). Of course, these will work only if children are actually identified as children: Recital 36 of the Asylum Procedure Regulation acknowledges the problem of disproportionate age assessment procedures, but the co-legislators have not come up with any solutions to bridge the huge gap between theory and practice in this respect (see Lyra Jakulevicienie's blog on the Screening Regulation). Also there is a persisting possibility to detain minors, though as a measure of last resort, 'after detention is assessed to be in the best interests of the child' (Recital 65 of the RAMM, Recitals 11 and 40 of the Screening Regulation, Art. 13 of the new Reception Conditions Directive)

– so that even minors being recognised as vulnerable in all instruments of the New Pact are not fully shielded from extreme measures such as deprivation of liberty.

Less consistent attention is given to other forms of vulnerability such as statelessness. Nonetheless, the explicit mention of this category is welcome as this form of administrative vulnerability is often fully overlooked. It is important that it is listed as a vulnerability factor in the Screening Regulation, as this will (hopefully) facilitate applications for recognition of statelessness as per the relevant Convention – even though this is not expressly foreseen in the New Pact.

While we cannot examine here in detail the provisions on each vulnerable profile present in the New Pact, we want to go beyond the analysis of the 'lists' of such profiles, and emphasise the efforts that were made to reflect not only the individual dimension of vulnerability, but also the contextual dimension of this concept: vulnerability depends not only on characteristics inherent to a person, but also on the context. For this, we will scrutinise the increased account taken of sex and gender as vulnerability factors, with the potential for a more inclusive and sensitive framework for individuals seeking protection.

The contextual dimension of vulnerability: the example of gender

The provisions on gender in the New Pact also bear the mark of an international human rights treaty: while the Istanbul Convention is not expressly mentioned in the New Pact, the CJEU has already expressly indicated that EU asylum law must now be interpreted and applied in compliance with this treaty, to which the EU has acceded (see *Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques)*, paras 46 and 47) and further developments in this area are to be expected. The gender-sensitive approach is also evident in various aspects of New Pact, including the development of gender-sensitive procedures, the consideration of special reception needs, and the recognition of gender-based violence as a form of persecution.

Gender as a vulnerability factor in the context of procedures: the development of Gender-Sensitive Procedures

The Asylum Procedure Regulation elaborates several critical measures to enhance the gender sensitivity of asylum processes. The referral mechanism to a specialist addressing the needs of the vulnerable persons required under Article 20 of the Asylum Procedure Regulation prioritises cases where there are indications that applicants might have been 'victims of torture, rape or another serious form of psychological, physical, sexual or gender-based violence'. Since it leads to exemptions from accelerated examination procedures or border procedures as outlined in Article 21, it allows for a more thorough evaluation of claims that may be influenced by gender-related factors.

Furthermore, Article 13 on personal interviews requires the determining authority to ensure that the interviewers and interpreters are of the sex that the applicant prefers, 'where requested by the applicant and where possible', 'unless it has reasons to consider that such a request does not relate to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner'. This shows that (gender) vulnerability is contextual: it is taken into account not in general, but in so far as it makes it more difficult to exercise one's procedural rights and ultimately one's right to asylum.

Gender-related vulnerabilities as grounds for Special Reception Needs

Article 24 of the new Reception Conditions Directive states that one of the categories of applicants with special reception needs are 'persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, for example victims of gender-based violence, of female genital mutilation, of child or forced marriage, or violence committed with a sexual, gender, racist or religious motive'. Assessment of those needs should be conducted as early as possible after an application for international protection is made, and completed within 30 days. The assessment however is an ongoing process that is responsive even if needs become apparent at a later stage, which is particularly important in cases of gender-based violence since victims of rape tend to have major difficulties to tell their stories. In cases of gender-based violence and trauma, Article 28 emphasizes the importance of ensuring access to essential services, such as 'medical and psychological treatment and care, including rehabilitation services and counselling where necessary, for the damage caused by such acts'. The New Pact thus also acknowledges that there is an obligation to protect and even to restore the mental and physical health of those asylum seekers who have been victims of gender-based violence.

Recognition of Gender-Based Violence as a Form of Persecution

The new Qualification Regulation, in the spirit of the recent case law of the CJEU, reflects the growing consensus within the EU regarding the need to protect individuals from gender-based violence and to ensure that such claims are adequately addressed within the asylum framework. In the case of *WS*, the applicant from Turkey had been a victim of domestic violence in the context of a forced marriage and at risk of an 'honour' killing by her biological father and her former husband after she left and divorced the latter. The Court concluded that women may be regarded as belonging to a 'particular social group', within the meaning of Article 10(1)(d) of the Qualification Directive, where it is established that, in their country of origin, they are, on account of their gender, exposed to physical or mental violence, including sexual violence and domestic violence (para 57).

In case *K and L*, the CJEU ruled that women who share as a common characteristic the fact that they genuinely come to identify with the fundamental value of equality between women and men, depending on the circumstances in the country of origin, may be regarded as belonging to 'a particular social group', constituting a 'reason for persecution' within the refugee definition. In the judgment of 4 October 2024 in Joined Cases AH and FN, concerning asylum seeking women from Afghanistan, the Court took into account the context of cumulative discriminatory measures against women imposed by the Taliban regime since 2021. It concluded that the level of seriousness of the situation in the country of origin is sufficient to presume that women in Afghanistan belong to a "particular social group" as a reason for persecution, without a need to prove further individual circumstances than their nationality and gender.

Thus, the innovations in the Pact seem to codify the achievements of the case-law of the CJEU. Along these lines, Recital 40 of the Qualification Regulation states that it is necessary to introduce a common concept of the persecution ground 'membership of a particular social group'. It further elaborates that for the purpose of defining a particular social group, issues arising from an applicant's sexual orientation or gender, including gender identity and gender expression, should be given due consideration in so far as they are related to the applicant's well-founded fear of being persecuted. Applicants with diverse sexual orientations, gender identities, gender expressions and sex characteristics (SOGIESC) are also recognized as having special needs, especially in the Qualification Regulation. Therein, membership of a particular social group includes membership of a group based on the common characteristic of sexual orientation, while it contains an innovative reference to 'gender expression' for the first time (Art. 10). It is important to note that asylum seekers cannot be expected to hide their identity in order to avoid persecution (Art. 10(3)), this being in line with the CJEU's judgment in *X, Y and Z*. The existence and application of criminal laws which specifically target lesbian, gay, bisexual, transgender and intersex persons, can mean that those persons are to be regarded as forming a particular social group (Recital 41). Here, too, assessing the need for protection is a matter of combining a particular individual characteristic with a specific context where that characteristic becomes a vulnerability.

The contextual understanding of vulnerability thus allows to make sense of the abundant and uneven references to vulnerability in the various instruments of the Pact. It allows to understand, for instance, why stateless persons are mentioned as vulnerable procedurally, but are not acknowledged in the Reception Conditions Directive: someone who is stateless is likely to stumble upon procedural difficulties (such as proving one's country of origin) whereas being stateless does not particularly translate into any special needs in terms of reception conditions. Conversely, not all vulnerabilities translate into procedural vulnerabilities: Article 8 of the Asylum Procedure Regulation provides that information documents prepared by the EUAA take into account certain vulnerabilities

such as those of minors or disabled applicants. Here, the purpose is to ensure participation in the procedure. This explains why some categories of vulnerabilities are emphasized, namely those associated with more difficulties to understand the procedure. On the contrary, gender or statelessness are not so relevant in this context. Someone who is vulnerable during the screening process is not necessarily vulnerable with regard to reception conditions or procedure, but of course there are connections between those various contexts. The degree of vulnerability of a person can also vary across the process (from preliminary screenings to the asylum procedure itself, and sometimes also up to a return procedure). Reading the New Pact in the light of this allows for responding to the needs of vulnerable persons in the various stages of the procedures.

Conclusion: « We will take a human and humane approach. »

This statement of the President of the European Commission does not have to remain an empty promise. Authorities in charge of implementing the New Pact need to be aware that the identification of vulnerabilities should take place as early as possible. Thereafter, identification should be undertaken proactively, not as a one-off procedural step, but a process that is applied throughout all steps of accessing, qualifying for, and enjoying asylum (or being returned). In each stage, authorities should take into account individual characteristics and whether those, in a given context, translate into vulnerabilities. Reading the New Pact in line with the case law of the CJEU, the Charter of Fundamental Rights, and international human rights instruments, entails the acknowledgement of the individual and contextual dimensions of vulnerability. This allows in turn for adequate responses to special needs, and ultimately effectiveness of fundamental rights, including the right to asylum as well as the full protection of human dignity.

13. Safe Third Countries: the Next 'Battlefield' by Daniel Thym

The spectre of asylum procedures in third states has been haunting EU asylum policy since its inception. The London Resolutions of 1992 promoted the idea. Ten years later, the British government under Tony Blair (Labour) sparked a lively political debate. So far the idea has never been put into practice on a larger scale, with the exception of the EU-Turkey-Statement to which we shall come back. The scarcity of practical experience is one factor explaining the startling mixture of enthusiasm and distrust any debate about the topic inevitably raises. The idea is bound to gather momentum during term of the next European Commission.

To prevent confusion, we should distinguish asylum procedures abroad ('external processing') from 'safe third country' schemes. The former ('external processing') concerns regular European asylum procedures in a country outside the EU. The Italian 'Albania model' follows that rationale. Two centres are currently being established in Albania where Italian officials will undertake regular asylum procedures, presumably via videoconferencing. Beneficiaries of international protection will be relocated to Italy, as will returnees whenever (voluntary) return fails in practice.

By contrast, the British 'Rwanda plan' was supposed to send asylum applicants who had entered the UK irregularly to Rwanda on the basis of an inadmissibility decision by the British authorities. They will receive an asylum procedure by the Rwandan authorities in accordance with domestic laws, without the option of eventual legal entry into the UK. The 'safe third country' provision in the new Asylum Procedures Regulation (EU) 2024/1348 follows the basic contours of that project.

In its 2024 manifesto, the European People's Party (EPP), 'advocate(s) a fundamental change in European asylum law' on the basis of the safe third country concept (here, p. 6). The outgoing Commission President supports the plan half-heartedly. She explicitly lent her support to 'smart' policies in a letter to the European Council, whose strategic vision for 2024–27 has recently called upon the EU institutions to 'consider new ways to prevent and counter irregular migration' (here, Annex). Such references to 'smart' and 'new ways' are shorthand for the involvement of third states—an idea that has been pushed by Italy, Denmark, the Czech Republic, Austria, the Netherlands, and several other governments for some time.

Any debate about safe third country schemes must distinguish four questions. First, the significance of the 'small print' for the practical realisation and the legal assessment. Secondly, factual uncertainties as to whether such project will have a 'deterrent effect'

which proponents promise and in the absence of which states will not usually be able to invest piles of cash into the realisation of safe third country schemes.

Thirdly, the new Asylum Procedures Regulation (EU) 2024/1348 requires Member States to perform an inadmissibility check, including the option of legal remedies, before sending asylum applicants to a safe third country. These admissibility procedures might prove a critical legal and administrative bottleneck, thus possibly triggering a swift revision of the newly adopted legislation as early as next year. The incoming Commission will be under an obligation to table a report about 'targeted amendments' on safe third countries in the summer of 2025 (here, Article 77(4)). That timing was deliberate given that majorities in the Council and the European Parliament might have shifted by the end of 2025. The German Christian Democrats, which are likely to retake the chancellery in the autumn of 2025, are fervent supporters of safe third country schemes (here, p. 23-24).

Fourthly, full respect for the principle of non-refoulement by the third state is a precondition for any safe third country arrangement, as is the provision of 'effective protection' in terms of living conditions there. Living conditions are an area where the new legislation introduces major changes in accordance with the plea, by the European Council of June 2017, to align protection standards with international minimum requirements, thus abandoning higher European standards (here, No. 23).

'YES BUT': RELEVANCE OF THE 'SMALL-PRINT'

Our rough comparison of external processing in the form of the Italian 'Albania model' and safe third country schemes like the British 'Rwanda plan' deliberately ignored political and legal controversies surrounding both projects. Space precludes their detailed analysis in a contribution focusing on the new EU legislation. Having said this, it is precisely the 'small-print' which defines the legal assessment of any safe third country arrangement. Both the European Court of Human Rights (ECtHR) and UNHCR recognise that the prohibition of refoulement permits safe third country schemes, provided they fulfil several conditions (here, paras 128-138; here, No. 2).

These conditions lay beneath the judgment of the UK Supreme Court of November last year. Judges were not convinced that the Rwandan asylum system offered sufficient security, as required by the European Convention on Human Rights (ECHR). In case the British Labour party wins the election on 4 July and abandons the 'Rwanda plan', we may never learn whether the revised Treaty, negotiated by the British government at short notice, would have been by British courts and the ECtHR. For our purposes, these debates offer limited guidance anyway. EU institutions cannot simply emulate the British

'example' of instructing national courts not to assess the safety of third states, as the British government did in legislation adopted after the Supreme Court ruling. Domestic courts in the Member States will enforce the requirements under the Charter of Fundamental Rights, which effectively incorporates the ECHR into EU law.

FACTUAL UNCERTAINTIES: 'DETERRENT EFFECT' IN PRACTICE

In another respect, however, any implementation of both the British 'Rwanda plan' and the Italian 'Albania model' might prove instructive. Safe third country models habitually assume that it is sufficient to return a limited number of people, whereupon the number of arrivals would fall automatically. Australia is the only country which has 'achieved' such a deterrent effect in practice, albeit at the price of massive humanitarian costs. Australia transferred 4,100 people to reception centres on remote Pacific islands – a transfer rate of almost 100% if we exclude those being 'pushed back' after a rudimentary screening on the high seas. After having implemented that scheme systematically for about one year during 2013/14, the number of maritime arrivals decreased sustainably.

Against this backdrop, a decisive question for European countries will be whether a similar deterrence can be achieved with much lower transfer rates. Italy plans to accommodate a maximum of 3,000 people in Albania at any given moment—much less than the number of arrivals per month during the summer (to increase the likelihood of 'success' may be one reason why the government has postponed the implementation of the scheme until the autumn when the number of arrivals decreases). The situation would have been similar under the British 'Rwanda plan'. The government has never said publicly how many asylum seekers it plans to transfer to Central Africa; the media reported about a few hundred – out of many thousand applicants via the Channel during the first months of this year.

In the case of the EU-Turkey Statement, several factors explained the substantial reduction in arrivals to Greece following the announcement of the safe third country scheme on 16 March 2016: closure of the Western Balkans route; better living conditions in Turkey; difficult situation on the Greek islands; end of the 'battle for Aleppo'; Turkish border controls; etc. The significance of contextual factors was reaffirmed by continuous low numbers of arrivals, once it became apparent that the Greek authorities were unable to transfer a substantial number of Syrians to Turkey for legal and practical reasons; the overwhelming majority remained in Greece. We shall learn what the practical effects of the British and Italian policies will be if they are

implemented in the coming months. These factual considerations come on top of the political and legal conditions.

ADMISSIBILITY PROCEDURES ON EUROPEAN SOIL

Whenever someone reaches the Schengen area and applies for asylum, Member State must respect the procedural safeguards laid down in the present Asylum Procedures Directive and new Asylum Procedures Regulation, which will apply from 12 June 2026 onwards. Their prescriptions authorise transfers to safe third countries only after an admissibility check on European soil, including the option of legal remedies. These procedural safeguards are a critical legal and administrative bottleneck for any safe third country scheme – as exemplified by the EU-Turkey Statement. The long duration of admissibility checks and legal oversight was one of several reasons why few Syrians were transferred back to Turkey. The Greek authorities took months to decide, as did the Greek courts which, moreover, annulled many transfer decisions on legal grounds.

Italy will have recourse to a legal 'backdoor' when implementing the 'Albania model', since the procedural safeguards in the EU's asylum legislation become applicable whenever someone makes an application for asylum 'at the border, in territorial waters or in transit zones' (here, Article 3(1)). Migrants and refugees rescued on the high seas cannot invoke these guarantees enshrined in EU legislation, meaning that 'only' fundamental rights apply (here, paras 238-242). Italy will not have to implement an admissibility check for the simple reason that it remains fully responsible for the treatment of asylum applicants in line with Article 1 ECHR, since its officials will exercise the effective control over the reception centres on Albanian soil. Italy will not, in other words, surrender effective control over the transferees to a third country. That rationale cannot be extended to safe third country schemes following the basic rationale of the British 'Rwanda plan'.

CONNECTION CRITERION: THE 'ANTI-RWANDA' RULE

When the Council reached its 'historic' compromise on the reform of asylum legislation in June 2023, the German government insisted on the 'connection criterion' according to which asylum seekers cannot be returned to a safe third country in the absence of a connection 'on the basis of which it would be reasonable for [the asylum seeker] to go to that country' (here, Article 59(5)(b)). At the bequest of the European Parliament, a non-binding opening clause for scenarios of transit was discarded at trilogue stage. The final wording is identical with the present Article 38(2)(a) of Directive 2013/32/EU which a CJEU had interpreted so that short-term transit was insufficient (here, paras 44-50).

It is unclear when transit turns into a 'connection' that makes return 'reasonable'. The Greek Council of State held a prior stay of 1.5 months in Turkey to be enough.

The connection criterion could be discontinued. UNHCR recommends it politically (here, No. 5), while recognising that it 'is not mandatory under international law' (here, No. 6). Its purpose has traditionally been to guarantee admission by the third state. This was not always the case in the early days of safe third country schemes when states refused asylum applications as being inadmissible on the basis of national laws without the guarantee of actual return. That risk does not exist under the new Asylum Procedures Regulation which, like the present Directive, only authorises the rejection of an application as inadmissible if a safe third country readmits the person (here, Articles 38(1)(b) and 59(9)). Whenever the transfer fails, a regular asylum procedure must be carried out on EU territory—as Advocate General Pikamäe has recently reaffirmed (here, points 59-64)

The alternative objective of the connection criterion, mentioned occasionally these days, to avoid secondary movements and to ensure local integration, is legitimate but cannot change the lack of binding legal force. The debate about whether it should be discontinued may soon resurface. The Commission report about 'targeted amendments' in the summer of 2025, mentioned previously, was the 'price' sceptical governments insisted upon to accept the German insistence on maintaining the connection criterion. In practice, it prevents any Rwanda-style cooperation without the prior amendment of EU legislation. The Italian 'Albania model' need not comply with the connection criterion, since it will only cover people rescued by state ships on the high seas where the Asylum Procedures Directive/Regulation does not apply, unlike in the territorial waters.

LEGAL REMEDIES IN- AND OUTSIDE BORDER PROCEDURES

Legal remedies guarantee that no transfer takes place without a domestic court having given its consent to an administrative decision rejecting an asylum application as inadmissible on the basis of a personal interview. A seemingly technical question concerns the nature of court intervention which can be either the preliminary injunction or the final judgment. This choice can have significant implications. Within Germany, a decision on interim remedies is taken within 40 days on statistical average, while the final judgment is being delivered after two years in asylum matters.

Against this backdrop, it is of great importance that the European Parliament rejected the Council negotiating position that interim legal protection was sufficient. The provisional right to remain until the final judgment remains fully intact for inadmissibility decisions based on the safe third country concept (here, Article 68(1), (3)(b), (4) does

not cover Art. 38(1)(b)). The only exception are border procedures. That prevents countries within the Schengen area from sending anyone to safe third countries quickly, whereas the actual transfer can take place after interim legal protection for inadmissibility decisions in the border procedure (Article 68(3)(a)(ii)). It can be compatible with the Charter to allow transfers after interim legal protection examining 'both facts and points of law' (Article 68(4)). That is exactly what the ambiguous reference to 'automatic suspensive effect' in ECtHR and CJEU case law requires (here, §§ 198-199; here, paras 51-53)

Note that asylum applicants covered by a safe third country arrangement may always be subject to border procedures (Article 44(1)(a)), even if they come from a country with high statistical recognition rates, such as Syria (Articles 44(1)(b), 42(1)(j)). We can expect the debate about 'targeted amendments' to re-examine the nature of judicial intervention and, possibly, the application of the border procedures within the Schengen area. After all, one may expect 'diversion effects' if, by way of example, applicants 'escaped' to Belgium when the Netherlands started operating a safe third country scheme. Diversion to the Western Balkans may possibly even be a hidden objective, or at least a side-effect, of the Italian 'Albania model' in case applicants can leave the reception centres de facto.

SITUATION IN THE THIRD STATE

Any safe third country scheme will usually proceed in three steps. First, governments participating in the scheme will negotiate the practical arrangements with the third state, either in the form of an international treaty or of a non-binding memorandum of understanding. That can be done by a single Member State or a 'coalition of the willing', possibly with the support of the EU institutions, for instance through the deployment of Frontex or the EU Asylum Agency. Secondly, the third state must be categorised as safe at national or European level, with both solutions having analogous practical effects (here, Articles 63 and 64). Finally, each asylum application must be assessed in accordance with the procedural requirements mentioned previously. Throughout these different steps, the level of safety a third state must provide is of paramount importance.

COMPREHENSIVE PROTECTION AGAINST REFOULEMENT

The prohibition of refoulement is the gold standard of international refugee law. It prohibits any transfer to states where someone would be persecuted or subject to grave human rights violations. It is beyond doubt that safe third countries have to provide comprehensive protection against illegal refoulement, including indirect 'chain refoulement' to another country that is not safe. EU legislation confirms that the level

of protection follows the wide European understanding of non-refoulement, including serious and individual harm during civil wars or, by way of example, gender-specific persecution by nonstate actors (here, Article 59(1)(a)–(c)).

Whenever a third state does not interpret the prohibition of refoulement accordingly, exceptions for specific categories of persons are warranted (Article 59(2)). A classic example is gay men in case of safe third countries on the African continent. A novelty of the new legislation is that there can be exceptions for 'specific parts of its territory', meaning that the insecurity of one region does not hinder the categorisation of the remainder of the country. By contrast, it appears to be insufficient, in light of the wording, that safety is guaranteed within a limited geographic area only, for instance in a reception centre or refugee camp.

The level of safety must be confirmed by reliable administrative practices, not the law in the books or the ratification of international treaties. The 'Rwanda judgment' of the UK Supreme Court is an exemplar demonstration of how such scrutiny should unfold. Judges prohibited all transfers to Rwanda in light of reliable international reports that the domestic asylum system was not effective: it had dealt with few cases, Syrians and Afghans had rarely received protection, and a safe third country deal with Israel had resulted in illegal refoulement (here, paras 74-97). It should be noted that status determination by the third state follows its domestic legislation, not the procedural safeguards in the Asylum Procedures Regulation. The only condition is that procedures are robust enough to ensure unconditional respect for the prohibition of refoulement by the third state.

In practice, these statutory safety requirements can prove challenging. Most countries in the global South, including on the Southern shore of the Mediterranean, have ratified the Refugee Convention and other international treaties but they have mostly not established robust administrative asylum systems. Status determination by UNHCR does not provide an unfettered guarantee of safety either. UNHCR delivers most valuable work under difficult conditions, but it cannot always and automatically guarantee the level of protection required under European human rights law (here, §§ 153-156; here, §§ 287-291). As a result, reliable asylum procedures in third states for a significant number of applicants presuppose active support by international actors. EUAA and Frontex may become active on the basis of their respective mandate (here, Articles 71-74; here, Article 35).

LIVING CONDITIONS IN ACCORDANCE WITH INTERNATIONAL LAW

In June 2017, the European Council had called upon the legislature, as we have seen, to lower the standards for socio-economic living conditions in safe third countries to international minimum requirements. That plea was followed through with determination. The legal background is the phased guarantee of socio-economic rights in the Refugee Convention. More specifically, we may distinguish rights requiring physical 'presence' (e.g. education and non-refoulement under Articles 22 and 33), 'lawful presence' (e.g. self-employment and freedom of movement under Articles 18 and 26), and 'lawful stay' or 'permanent residence' (e.g. employment, welfare, and social security under Articles 17(1), 23 and 24). While the first category is available during the asylum procedure, the third stage presupposes formal refugee status which states are, according to the habitual reading, not obliged to deliver qua international refugee law.

The implications of this graded approach are legally contested. State practice and the judgments of domestic courts on safe third country schemes indicate that safe third countries do not have to provide full access to the third stage (here, pp. 8-9, 18-22), although some academics claim such outcome is contrary to the spirit of the Refugee Convention (here; here). EU institutions sided with the former view, also considering that the precise meaning of international refugee law can remain ambiguous in the absence of an international court interpreting it authoritatively.

On that basis, the legislature introduced the generic notion of 'effective protection' in Article 57(1) Asylum Procedures Regulation (EU) 2024/1348. It will serve as the reference point for the legal and factual assessment of living conditions in safe third countries. Three crucial changes have been implemented in comparison to Article 38(1) Asylum Procedures Directive 2013/32/EU (for a detailed assessment, see here, pp. 49-54):

(1) an 'adequate standard of living with regard to the overall situation' shall include access to food, clothing, [and] housing or shelter' (Recital 51): this is more precise but also less demanding than the previous guarantee of equal treatment with nationals in terms of access to social benefits;

(2) access to healthcare and 'essential treatment' under the conditions generally provided for in that third country replaces the former guarantee of equal treatment with nationals of the third state;

(3) authorisation to remain on the territory, presumably in the form of a residence permit, for as long as there is a need for protection will supplant refugee status 'in accordance with' the Refugee Convention. That amendment answers the former dispute

whether formal ratification of the Refugee Convention without geographical limitation is mandatory under the former Article 38(1)(e) Asylum Procedures Directive. UNHCR highlights that ratification is 'desirable' but not mandatory; what matters is that protection against refoulement is available in law and in practice.

The only area where the notion of 'effective protection' is more generous than international minimum requirements is labour market access, which, according to Recital 51, must be given under the same conditions as for any other foreigner residing in the safe third country. There is a political rationale behind this guarantee the European Parliament had insisted upon. Labour market access upon completion of status determination guarantees that transferees can build a life of their own in the safe third country, as foreseen by the Global Compact on Refugees. EU legislation opts against the dystopia of the Australian 'Pacific Solution' which had left returnees detained in refugee camps on remote Pacific islands for years. Any safe third country scheme in accordance with the Asylum Procedures Regulation will have to sponsor local integration into host states.

CONCLUSION

References to 'smart' and 'new ways' in policy documents circulating in Brussels before the summer break indicate that the adoption of the New Pact will not put an end to forward-thinking initiatives. Safe third country schemes are poised to play a critical role in these debates. They might even, as we have seen, involve 'targeted amendments' of the new legislation as early as next year. Political controversies may start soon when the Commission President assigns the justice and home affairs portfolio to the future Commissioner and Vice President and when these two appointees are being grilled in the European Parliament's LIBE Committee before the approval of the college of Commissioners this autumn. These debates are likely to concentrate on whether there is a political desire to implement a safe third country scheme. If that was the case, the diplomatic, legal, administrative, and practical hurdles might prove challenging.

Disclaimer: The author has served as a witness in hearings of the German government on a potential realisation of the safe third country scheme in the run-up to the interim report presented in June 2024; in this broader context, he wrote an expert opinion on legal requirements for safe third countries in asylum law and practical implementation options.

14. EU Pact Instruments on Asylum and Minimum Human Rights Standards by Elspeth Guild and Vasiliki Apatzidou

EU law in the field of asylum and protection of refugees has undergone dramatic changes in the first quarter of 2024. The legislator has agreed a new set of EU instruments which cover all areas from arrival on the territory to reception, treatment of claims, rights of those in need of international protection and expulsion of those determined not to need it. Collectively, this set of new instruments constitutes the 3rd phase of the Common European Asylum System (CEAS) replacing the 2nd phase instruments adopted in 2013. Moving towards the implementation phase, EU States must ensure that their practices are consistent with human rights standards. This issue is the subject of a recent report by the Swedish Institute for European Policy Studies. We will not repeat its contents here. Our objective is to offer a concise yet insightful examination of four key areas in the new CEAS instruments which may have human rights implications: access to the territory, access to a fair procedure, detention and reception conditions including family reunification. The aim is to provide a broad understanding of these areas highlighting overarching human rights concerns.

Sources of Human Rights Protection

The new instruments straddle three different regimes of legal responsibility. The first is the state sovereignty claim to control its borders and determine those aliens who may enter. The EU instruments modify this exercise of state sovereignty by providing rules which are binding on the Member States. The form of these rules in EU law is now directly applicable regulations with the exception of the Reception Conditions Directive (RCD). These new instruments are all subject to and must be applied consistently with the EU Charter of Fundamental Rights.

The second regime is that of European human rights law. The European Convention on Human Rights (ECHR) is applicable to all EU states and incorporated into the TEU. The ECHR does not contain any provisions which explicitly mention refugees or asylum. However, through the jurisprudence of the ECtHR, many provisions are relevant to the reception and treatment of people seeking international protection, most importantly the principle of *non-refoulement* on which the other obligations are built. Further, at least one other Council of Europe convention ratified by the EU has been found by the EU's Court of Justice (ECJ) to be relevant to asylum applications.

The third regime is international refugee and human rights law contained in conventions adopted by the UN and ratified by the Member States and (in some cases) the EU. The Refugee Convention (and its protocol) are key among these instruments and referred to in the TFEU and the EU Charter. There are nine core human rights conventions in this

category (with many protocols) all of which are relevant to the treatment of people seeking international protection with two of them setting out an express *non-refoulement* requirement. The application of these conventions extends to all individuals within a state's jurisdiction or control.

Access to Territory

The standards that states must uphold concerning protection seekers' access to territory entail the obligation not to send individuals to places where they face grave risks such as persecution, torture, or other forms of inhuman treatment. This principle, known as *non-refoulement*, is widely recognised at the international, regional, and national levels. This means that every state which is a party to any of the conventions in which a *non-refoulement* duty is included (directly or indirectly) must carry out an assessment of the protection claim before taking action to remove the individual from its territory. This principle is not only foreseen in international law (customary international law and treaty law), but the ECtHR has many times relied on Articles 2 and 3 ECHR to find violations of this principle. Further, the EU Charter contains provisions which are relevant to *non-refoulement* (Articles 4, 18 and 19). However, the implementation of the new instruments may present significant challenges to this principle.

Primarily, the Screening Regulation although it describes a procedure which is not new as such, yet it brings a novelty which concerns the outcome of this procedure (mentioned as 'completion of the screening'). While identification procedures previously conducted in 'hotspots' in Greece and Italy primarily served to collect and register data of third-country nationals, under this Regulation, these procedures will also be used to determine whether they should be directed to asylum or return procedures. Additionally, the decision will specify which asylum procedure, regular or border, should be followed (Article 18 Screening Regulation). Consequently, the outcome of the screening process can impact individuals' rights and their protection from *refoulement*.

Despite its profound implications, the decision resulting from the screening process will be a 'screening form' rather than a formal administrative decision. According to Article 17 Screening Regulation, the information in the screening form shall be recorded in such a way that it is amenable to administrative and judicial review 'during any ensuing asylum or return procedure'. Hence, the 'screening form' should be incorporated in an administrative act to be subject to legal remedy. This approach may lead to a possible violation of the right to an effective remedy and subsequently to *refoulement*.

Further, uncertainty surrounds whether third-country nationals undergoing the screening process will have access to legal assistance, as these procedures will usually take place at external border locations and in detention. Legal assistance is crucial for

accurately recording their asylum claim and preventing *refoulement.* In the Regulation, there is no mention of legal assistance, only the right of organisations and persons providing advice to have access to third-country nationals during screening (Article 8 (6) Screening Regulation).

We appreciate the introduction of Article 3, emphasising compliance with relevant Union and international laws, including the principle of *non-refoulement* as well as the introduction of a monitoring mechanism regarding compliance of screening procedures with fundamental rights (Article 10 Screening Regulation). However, compliance with these minimum standards may in practice prove challenging due to the 'non-entry' fiction maintained in the final text (Article 6 Screening Regulation), which means that third-country nationals physically present in the territory will be treated as 'not-entered', justifying diminished procedural protections and preventing access to the full set of rights associated with legal entry.

Access to the Asylum Procedure

Ensuring protection from *refoulement* hinges on granting asylum-seekers timely access to quality asylum procedures. Like access to territory, access to the asylum procedure is an essential condition for effective refugee and human rights protection. The right to access to a procedure is implicit in the prohibition of *refoulement*. Although refugee status is declaratory, protection from *refoulement* requires a procedure to determine whether there is a risk of persecution or other ill-treatment in the country of return. Procedural rules are inherent to substantive rights, hence this part delves into the critical aspects of the asylum procedure, exploring how the new regulations may pose challenges to the right to access asylum.

Firstly, states have an obligation to promptly register asylum claims by recording applicants' personal details and reasons for their claims and to treat them as 'asylum seekers' from the moment they express their intention to apply for asylum. However, the Screening Regulation requires that access to registration and asylum procedures is contingent upon the completion of the screening process, which should ideally be finalised within 7 days. At least, Article 4 of the Regulation clarifies that third-country nationals who have made an application for international protection during screening are still entitled to certain rights. Specifically, the registration of their asylum application follows the rules laid out in Article 27 of Regulation (EU) 2024/1348 (Asylum Procedures Regulation), and the application of reception conditions is governed by Article 3 of Directive (EU) 2024/1346 (Reception Conditions Directive). Consequently, while individuals undergoing screening are not immediately classified as 'asylum seekers', certain protections under asylum law still apply during the screening process.

Even if individuals manage to access the asylum system post-screening, they may be directed to asylum border procedures, which offer lower procedural guarantees. Border procedures are mainstreamed in the new Asylum Procedures Regulation (APR) and even become obligatory in some cases (Articles 45 APR). The most problematic issue is the third criterion which mandates the use of border procedure based on the recognition rates of countries of origin. Both accelerated (Article 42 APR) and border procedures become mandatory for asylum-seekers coming from countries of origin with a recognition rate of 20% or lower, according to the latest available Eurostat data. This nationality-based criterion influences the extent of procedural rights accorded to applicants which may seriously impact the principle of non-discrimination.

Additionally, the APR extends the concept of 'safe third country', which can be decided on the basis of a national list, EU list or no list at all (Articles 59-60 APR). Applicants coming from 'safe countries' will usually have to undergo accelerated, border, and inadmissibility procedures which are super-fast sub-standard procedures which hinder access to quality asylum procedures, efficient determination of the claim and protection from *refoulement.* Moreover, asylum-seekers in border procedures are subject to the 'non-entry' fiction, further legitimising exceptions from procedural protections.

For instance, access to legal assistance may be restricted in accelerated and border procedures due to the locations where these procedures take place (detention or *de facto* detention). While the European Parliament advocated for expanded legal aid, Member States insisted on providing only free legal counselling for the administrative procedure (Article 16 APR), while free legal representation will be available only at the stage of the appeal.

Moreover, ensuring access to asylum procedures entails considering applicants with special procedural needs, as vulnerabilities may affect an individual's ability to participate in the asylum process. While the Screening Regulation mandates a vulnerability check, its completion within 7 days, especially during mass arrivals, remains uncertain. Even if identified as vulnerable, applicants may still be subject to border procedures, as vulnerability does not exempt them from these procedures (Article 53 APR).

Also, in case of rejection, applicants should have the right to an appeal. However, in accelerated and border procedures, the lack of sufficient time to prepare and lodge an appeal negates the guarantee to an effective remedy, particularly for asylum-seekers whose rejection decisions do not grant suspensive effect (Article 68 APR).

Finally, the diminished standards of border procedures may apply to applicants from countries of origin with a recognition rate of 50% or lower in cases of 'crisis' (Article 11

(4) Crisis Regulation). In situations of 'instrumentalisation', *all* applications may be subjected to border procedures (Article 11(6) Crisis Regulation). Consequently, access to asylum and a proper procedure may be seriously compromised in such situations.

Detention

The agreed instruments introduce provisions allowing for detention or movement restrictions for applicants for international protection at various stages of the asylum procedure, raising significant concerns about their compliance with international standards on detention and freedom of movement. The new provisions must be interpreted in accordance with international obligations and EU primary law.

It is essential to note the general presumption against detention in international law, where detention is permissible only under strictly defined circumstances (e.g. in Article 9(1) of the International Covenant on Civil and Political Rights). For detention to be non-arbitrary, it must be lawful, pursue a legitimate aim, and be necessary, reasonable, and proportionate. Similar to international law, EU primary law also mandates that detention must be proportionate and necessary according to the ECJ. The ECtHR has also many times ruled on border crossing and detention under Article 5 (1) (f). In the case-law of the ECtHR, the principles of necessity and proportionality are compromised when detention is imposed to prevent unauthorised entry. However, such decisions (Ilias Ahmed v Hungary and Saadi v UK) must also be implemented consistently with UN principles and guidelines, and the jurisprudence of the Human Rights Committee(HRC).

The RCD regulates detention and movement restrictions in the new Pact. While Article 10 outlines reasons for detention, many of which are already present in the current Directive, particularly troubling is the legitimisation of movement restrictions within the new framework. The practice of allocating asylum seekers to specific geographical areas or restricting their movement to designated places (Articles 8 and 9 RCD), poses serious questions about the true intent behind such measures. Despite being framed as necessary for efficient asylum processing or prevention of absconding, these restrictions may effectively amount to *de facto* detention. This is especially problematic when coupled with the conditionality of receiving material reception conditions only if one remains in the designated area.

Moreover, the emphasis on the establishment of a 'pre-entry phase' at the external borders exacerbates concerns, as border procedures often take place in detention or *de facto* detention settings. The legislation's vagueness regarding the location where border procedures may occur and the lack of clarity on necessary accommodation for asylum seekers during these procedures suggest that *de facto* detention may become a routine practice mainly due to the 'non-entry' fiction as asylum seekers in border

procedures should be prevented from (legally) entering the territory. This means that restriction on the freedom of movement may be automatically imposed in the context of border procedures based on a generic rule, without an individual assessment (Article 9 RCD). Additionally, the RCD explicitly allows detention in the context of border procedures (Article 10 (4) d RCD). However, in such cases, detention cannot be imposed automatically and a necessity and proportionality assessment should always be conducted.

Similar concerns arise in the Screening Regulation, where it is mentioned that states are 'required to apply measures [..] to prevent the persons concerned from entering the territory during the screening' effectively leading to a form of detention or at least a restriction on the freedom of movement. Additionally, return border procedures include a specific provision on detention (Article 5), justifying detention for individuals rejected in the context of a border procedure.

Further, the Crisis Regulation allows for the extension of the registration period, the asylum border procedures (Articles 10, 11 Crisis Regulation) and the return border procedures (Article 6 Return Border Procedures Regulation) which also may result in longer periods of deprivation of liberty or movement restrictions in cases of mass arrivals or 'instrumentalisation'.

These provisions raise concerns about potential violations of personal liberty under international human rights frameworks, as there is a notable lack of clarity within the Pact regarding the distinction between detention and constraints on freedom of movement. To ensure compliance, decisions on non-entry policies must explicitly delineate whether they constitute detention or limitations on movement, supported by individual assessments and necessity and proportionality justifications. Additionally, administrative decisions should undergo judicial review, granting the judiciary authority to assess legality and potentially overturn administrative decisions.

Reception Conditions including family reunification

There are two key standards regarding reception conditions for those seeking international protection in the ECHR and international human rights conventions. The first is that the treatment of any person under the control or jurisdiction of a state must not constitute torture, inhuman or degrading treatment. Where those seeking international protection are not permitted to work to fulfil their needs, and when there are restrictions on their liberty, states must ensure for them conditions of reception which do not fall below this standard. This includes accommodation, living conditions, access to clean water and nutritious food, health care and the identification and protection of those who are in situations of vulnerability.

The second standard is that of non-discrimination on prohibited grounds in the access to goods and services, including social benefits. This standard has been the subject of increasing scrutiny by the Committee on Economic, Social and Cultural Rights (See General Comment 20). Both standards may also include issues of family reunification.

The revisions made to the RCD include a new Article 7 on organisation of reception conditions. This provision leaves substantial leeway to Member States on how to deliver reception. It permits many limitations on reception and possible conditions which may be placed on those seeking international protection. Further, it specifically states that state actions do not require the adoption of an administrative decision (thereby preventing appeals). Article 17 requires States to allow asylum seekers access to the labour market at least six months after their claims. However, the provision permits states to exclude equal treatment in social security benefits (Article 17(6)) which may not be compatible with international standards.

Articles 19 and 22 relate to health care and set out how States may choose to provide healthcare. But this includes ways which are discriminatory against those seeking international protection in comparison with the own nationals of the state. The General Comments of the (UN) Committee on Economic, Social and Cultural Rights require the principle of non-discrimination to be respected. This does not mean that in all cases aliens and citizens must be treated in the same manner, but any difference of treatment must be necessary, proportionate and justified to be consistent with the ICESCR. The interpretation of the ECHR by the ECtHR adopts a similar approach, but also accepts that there may be circumstances where the situations of aliens and citizens are so different that they are not comparable. The CJEU has adopted a similar approach. It should be noted that the differences in approach between the ESC Committee, the ECtHR and the CJEU do not mean that states are free to choose which regime they approve. Where they have, through ratification of a treaty, consented to be bound, they must comply with all the obligations as separate and cumulative commitments.

Articles 20 and 21 relate to material reception conditions. The power to provide differential reception conditions to those seeking international protection whose applications will be considered in the state where they are resident and those who (in theory) will have their applications dealt with in another Member State is problematic. This appears to constitute discrimination on grounds which may not be consistent with international standards. In the case of withdrawal of reception conditions for failures on the part of the individual, the directive specifically references the need to comply with international human rights standards. It would be advisable for States to use this requirement across the board in considering the level of reception conditions, not merely decision on withdrawal.

Article 27 deals with the situations of unaccompanied minors and the question of age assessments. It is a sad truth that there are examples of Member States making erroneous age assessments which result in the classification of minors as adults resulting in the immediate loss of the specific benefits designed to protect children. State implementation of this provision must take into account international standards on age assessments.

Article 2(3) defines family members as including only those persons who were family members before the asylum seeker arrived on the territory of the Member State. The class is limited to spouses and unmarried partners (where permitted under national law) and minors or dependent children, who must be unmarried. For unaccompanied minors, the definition includes only parents or responsible adults which can include siblings. This definition is then applied to the provision of reception conditions for families. While there is no single definition of a family in international law, a number of Treaty Bodies have addressed the issue preferring a flexible meaning to respect the dignity of the people involved whose legal and cultural obligations to relatives. But the principle of non-discrimination with own nationals has been a useful tool in assisting to determine these relationships and the extent to which states protect them. In many Member States adult children are legally responsible for the welfare of their parents. As this standard of family duty is applicable to nationals it may be wise also to reflect this in the treatment of family unity for those seeking international protection.

Conclusions

In this blog we have highlighted some of what we see as the key issues regarding EU and Member States obligations to all persons under their control (or jurisdiction) which arise as in the context of the new CEAS instruments. We do not claim that this is a definitive analysis of every issue which may arise, like state officials, we are sometimes surprised by the issues which arise before the supra and international courts and their interpretations. Our purpose here is to examine some of the issues which have received substantial attention or which we have identified as problematic. We recommend that Member States take great care when establishing their practices under the new instruments to ensure that each one is compliant with all three regimes applicable to the treatment of those seeking international protection.

SESSION 5: ASYLUM PROCEDURES

15. Harmonisation of types of asylum procedures: new Regulation, old dilemmas by Jens Vedsted-Hansen

In light of the tremendous aspirations for the future of harmonisation of EU Member States' asylum procedures when the process of reforming the Common European Asylum System was launched, it seems indispensable to examine whether and how the Asylum Procedure Regulation (EU) 2024/xx now adopted by the EU co-legislators is likely to fulfil the aims underlying the initial proposal for a Regulation. In the following, we shall attempt to elucidate the degree of harmonisation achieved with the new Regulation. Particular attention will be paid to the 'special procedures' according to Section IV of Chapter III of the Regulation which concerns the administrative procedure.

Thus, it will be considered whether harmonisation of this stage of the asylum procedure is likely to increase to the level of 'full convergence' as initially intended by the Commission. Under the Regulation, 'special procedures' encompass the application of the asylum border procedure, the accelerated examination procedure as well as the processing of subsequent applications. Admissibility decisions may be taken as part of the asylum border procedure, and the concepts of 'first country of asylum' and 'safe third country' as well as the novel 'notion of effective protection' (separately dealt with in the adjacent Section V of Chapter III of the Regulation) are going to provide the basis for a significant part of the decisions rejecting applications as inadmissible.

The rules governing these specific procedural devices and concepts call for attention in order to understand the degree of future EU harmonisation of asylum procedures. Is the scope of 'special procedures' going to be expanded to the detriment of harmonisation? To which extent will the application of such procedures, in particular the asylum border procedure, become mandatory? Can Member States be expected to apply the accelerated examination procedure more coherently? As we shall see, while the Asylum Procedure Regulation introduces new mandatory rules, they may not necessarily result in full and effective harmonisation as they will in some instances become modified in practice due to various aspects of Member States' procedural autonomy.

Evolving aspirations for harmonisation

Let us first recapitulate the rationale of the various approaches to harmonisation of the standards on asylum procedures as they evolved during the preparation of the reform of the Common European Asylum System. When launching the initial proposal for a

Regulation establishing a common procedure for international protection in the EU (Asylum Procedure Regulation) in July 2016, the Commission presented its aim to 'establish a truly common procedure for international protection which is efficient, fair and balanced' (here, p. 3). By choosing the form of a Regulation that would be directly applicable in Member States, and by removing elements of discretion as well as 'simplifying, streamlining and consolidating procedural arrangements', the proposal allegedly aimed at achieving a *higher degree of harmonisation* and *greater uniformity in the outcome* of asylum procedures across all Member States, thereby removing incentives for asylum shopping and secondary movements (here, pp. 3-4).

According to the Commission, a solid, coherent and integrated Common European Asylum System was to be based on common, harmonised rules that are both effective and protective, fully in line with the Geneva Convention. Thus, the reformed system would become 'designed to ensure full convergence between the national asylum systems, decreasing incentives for secondary movements, strengthening mutual trust between Member States and leading overall to a well-functioning Dublin system' (here, p. 3).

It should be recalled that some of the aspirations for harmonisation, and at least some of the mechanisms devised to implement them, were evolving in the Amended proposal for an Asylum Procedure Regulation (here) that was tabled by the Commission as part of the legislative package accompanying the New Pact on Migration and Asylum in September 2020 (here) and the subsequent negotiations on the proposal. This development had particular impact on the question of mandatory versus or optional application of border procedures which turned out to be rather controversial.

Asylum border procedure – mandatory rules, uncertain harmonisation

While border procedures on the admissibility and/or the substance of asylum applications are optional under the Asylum Procedures Directive 2013/32/EU (here, Article 43), and the Commission would retain the optional border procedure in its 2016 proposal for an Asylum Procedure Regulation (here, Article 41), the Council was divided as to whether the border procedure should become mandatory, based on a variety of practical and more principled concerns.

The Member States favouring an obligation to apply the border procedure considered it important as a *migration management tool*, in particular towards asylum applicants from countries of origin with low recognition rates, since examination at the border was expected to increase chances of direct return from the external border upon negative asylum decisions. Sceptical Member States pointed to challenges in applying the border

procedure, such as difficulties in fast allocation of applications to examination in the border procedure, the need to keep applicants at the border during the procedure, problems in connection with appeal procedures, as well as concerns relating to the need for investments and resources for infrastructure, staff and equipment for examining asylum cases at the border (see here, p. 9).
In the light of this divide among Member States, the Commission seemed in the 2020 amended proposal for an Asylum Procedure Regulation to aim at a compromise: the asylum border procedure would remain optional as the point of departure, but examination in the border procedure of significant categories of asylum applications would become mandatory, partly reflecting certain Member States' focus on applications with *low recognition rates* as mentioned above (here, Article 41(1)-(3)). Thus, the asylum border procedure should become mandatory for applications being subject to accelerated examination due to the applicant's misleading the authorities with regard to his or her identity or nationality, the applicant being considered a danger to national security or public order, as well as applications falling under the new acceleration ground based on an average recognition rate at 20% or lower (here, Article 41(3) and Article 40(1)(i), taken together with the 2016 proposal here, Article 40(1)(c) and (f)).

The adopted Asylum Procedure Regulation has largely followed this approach: *mandatory* asylum border procedure for the abovementioned three types of cases, and *optional* border procedure for the rest (here, Article 45(1) taken together with Article 42(1)(c), (f) and (j), and Articles 43(1) and 44(1), respectively). It is therefore to be expected that significant numbers of applications will have to be examined in the asylum border procedure, yet the size and composition of the caseload is likely to vary as a function of fluctuations between the three types of cases subject to the mandatory border procedure. Should the number of misleading or dangerous applicants or of those with an average recognition rate at 20% or lower decline at any point in time, thus bringing fewer applications within the scope of the mandatory asylum border procedure, then it might trigger Member States' exercise of their procedural autonomy by referring additional types of cases to the asylum border procedure according to the optional provision in Article 44 of the Regulation.

Against this background, it is rather difficult to predict the extent to which the asylum border procedure will be applied in practice according to the mandatory rules in Article 45 of the Asylum Procedure Regulation. Insofar as existing capacity for examination in the asylum border procedure should become vacant, it may instead be used for the processing of other types of cases under the optional Article 44. In sum, it seems somewhat uncertain whether the total use of the asylum border procedure will actually converge across Member States on the basis of a combination of the mandatory and the

optional rules in the Regulation, in line with the Commission's initial intentions in the 2016 proposal for an Asylum Procedure Regulation (here, pp. 3-4).

Procedural autonomy and 'adequate capacity' – distorting harmonisation?

The uncertain degree of harmonisation of the asylum border procedure may ultimately be compensated by other legislative measures under the New Pact. First, Member States will be required to carry out *pre-entry screening* of asylum applicants at the external borders of the EU or in transit zones, as well as of other third country nationals if they are apprehended in connection with an irregular crossing of the external border, according to the new Screening Regulation (EU) 2024/xx (here, Article 3) which will be examined by Lyra Jakuleviciene in a separate post on this blog. At the opposite end of the examination procedure, decisions rejecting asylum applications in the context of the asylum border procedure will have to be enforced in the mandatory *return border procedure* as stipulated in the Return Border Procedure Regulation (EU) 2024/xx (here, Article 4, to be discussed by Madalina Moraru in a future post).

Considering the totality of mandatory rules which Member States will be required to apply under the three Regulations on pre-screening, asylum procedure and the return border procedure, respectively, there is therefore a significant probability that the legislative measures accompanying the New Pact will altogether result in enhanced harmonisation of the various types of border procedures affecting asylum applicants. Nonetheless, as argued elsewhere, pre-screening of asylum applicants at the external borders might in the practice of some Member States become *de facto* merged with, or at least inseparable from, examination in the asylum border procedure and eventually removal under the return border procedure (here, pp. 171-73, and here, p. 102, see also here, recital 57 of the Asylum Procedure Regulation). Here again the combination of mandatory rules and Member States' procedural autonomy may distort the actual degree of harmonisation of procedural arrangements, potentially driven by national policy incentives to introduce restrictive control measures that may deviate from the aim of EU convergence while at the same time risk undermining procedural guarantees for applicants.

The uncertainty regarding the actual use of the asylum border procedure, as pointed out above, may ultimately become reinforced by non-normative factors resulting from a novelty that was inserted into the Asylum Procedure Regulation during the negotiations. Important limits on Member States' obligation to apply the asylum border procedure, regardless of its formally mandatory nature, were adopted during the trilogue negotiations of the Regulation by way of the introduction of *quantitative criteria* based on the notion of 'adequate capacity'. In regulatory terms such criteria seem to sit

ill in a legislative instrument concerning the legal principles, rights and obligations of Member States and asylum applicants. Technicalities of the calculation of the 'adequate capacity' for each Member State, as well as the maximum number of applications to be examined in the asylum border procedure per year by each Member State according to the Regulation (here, Article 47(1) and (4)) shall not be accounted for in this context. Neither will the procedure for Member State notification of the Commission of having reached its 'adequate capacity' target or the annual maximum number of applications to be examined in the border procedure, nor the impact of such notifications (here, Articles 47(2)-(3) and 48-50) be described or analysed.

However, two significant consequences of applying such non-normative factors have to be emphasised. First, the quantitative 'adequate capacity' and annual maximum thresholds are of a substantively different nature than the normative rules governing the optional and mandatory use of the asylum border procedure. This kind of difference may arguably in principle result in weakening the degree of regulatory harmonisation. Second, the fact that Member States will, according to these quantitative criteria, be under the obligation to establish administrative and logistical capacity to examine a certain number of asylum applications at the external border may well in itself create incentives in favour of using that capacity irrespective of the qualitative criteria and principles – either under EU law or national law – that are supposed to govern allocation of applications to the asylum border procedure, especially if the allocation is based on the optional rules in the Asylum Procedure Regulation.

Examination of cases in the accelerated procedure

The asylum border procedure is closely connected to the accelerated examination procedure provided for in the Asylum Procedure Regulation in two particular respects: The merits of an asylum application *may*, with just a couple of exceptions, be examined in the asylum border procedure if it falls within the scope of the accelerated procedure (here, Article 44(1)(b) taken together with Article 42(1)(a)-(g), (j) and (3)(b)). And Member States *shall* apply the asylum border procedure in the abovementioned three categories of cases that are subject to examination in the accelerated procedure, i.e. the applicant's misleading the authorities with regard to his or her identity or nationality, the applicant being considered a danger to national security or public order, and applications falling under the acceleration ground based on an average recognition rate at 20% or lower (here, Article 45(1) taken together with Article 42(1)(c), (f) and (j)).

While Member States have quite wide discretion in applying the asylum border procedure, as discussed above, this is not the case for the accelerated examination procedure. Contrary to the current Asylum Procedures Directive under which both

prioritisation and acceleration of the examination are optional (here, Article 31(7) and (8)), the future Asylum Procedure Regulation stipulates that Member States are required to apply the accelerated examination procedure for all asylum applications falling within the *mandatory list* of ten grounds for acceleration, except in cases concerning unaccompanied minor applicants for whom the accelerated procedure is optional and applicable only on five of those grounds (here, Article 42(1) and (3)).

Among the acceleration grounds, the one based on *average recognition rates* is probably the most significant and controversial novelty. According to this provision, the accelerated examination procedure applies to applicants of a nationality for which the proportion of decisions granting international protection, based on the latest available annual EU-wide average Eurostat data, is 20% or lower, unless a significant change has occurred in the country of origin since the publication of the data, or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs (here, Article 42(1)(j)). As argued in connection with the amended proposal for an Asylum Procedure Regulation (here, pp. 72-74, and here, pp. 103 and 105-6), such a ground for accelerating the examination procedure may appear disproportionate and even somewhat arbitrary, not least given the already existing acceleration ground based on the concept of 'safe country of origin' (here, Articles 36-37) which is retained in the future Regulation (here, Articles 61-64).

The insistence on mandatory application of the accelerated asylum border procedure based on average recognition rates seems to reflect the co-legislators' strong focus on the migration management aspects of the Asylum Procedure Regulation. It was apparently considered less relevant that the exception from the average rule for certain categories of persons, based on assessment of their individual protection needs, will be difficult to apply meaningfully within the confines of accelerated examinations and in the context of the asylum border procedure. Thus, notwithstanding the accompanying reference to both 'swift' and 'fair' procedures for all applicants (here, recital 56), the new acceleration ground is a basis for concern in terms of managerial effectiveness as well as individual protection. It also cannot be disregarded that the average recognition rate resulting in application of the asylum border procedure may be increased to 50% in situations of crisis, albeit on the basis of an optional derogation provision (here, Article 11(4) and recital 47, to be discussed by Meltem Ineli Ciger in a future post). Nonetheless, regardless of these concerns, the introduction of a mandatory acceleration ground based on average recognition rates is a clear step towards harmonisation of the asylum procedure.

At the same time, however, the Asylum Procedure Regulation retains Member States' option to *prioritise* the examination of certain asylum applications with a view to examining them before others, as opposed to accelerated examination. The Regulation mentions examples of cases in which this may be deemed relevant, emphasising that this is a matter of flexibility (here, Article 34(5) and recital 44). As a remarkable difference from the current Directive which refers only to well-founded applications, vulnerable applicants and persons in need of special procedural guarantees (here, Article 31(7)), the future Regulation includes further examples of prioritisation expressly relating to Member State interests, such as applicants reasonably considered as a danger to national security or public order, and subsequent applications (here, Article 34(5)(c) and (d)).

Admissibility decisions and 'safe country' concepts

Although decisions on the admissibility of asylum applications are not formally taken in 'special procedures' under the Asylum Procedure Regulation, they are in reality an intrinsic part of such procedures given the fact that inadmissibility decisions may be, and are normally, taken in the framework of the asylum border procedure. In addition, some of the most important inadmissibility grounds are based on criteria which have to be applied in accordance with the 'safe country' concepts laid down in Section V of Chapter III of the Regulation.

Both the scope and the content of mandatory 'safe country' rules has been changing during the negotiations on reform of the Common European Asylum System. The Commission's initial proposal for an Asylum Procedure Regulation would make the inadmissibility decisions as well as the underlying concepts of 'first country of asylum' and 'safe third country' mandatory, as opposed to the current Asylum Procedures Directive (here, Articles 36, 44(1) and (2), 45(1)-(3) and 46, cf. here, Articles 33(2), 35 and 38). The adopted Regulation seems to reflect a compromise insofar as inadmissibility decisions are in principle optional, and application of the asylum border procedure to such decisions is also a matter of Member States' discretion (here, Articles 38(1) and 44(1)(a)) . By contrast, the general notion of 'effective protection' is formulated in mandatory terms. Since this notion will to a significant degree govern inadmissibility decisions based on the 'first country of asylum' and 'safe third country' concepts (here, Articles 57, 58(1)(a) and 59(1)(d)), the regulatory basis for such decisions can be characterised as a kind of hybrid between optional and mandatory standards.

The definition of the concept of *safe third country* was particularly controversial during the negotiations, and future application of this concept under the new Regulation may well give rise to legal challenges of its compatibility with the UN Refugee Convention

and the EU Charter of Fundamental Rights. While this concept will be subject to a separate post on this blog, one specific element of the definition has to be noted in order to illustrate the degree of harmonisation of this inadmissibility ground. Reflecting the policy interests of certain Member States in abandoning the existing requirement of a connection between the individual applicant and the third country concerned (here, Article 38(2)(a) and (c)), there were proposals to change this requirement into an optional rule and leave it with Member States to decide whether and how transfers to 'safe third countries' should be contingent on the applicant's connection to the relevant third country.

The adopted Regulation has retained the *connection requirement* as a mandatory rule, yet apparently lowering the threshold for a requisite connection to be considered established (here, Article 59(5)(b) and recital 48). Importantly, however, as part of the evaluation stipulated in the Regulation, the Commission shall by one year from the date of its entry into force review the concept of 'safe third country' and shall, where appropriate, propose any targeted amendments (here, Article 77 *in fine*). The outcome of this review and potential future amendment of the concept may not only further expand the scope of this inadmissibility ground, but at the same time reduce the degree of harmonisation of the asylum procedure in terms of Member States' possibility to adopt diverging policies and practices on 'safe third countries'.

16. The Asylum Procedure Regulation and the Erosion of Refugee's Rights by Vincent Chetail and Mariana Ferolla Vallandro do Valle

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The images of boats packed with people arriving on the shores of Europe has fixed public imagination and continues to frame the political debate. According to the rumor spread by mass media and politicians, there is an invasion of 'economic migrants' who are abusing asylum procedures to enter into the EU territory irregularly. Although this rhetoric is all but true, it represents the main premise of the Pact on Migration and Asylum. A complicated array of regulations and directives has been adopted in April 2024 to address the 'increased pressure resulting from the arrivals of mixed flows with a high proportion of those with low chances of receiving international protection'.

Following this stance, the official purpose of the Asylum Procedure Regulation (APR), as proclaimed in its preamble, is 'to streamline, simplify and harmonise the procedural arrangements of the Member States by establishing a common procedure for international protection in the Union". Whether the new Regulation has achieved this threefold objective remains disputable (see the contributions of Jens Vedsted-Hansen and of Philippe De Bruycker in this blog series). One thing is sure, however: asylum procedures essentially serve as a tool of migration control at the expense of refugee's rigths (for a similar account of the previous APR's drafts, see here, here, here, and here).

This strategy is not new and has long been documented (see e.g. here, here, here, and here). Nonetheless, the APR is exacerbating it at an unprecedented scale. Despite many warnings from the UN Special Rapporteurs, the UNHCR and civil society organizations during the drafting of the Regulation, its final text maintains most of its criticized provisions as well as its focus on migration management as an integral component of asylum procedures.

This blog post argues that the procedural devices introduced by the new Regulation jeopardise the right to seek asylum and the principle of *non-refoulement*. Summary rejection of asylum claims has become the new normal through the generalization of accelerated and border procedures. Despite a core common of procedural guarantees, the double standard between these special procedures and the ordinary one exacerbates the risk of illegal *refoulement*.

The new normal: summary rejection of asylum applications

The expanded use of the border procedure represents the most striking characteristic of the APR, alongside the banalization of inadmissible grounds and accelerated procedure. When they are combined with the new rules governing detention and return of asylum seekers, the overall machinery constitutes a powerful tool of rejection in the hands of Member States.

Border procedure

Border procedures will become the rule for the vast majority of asylum seekers in Europe. In essence, the APR takes the 'hotspot approach' used in Greece and Italy and transforms it from an ad hoc and exceptional mechanism into the principle to be followed across the EU. This creates significant prejudice to how asylum seekers' rights are perceived and applied in practice by national authorities (see, e.g., here, here, and here).

Border procedures have a broad scope of application and strong consequences for asylum seekers. Curiously, this procedure is not limited to applications made at an external border or in a transit zone. It may also apply to anyone who is apprehended for having crossed an external border irregularly, even if this person is actually far from the border, as well as to those who arrive in a Member State through a search and rescue operation (art. 43).

Although the APR distinguishes mandatory grounds from optional ones (art. 45), it is likely that most Member States will use both of them on a systematic basis to process asylum applications more quickly. To make this a reality, the Regulation mandates Member States to create 30'000 places for border processing at the EU level. The Commission is to determine the allocation of that capacity for each Member State, with the numbers that each Member State is obliged to assess in a border procedure rising to a total of 120,000 annually by 2028 (see arts. 46-50 and here). These caps give Member States further flexibility in deciding to what extent they wish to rely on border procedures according to their own interests.

Following the typical logic of migration control, most applicants are supposed to be detained and, if not, they shall reside at or in proximity to the external border or transit zones, or in other locations designated by the Member State (art. 54(1)). This containment at the border relies on the fiction of non-entry: asylum seekers are physically within the territory, but not legally authorized to enter the territory. This

fiction has no grounding on international human rights law and refugee law, which remain plainly applicable, even if the likelihood of violation is obviously amplified with such formalistic distinction between physical presence and legal entry.

When applying border procedures, Member States may decide on the inadmissibility of applications, in accordance with Article 38, and on the merits of an application in most situations where accelerated procedures must be applied (art. 45(1)). This means that, in a number of cases, asylum applications may be rejected at the border, without giving the applicant a chance to effectively enter the Member State.

Automatic denial of protection

Whether submitted at the border or not, asylum applications may be rejected as being considered inadmissible in several circumstances listed in Article 38, including on the very controversial ground of safe third country. This notion is defined in a very broad way to allow a widespread usage which is not compatible with international law, for asylum seekers could even be sent in non-state parties to the Geneva Convention (art. 59; for further discussions see the contribution of Daniel Thym in this series and also here and here).

Furthermore, an application shall not be examined on the merits where an application is explicitly or implicitly withdrawn (art. 39(c)). In particular, an application is implicitly withdrawn in cases involving lack of cooperation from the asylum seeker in providing information to the Member State's authorities or if the asylum seeker fails to lodge an application or attend a personal interview without good cause (art. 41). Denying protection on such elusive grounds, without assessing whether the person is or not a refugee, is a blatant violation of the Geneva Convention, for the lack of cooperation or the failure to attend an interview have nothing to do about the fear of being persecuted in the country of origin.

Furthermore, many asylum seekers do not receive adequate and clear information on how to apply for international protection and conduct themselves in the proceedings, an issue that still generates controversy within the European human rights framework. The APR grants a wide margin of discretion to national authorities in this regard and heightens the risk that applications will be considered as implicitly withdrawn when, in fact, the applicant may not have received enough assistance to understand what was required of them during the proceedings.

Accelerated procedures

The greatest change the APR introduces is to make accelerated procedures mandatory in a broad variety of cases listed in Article 42. These include vague and subjective situations in which applicants are deemed to have only raised issues that are not relevant to the examination of the asylum claim, made false and contradictory allegations, or intentionally misled the authorities. The implicit logic in these provisions is that, in such situations, the applicant has a lower likelihood of being a *bona fide* asylum seeker, and thus their application can be examined more quickly, as it will probably lead to a rejection.

The same presumption of rejection applies when the applicant has not made an application as soon as possible after entering the Member State's territory and, more generally, when they are a national of a so-called 'safe country of origin' or a country for which the proportion of decisions granting international protection EU-wide is 20% or lower. This last scenario is a novelty of the APR, and one of its most problematic additions. It creates a bias against applicants from such countries without any evidence of its rationale, for recognition rates per country of origin vary widely among Member States.

Both in pith and substance, summary rejections of asylum applications remain a central objective of the Pact through the generalization of special procedures and the introduction of vague and disputable notions, leaving a considerable margin of discretion to Member States. This increases the risk of *refoulement* in violation of international law; a risk which is all but virtual, given that the common procedural guarantees are not free from ambiguities and allow derogations in case of border and accelerated procedures.

The common core of procedural guarantees in the APR

The APR sets out some procedural guarantees that are applicable to the examination of all applications for protection made within Member States (art. 2(1)), regardless of the specific procedure followed. While endorsing important standards of protection, the APR has significant shortcomings about applicants' access to information and assistance, which are particularly worrying in the case of accelerated and border procedures.

Information

The provision of information about how to apply for international protection and how this procedure is carried out is crucial to asylum seekers. The APR mandates Member States to provide this information, including in detention facilities and border crossing points (art. 30(1)). In the administrative procedure, the APR, following the trend

established in previous EU directives (e.g. art. 5(2) of Directive 2013/33/EU), requires applicants to be informed 'in a language which they understand *or are reasonably supposed to understand*' (art. 8(2)). This alternative formulation creates serious risks that insufficient efforts will be taken to ensure that the applicant has effectively understood the information, thus hindering their access to international protection, as pointed out by the UNHCR (p. 44, 51) and the ECRE (p. 17-18).

Moreover, during the appeals procedure, the applicant shall be informed of the decision on the application only when they are not assisted by a legal adviser (art. 36(3)-(4)). The assumption here seems to be that the legal adviser will pass on the relevant information and explain its consequences to the applicant, so that having only the legal adviser understand the decision is enough to ensure procedural fairness. Practice, however, once again challenges this assumption, as legal advisers in the field of asylum frequently have difficulties communicating with their clients, be it due to language barriers or difficulties in contacting them.

Assistance during the procedure

Another significant difference between the administrative and the appeals procedure concerns precisely the extent of applicants' access to legal advice. Member States shall provide free legal assistance and representation only during the appeals procedure (art. 15(2)), whereas, for the administrative procedure, only legal counselling is provided for free. Hence, applicants have to rely on NGOs and lawyers offering *pro bono* services or forego legal assistance and representation during the administrative procedure, making the preparation of their asylum claim and the navigation through the procedure even more difficult.

The APR further allows Member States to exclude free legal aid in several circumstances, including when an application in the administrative procedure is a first subsequent application lodged in order to delay or frustrate the enforcement of a return decision (art. 16(3)), or when the appeal is considered to be abusive or to have no tangible prospect of success (art. 17(3)). These grounds are subjective and gives national authorities an important leeway for withdrawing free legal aid.

By contrast, interpretation services and access to UNHCR are more widely recognized. The APR requires free interpretation services for the purposes of registering and lodging an application and for the applicant's personal interview (art. 8(3)). Interpretation shall also be provided for hearings at the appeals procedure, if necessary to ensure appropriate communication (art. 67(4)).

Furthermore, UNHCR shall have access to applicants, regardless of whether they are in reception centres, detention, at the border, or in transit zones (art. 6(1)(a)). Subject to applicants' consent, the UN agency shall have access to information on individual applications and decisions taken on them (art. 6(1)(b)). The UNHCR must also be allowed to present its views on individual applications to competent authorities at any stage of the asylum procedure (art. 6(1)(c)). Nonetheless, the APR does not establish an obligation for domestic authorities to take the UNHCR's views into consideration or, at least, to respond to them.

Opportunities to be heard

To ensure that applicants will have the opportunity to be heard and present elements to substantiate their claims, the APR establishes different kinds of personal interviews during the asylum procedure. The applicant has the right to an admissibility interview before the competent authority decides on the inadmissibility of the application (art. 11) and to a substantive interview before a decision is taken on the merits (art. 12). The presence of the applicant's legal adviser shall be ensured in both cases (art. 14(4)). Another important guarantee is that all interviews are recorded and transcribed, and applicants have the opportunity to review the transcripts, make comments, and provide clarification (art. 14(3)).

These interviews may be omitted in the scenarios listed under Article 13(11), including in two new and disputable circumstances: where the national authority considers the application inadmissible on the basis of the available evidence and, in the case of a subsequent application, where the preliminary examination is done on the basis of a written statement. This grants considerable discretion in rejecting applications without hearing the applicant and raises issues of procedural fairness and biased assessments by the authorities.

Effective remedies

Decisions taken at the administrative procedure may be appealed before a domestic court or tribunal in accordance with Article 67 of the APR. The examination of the appeal must include 'a full and *ex nunc* examination of both facts and points of law' (art. 67(3)). As a general rule, appeals are endowed with suspensive effect for as long as the applicant has a right to remain in the Member State's territory (art. 68(1)). There are, however, exceptions to this rule, as will be seen below.

Special procedures and the regime of double standards

With the new Regulation, the border and accelerated procedures will not only become the rule for the vast majority of asylum seekers; they also derogate from the ordinary asylum procedure on two main aspects: the requirement of very short – and in fact unworkable – time-limits and the adoption of ambiguous rules governing suspensive effect of appeal.

Time-limits

Under the regular asylum procedure, applicants have 21 days from the registration of their application to lodge their application, provided the applicant is given an effective opportunity to do so, usually through an appointment with the competent authority (art. 28(1), (3)). In border procedures, however, the application must be lodged within only five days from the registration (art. 51 (1))—that is, less than a quarter of the time available in regular procedures.

The entire border procedure must be completed as quickly as possible and no later than 12 weeks from the registration of the application, or 16 weeks in case of transfer to another Member State (art. 51(2)). Although the APR expresses that border procedures should still enable 'a complete and fair examination of the claims' (art. 51(2)), it is difficult to see how Member States will be able to ensure that, since, as pointed out by Daniel Thym, many already struggle to complete the procedure within the six months required by current EU law. While the APR does not establish specific time-limits during accelerated procedures, it is likely that Member States will adopt short ones as well, similar to those of border procedures, thus transposing these difficulties to a wider variety of cases.

Such short time-limits compromise the applicant's ability to prepare and present an application with as much chance of success as it could have. After all, they do not give adequate time for the applicant and their legal adviser to communicate effectively and decide how to organize the claim, or even for the applicant to find a legal adviser in case none is provided. This is particularly the case for applicants who might have difficulties talking about their past experiences and protection needs because of their trauma. Similarly, the shortened timeframes make it difficult for the UNHCR to evaluate the applicant's situation and meaningfully assist them as well. Interestingly, in *I.M. v. France* (§144), the European Court of Human Rights (ECtHR) considered that the time-limit of five days to lodge an asylum application, along with difficulties in accessing interpretation services, offered insufficient procedural protection against *refoulement* and was contrary to Articles 3 and 13 of the European Convention on Human Rights (ECHR).

Further reduction of time-limits is seen at the appeals procedure. In principle, Member States must give applicants a minimum of two weeks and a maximum of one month to lodge appeals (art. 67(7)(b)). Nonetheless, the appeal must be lodged within five to 10 days where the application has been processed under the accelerated procedure and rejected as inadmissible, implicitly withdrawn, unfounded, or manifestly unfounded (art. 67(7)(a)). Given the APR's expansion of the circumstances to which inadmissibility decisions and accelerated procedures apply, these short time-limits will become the rule here as well, hindering the adequate preparation of appeals.

Suspensive effect

Another typical drawback of the APR concerns the suspensive effect of appeals. Under Article 68(2), applicants shall have the right to remain on the Member State's territory until the time-limit for appeals has expired and, where an appeal has been lodged, while the outcome of the remedy is pending. However, Article 68(3) excludes suspensive effect in cases where the application was examined under the accelerated procedure or rejected: as inadmissible under Articles 38(1)(a), (d), (e), and 38(2); as implicitly withdrawn; as an unfounded or manifestly unfounded subsequent application.

Although the APR states that this is without prejudice to the observance of the *non-refoulement* principle and that a court may allow the applicant to remain in the Member State even in these cases, the presumption of exclusion of suspensive effect remains, leaving it up to the applicant to prove that the protection from *refoulement* applies to their case. The lawfulness of such logic is dubious, as the ECtHR has repeatedly held that an effective remedy against ill-treatment in cases of *refoulement* must include automatic suspensive effect (e.g., *Gebremedhin*, §66; *M.K.*, §143-144).

Some concluding remarks: border control at the expense of protection

The gap has never been so huge between law and practice at the external borders of the EU than since the last decade. As highlighted above, the new Regulation may transform this gap into a gulf at the expense of refugee' rights. Despite setting out an array of common procedural guarantees based on human rights law, the APR grants national authorities a broad discretion and allows for many exceptions and special procedures. When all these changes are taken as a whole, the asylum procedure is losing its *raison d'être*: it is becoming a tool of exclusion rather than a means for identifying those who are in need of protection from persecution and armed conflict.

17. The maze of legal support in the New Pact on Migration and Asylum by Barbara Mikołajczyk

Introduction

Third-country nationals (TCNs) arriving at the borders of the European Union and seeking international protection may well be unfamiliar with the language, culture, customs and, above all, the law. Therefore, accessible information, legal counselling, assistance, representation and exemptions from fees and costs (in general, legal support) are *sine qua non* conditions for the enjoyment of the human right to asylum and access to justice. The sources for providing legal support for asylum seekers are embedded in Article 16 of the 1951 Convention Relating to the Status of Refugees and the international human rights law. The Geneva Convention guarantees refugees equal treatment with nationals in matters of court access. However, given that recognising refugee status is a declaratory act (UNHCR Handbook, 28), migrants seeking international protection should also enjoy this right. The Geneva Convention does not mention asylum procedures or administrative procedures, which precede the court stage and are of principal importance on the way to international protection.

Meanwhile, the efficiency and fairness of asylum procedures depend, to a large extent, on the legal support provided to migrants. Moreover, there is no doubt that the adoption of guarantees in this regard directly impacts compliance with the principle of *non-refoulement*. The importance of access to legal advisors and legal assistance for asylum seekers was stressed by the European Court of Human Rights considering the right to an effective remedy (Article 13 of the European Convention on Human Rights) in the context of collective expulsions, Dublin procedures, accelerated procedures, and push-backs, for example in *M.S.S. v. Belgium and Greece*, *Hirsi Jamaa and Others v. Italy*, *Sharifi and Others v. Italy and Greece*, *Khlaifia and Others v. Italy*, *Asady and Others v. Slovakia*, *M.K. and Others v. Poland*, *D.A. and Others v. Poland*, *S.H. v. Malta*. In *M.S.S. v. Belgium and Greece*, the Court held, among other things, that the lack of free assistance and shortage of legal advisors constituted an obstacle to a remedy and fell within the scope of Article 13, particularly for asylum seekers (sec.301).

In turn, the Court of Justice of the European Union (CJEU), in the *DEB* case, considering the personal scope of the right to an effective remedy and to a fair trial contained in Article 47 of the Charter of Fundamental Rights, stressed that this provision "provides specifically that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice" (sec. 31). Thus, "those" means every individual and legal person in need.

Moreover, access to and effectiveness of legal support in asylum procedures may also be analysed in the light of the right to good administration (Article 41 of the Charter), as in the H.N. case, especially since the New Pact on Migration and Asylum introduced the provisions on legal counselling in the "administrative procedure."

The instruments adopted in December 2023 as part of the New Pact on Migration and Asylum contain provisions on legal support at various stages of applying for international protection. Since 2016, they have been evolving constantly through negotiations and criticism from NGOs, including ECRE/ELENA. Significant and surprising changes were introduced on the final straight of talks, most notably in the Asylum Procedures Regulation (EU) 2024/1348.

The provisions for free legal counselling in the administrative procedure are a novelty that deserves special attention. At first sight, the introduced changes increase the chances of TCNs applying for international protection. However, many ambiguities and loopholes in the proposed instruments are worth identifying. This poses quite a challenge, as the provisions on legal support are scattered across the many instruments that comprise the New Pact on Migration and Asylum, making it difficult to determine the standard of legal support for third-country nationals.

Considerations of legal support cannot be limited solely to the Asylum Procedures Regulation (EU) 2024/1348. The number of steps preceding the substantive examination of an application depends on how and where a TCN crossed the border. If the person does not meet the entry conditions, they will be subject to the procedure established in the Screening Regulation (EU) 2024/1352. If the TCN does not apply for protection or the outcome of the screening procedure is not favourable for the applicant, they will be subject to a procedure under the Return Directive 2008/115/EC or the Return Border Procedure Regulation (EU) 2024/1349. Meanwhile, the successful submission of an application triggers the procedure determining the Member State responsible for processing the application under the Asylum and Migration Management Regulation (EU) 2024/1351. Finally, the Member State responsible verifies an application in merits. However, it should be noted that if TCNs arrive in the EU due to events identified by the Crisis and Force Majeure Regulation (EU) 2024/1359, they may never have the chance to benefit from many procedural guarantees set out in the Asylum Procedures Regulation (EU) 2024/1348.

- *At the border*

The Screening Regulation (EU) 2024/1352 addresses the issue of legal support in a very limited and indirect way. Third-country nationals subject to the screening are informed,

among other things, about the right to apply for international protection, the applicable rules and obligations when cooperating with the relevant authorities and the consequences of non-compliance laid down in the Asylum and Migration Management Regulation (EU) 2024/1351. According to Articles 8 [6] and 11 [1c], organisations and individuals providing advice and consultation should access TCNs effectively during the screening. "Legal" advice or counselling is not indicated here but is not excluded. However, Member States may impose restrictions on such access where, under national law, they are objectively necessary not only for reasons of public security and public order but also for the administrative management of the border crossing point or the screening facility. It is worth noting that the Crisis and Force Majeure Regulation (EU) 2024/1359 copies these solutions. Moreover, it allows the Member States to apply derogations from relevant rules on the asylum procedure. Thus, this restrictive approach puts any legal support in question.

According to the Screening Regulation (EU) 2024/1352, access may not be severely restricted or prevented, but the "administrative management" concept allows for a rather broad interpretation. A kind of security brake on human rights violations at borders, including effective claims for protection, is the introduction of fundamental rights monitoring by ombudspersons, national human rights institutions and National Preventive Mechanisms. However, it is difficult to identify the direct impact of this monitoring on providing a particular person with legal aid, as the finding of violations may occur after the third-country national has already been returned.

Chapter IV on detention for removal does not mention any form of legal counselling or assistance in such cases. It only provides that the detained TCNs should be systematically provided with information on their situation, including their entitlement to contact the organisations and bodies under national law. The relevant NGOs and other bodies can access the detention centres, though such visits may be subject to authorisation.

The Return Border Procedure Regulation (EU) 2024/1349 is also very modest in this area. It refers to several Return Directive 2008/115/EC provisions. However, it does not indicate Article 13 [3 – 4], which is crucial for obtaining free legal assistance and representation allocated on request. The Regulation refers only to Article 16 of the Return Directive 2008/115/EC, allowing for contact with legal representatives upon request and in due time, which in the border circumstances can be difficult.

- *In the procedure for determining the Member State responsible*

The next stage experienced by a third-country national on the path to international protection is the Dublin procedure for determining the state responsible for processing their application. Compared to the Dublin III Regulation, the Asylum and Migration Management Regulation (EU) 2024/1351 contains much more detailed provisions for obtaining legal support. According to Article 21, the applicant must be informed of the right to free legal counselling and assistance, and the conditions involved. At all stages of determining the Member State responsible, applicants have the right to consult a legal adviser or other counsellor. They may choose a legal adviser or counsellor at their own expense or request free legal counselling provided by legal advisers or other counsellors admitted or permitted under national law to advise, assist or represent them or by non-governmental organisations accredited under national law. Subsequent provisions indicate a great deal of latitude for states to shape the system of legal counselling in the procedure determining the Member State responsible. The Member States' primary obligation is to establish detailed procedural rules on the forms of submitting and processing requests for free legal counselling and, at further stages, free legal assistance and representation. However, counselling may or may not be provided by a lawyer. A designated immigration officer may also become a counsellor and serve several people simultaneously. In practice, the concept of an "other counsellor" acting in "several" cases may be interpreted differently in different countries, which raises the question of the quality and independence of counselling.

Article 21[6] defines the scope of free counselling, which includes guidance and explanations of information that an applicant should provide in order to help establish the Member State responsible, the applicants' rights and obligations, the criteria applied in this procedure, and assistance in completing the relevant documents.

In turn, the notion of "legal assistance" appears only at the last stage of this procedure, when an applicant wants to challenge the decision on the transfer to the Member State responsible. Legal assistance includes at least preparing the required procedural documents. Meanwhile, legal representation comprises at least representation before a court or tribunal and may be limited to legal advisers or counsellors specifically designated by national law to provide legal assistance and representation. Free legal assistance and representation in appeal proceedings are also possible.

However, Member States may introduce limits regarding exemptions from fees and other costs and may provide that free legal assistance and representation will not be granted if the competent authority, court or tribunal considers that an appeal or a remedy has no realistic prospect of success

- *In the asylum procedure (finally!)*

The most significant changes in terms of "legal support" have been introduced at the next stage of the application for international protection, regulated by the Asylum Procedures Regulation (EU) 2024/1348. This proclaims, in the preamble, that access to legal counselling, assistance, and representation should be an integral part of the common procedure for granting international protection. The regulation mainly modifies the pre-court stage (the first instance) of the asylum procedure.

At the pre-court stage, the Asylum Procedures Directive 2013/32/EU only requires states to provide, upon request, free legal and procedural information, including at least information on the procedure and an explanation of how to challenge a negative decision (Article 19). Certainly, the applicants may also contact their legal adviser or NGOs. The directive also gives Member States a relatively large degree of discretion in fulfilling their obligation to inform applicants.

Meanwhile, Articles 16 – 20 of the Asylum Procedures Regulation (EU) 2024/1348 establish that, in addition to the right of access to any legal support at one's own expense, applicants should: 1) receive information on the possibility of applying for free counselling, assistance, and representation, 2) have access upon request to free legal counselling in administrative procedure (the former first instance) 3) have access, upon request, to legal assistance and representation in the appeal procedure.
The regulation also assumes the "possibility" for Member States to provide free legal assistance and representation at the administrative stage according to their national law.

Member States may organise all the legal support under their national systems, so the national solutions may differ, but the regulation sets out the minimum requirements for free legal counselling. It should at least include guidance and explanations on the administrative procedure, including information on rights and obligations during the procedure, as well as assistance in submitting an application. In addition, it should cover guidance on the various procedures and rules related to admissibility and legal issues arising during the procedure, including information on how to challenge a decision rejecting an application. The changes introduced are therefore quite significant, as free legal counselling goes well beyond the legal information envisaged in the Asylum Procedures Directive 2013/32/EU.

By contrast, there are no such considerable changes at the appeal stage. Free legal assistance and representation in appeal proceedings must be provided upon the applicant's request. It only needs to be provided at the first level of the appeal procedure. However, the list of grounds for excluding the provision of free legal assistance and representation in appeal proceedings has been extended. In addition to

the grounds of exclusion due to having sufficient resources for legal assistance and representation and having no tangible prospect of success in the appeal, the ground of abuse of an appeal has been added.

The Asylum Procedures Regulation (EU) 2024/1348 also sets out the possibilities of access to applicants held in detention, at borders and in transit zones. Access cannot be severely restricted or rendered impossible, but it may be subject to prior agreement with the relevant authorities and be limited due to issues of security, public order or administrative management of a border crossing point, transit zones and detention facilities. In addition, concerning access to information and documents by legal counsels/advisors, the regulation relies heavily on national law solutions for refusing access to sources and information and expands the list of grounds for denial of access to information and sources deemed classified under national law.

The (future) Asylum Procedures Regulation (EU) 2024/1348 pays much more attention than the (current/former) Directive 2013/32/EU to those who can provide legal counselling, assistance and representation. According to Article 21 of the directive, free information can be provided by NGOs or specialised state services. In the appeal procedure, anyone admitted or permitted under national law may provide free legal assistance and representation. Under their national law, states may also allow non-governmental organisations to do so. All of these entities should be qualified, but states have much discretion in determining this (EASO 2018, 97).

Meanwhile, under the Asylum Procedures Regulation (EU) 2024/1348, legal counselling may be given in administrative procedure by a "person entrusted with counselling" (recital 14, Articles, 12 [1] and 18 [3]). Thus, it may also be a designated staff member of the authority processing the application counselling several persons simultaneously. However, according to Article 19, in the case of assistance and representation, there is no longer just a "person" admitted or permitted under national law to provide legal services, but a "legal adviser" or "counsellor." It can also be assumed that states should verify such a person's competence/experience when accrediting NGOs. Thus, from the perspective of the qualifications of legal support providers, the standard of free legal assistance and representation has been raised.

Regarding legal support providers, the (future) Reception Conditions Directive (EU) 2024/1346 differs from the regulations in that it prohibits any conflicts of interest in the provision of free legal aid and representation. It can, therefore, be assumed that legal advisers or "other suitably qualified persons" should be independent of reception centres. This is important as the directive regulates access to free legal assistance and

representation in appeals against the reception centre staff's decision on the withdrawal or reduction of social welfare benefits.

Conclusion

The above review does not, of course, address all the nuances of providing legal support to TCNs seeking international protection offered by the various instruments of the New Pact on Migration and Asylum. However, despite its limitations, the review does lead to several conclusions.

The Pact's instruments invoke the Geneva Convention Relating to Refugee Status and the European Convention on Human Rights. They declare full respect for human dignity and the application of the Charter of Fundamental Rights (including Article 47). Obviously, this is essential from the perspective of the protection of human rights, but the instruments do not provide clear guidance on how, in the context of legal support, the right to seek asylum, the asylum seekers' right to court, and prohibition of *refoulement* are to be achieved.

The complex structure of the whole new system does not facilitate access to legal counselling, assistance and representation, especially in countries on the EU's external borders. The proliferation of sub-entities responsible for screening, registering, receiving and considering applications complicates applying for legal support and, consequently, for international protection. The effectiveness of legal support will depend on the capacity (e.g. in emergencies), management and goodwill of states, and this may vary. For example, the adopted model is unlikely to prevent the Hungarian government's policy of penalising civil society organisations for assisting asylum seekers (see Commission v Hungary C-821/19).

Differences in the level of legal support for applicants, access by NGOs and legal advisors to applicants in closed zones and access to information and materials can, therefore, still be expected to persist. However, it will be a long time before the new asylum system, with its entire infrastructure, becomes operational and its effectiveness, including in terms of legal support, can be assessed.

A review of the various instruments shows that the more steps TCNs go through in their search for protection, the more likely they will receive free legal support of a broader scope and better quality. The weakest support is guaranteed in the first contact with the immigration services, yet it is crucial for the subsequent stages of applying for protection. At the borders and closed zones, they can count on the information provided by officials representing the immigration services. The provisions referring to

counselling by a "person entrusted with counselling" without a guarantee of independence, should be discussed in depth. This problem arises not only at the European level but also at the national level. An example of this can be found in the judgment of the Austrian Constitutional Court, which ruled in December 2023 that the independence of legal counselling for asylum seekers and foreigners should be sufficiently legally secured to protect the right to an effective legal remedy.
On the other hand, compared to the Directive 2013/32, the Asylum Procedures Regulation (EU) 2024/1348 undoubtedly raises the standard of legal support by replacing information with "legal counselling" and by imposing higher requirements on providers of free legal assistance and representation.

The introduction of an "administrative procedure" (instead of the first instance) also seems to be aimed at unifying and improving the quality of this procedure. Moreover, "administrative procedure" makes it easier to distinguish the procedure aiming at the substantive examination of an application for international protection from the other procedures set out in the other instruments of the New Pact on Migration and Asylum. On the other hand, leaving a lot of discretion to Member States in this respect may make this change illusory, at least in the context of legal support. It is well known that national asylum/migration procedures are usually administrative procedures of a specific nature anyway. Meanwhile, the general administrative procedural laws of Member States vary widely and often do not provide any free legal aid at the pre-court stage. Certainly, such legal support is advocated internationally, including by the Committee of Ministers of the Council of Europe. The introduction of free legal counselling in "administrative procedure" may seem on the surface to privilege TCNs. However, it should be rather perceived as a legitimate compensation measure that at least approaches the requirement of equality of arms and, above all, may contribute to the protection against *refoulement*.

SESSION 6: TOOLS FOR CONTROL

18. The Transformation of Eurodac from an Asylum Tool into an Immigration Database by Niovi Vavoula

1. Introduction

Eurodac (European Asylum Dactyloscopy Database) is the EU-wide, large-scale IT system (database), initially designed to assist in the implementation of the Dublin system for the determination of the Member State responsible for examining an application for international protection. It is then an important, yet relatively under-researched, tool of the Common European Asylum System (CEAS). At the same time, it forms part of a complex network of centralised and soon-to-be interoperable EU/Schengen IT systems along with the Schengen Information System (SIS), the Visa Information System (VIS), the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS) and the European Criminal Record Information System for Third-Country Nationals (ECRIS-TCN). As such, Eurodac sits on two stools: on the one hand, it follows the pathway of the rest of the CEAS instruments, and on the other hand, it belongs to an ever-growing family of centralised databases in the field of migration, asylum, and border management.

This blog post provides a concise overview of the main changes in the revamped Eurodac under the newly adopted Regulation (EU) 2024/1358 (revised Eurodac Regulation), part of the New Pact on Asylum and Migration instruments, and critically appraises the relevant fundamental rights concerns. In its first part, the blog post outlines Eurodac's currently applicable rules (Part II), followed by a synopsis of the revised rules that will apply as of 2026 (Part III). Finally, Part IV analyses key fundamental rights issues stemming from the reconfiguration of Eurodac following the adoption of the recast Eurodac Regulation.

2. Eurodac as the Sidekick of the Dublin System

Eurodac is intrinsically linked to the operation of the Dublin system to track onward movements of asylum seekers from the Member State of first irregular entry to further Member States in the EU. According to Regulation (EU) 603/2013, the current legal basis of Eurodac, Member States must collect the fingerprints of every applicant for international protection over the age of 14, which are then compared with fingerprints collected and stored by other participating countries to Eurodac (that is, EU Member States, as well as Dublin Associated States) (Category 1). If a Eurodac check reveals that fingerprints have already been recorded in another Member State (a 'hit' in the

technical jargon), the latter Member State could be requested to 'take back' or 'take charge' of the asylum applicant on the basis of Dublin rules.

Member States must also collect the fingerprints of all third-country nationals apprehended in connection with an irregular border crossing, to be compared against fingerprints subsequently collected from applicants for international protection (Category 2). As for third-country nationals found illegally staying on a Member State national territory (Category 3), their fingerprints *may* be collected and checked against Eurodac records to determine whether they have previously applied for international protection in another Member State. In practice, however, neither are Member States obliged to undertake the procedure, nor would that data have to be stored within the system. Overall, this process of biometric tracking can settle whether asylum seekers belong, territorially and jurisdictionally, to the place they physically find themselves. According to latest report on the functioning of Eurodac, adopted by eu-LISA, the EU agency responsible for the operational management of large-scale IT systems, including Eurodac, in 2023, 1,776,914 fingerprint data sets were transmitted to the Eurodac Central System, of which 1,024,923 were recorded in Category 1 (asylum applications), representing 58% of the total. A further 447,745 data sets (25% of the total) were recorded in Category 3 (third-country nationals found to be staying irregularly) and 302,137 data sets (17% of total) were recorded in Category 2 (irregular crossings). However, during the so-called refugee crisis of 2015-2016, several participating states, such as Greece and Croatia, became overwhelmed with the obligation of fingerprinting those that arrived at the external borders and failed to comply with their Eurodac obligations (also see here), due to infrastructure deficiencies or unwillingness of state authorities to take responsibility.

Apart from a full set of fingerprints, Eurodac stores limited information on the sex of asylum seekers and irregular border crossers, the date of registration and transmission of fingerprints, and the Member State of origin. Each dataset on asylum applicants is stored for ten years. If, in the meantime, an asylum seeker is recognised as a refugee or beneficiary of subsidiary protection, the data are 'marked', which means that in the record it is indicated that the person concerned is a beneficiary of international protection, and the fingerprints may be accessed for law enforcement purposes for three years, before they are 'blocked' until their erasure. As regards records of irregular border-crossers, the retention period is 18 months. Regulation 603/2013 allows law enforcement authorities and Europol to consult, under specific conditions, Eurodac fingerprints for the purpose of preventing, detecting and investigating terrorist offences and other serious crimes. Transfers of Eurodac data to third countries are prohibited, except in the context of law enforcement, but even then they are prohibited if there is a serious risk that as a result of such transfer the data subject may be subjected to

torture, inhuman and degrading treatment or punishment or any other violation of their fundamental rights.

3. The Transformation of Eurodac into an Immigration Database

In 2016, the Commission adopted a proposal revising the Eurodac rules as part of a broader reform of the CEAS. Nonetheless, the Commission proposal also aimed at supporting the EU's return policy, essentially detaching the database from its asylum roots and repackaging it as a tool for wider immigration purposes. The negotiations on the 2016 proposal led to an interinstitutional agreement between the co-legislators, but no formal adoption of the new rules took place pending agreement on other CEAS proposals, primarily the Dublin IV Regulation proposal. In 2020, the Commission proposed further amendments, in the framework of the New Pact on Migration and Asylum, on which a basis agreement was reached in December 2023 (for an analysis see here, here and here). Regrettably both proposals only provided targeted amendments to Eurodac rather than fully recasting the instrument, thus making it particularly difficult to track the changes. In addition, the interinstitutional agreement remained secret for years, further exacerbating the opacity of how the revamped Eurodac would operate.

Regulation (EU) 2024/1358 combines the amendments stemming from the two proposals and the main changes can be summarised as follows. Eurodac acquires new functions relating to assisting in returning irregular migrants; selecting persons for admission and resettlement; protecting children; supporting other systems; and, becoming a primary pool of information for compilation of statistical data to enable evidence-based policy making. This is reflected in Article 1(1) of the Eurodac Regulation, which lists no less than 10 purposes. Eurodac is expanded both *qualitatively* and *quantitatively* with a view to better tackling irregular movements and monitoring the paths of asylum seekers and irregular migrants.

To those ends, the personal scope of the Regulation is extended, and the minimum age for fingerprinting is lowered to six years old (Article 14). Personal data on persons who are found irregularly present will be mandatorily centrally stored (not merely used for consultation), as well as data on beneficiaries of temporary protection (excluding Ukrainian nationals – Recital 10) from 2029 onwards will be collected. In addition, the database will comprise the data of persons registered for conducting an admission procedure under the EU resettlement and humanitarian admission framework (Articles 18-19) or national resettlement schemes (Articles 20-21). Individuals who are disembarked following a search and rescue (SAR) operation are distinguished from other groups of asylum applicants or irregular migrants, which means that they will be recorded in Eurodac under a separate category primarily to allow for precise statistical

data and evidence-based policy making (Article 24). All datasets registered in respect of the same individual will be linked together (Article 3(6)) to avoid the 'double counting' that currently occurs. Moreover, Eurodac data will be used in an anonymised to generate various types of statistical data for example, how many individuals have applied for international protection, how many have been subject to a SAR operation including cross-system statistical data (e.g. asylum seekers who had first applied for a visa via the VIS, that will be used for more evidence-based policy making (Article 12).

On top of a full set of fingerprints, Member States will be obliged to capture a facial image (thus a second type of biometric data) and many more categories of personal data, such as various biographical data and copies of travel or identity documents to assist in identification and issuance of travel documents for returning irregular migrants. In addition, Member States must record whether, following security checks in accordance with the Screening Regulation, a person could pose a threat to a country's internal security, if they are armed, violent, or there are indications that the person is involved in terrorist activity or serious crime (Articles 17(2)(i), 22(3)(d), 23(3)(e) and 23(3)(f)), a so-called security flag. The retention period of records on irregular border-crossers and irregular migrants is raised to five years. The retention period in respect of personal data of individuals on an admission procedure will vary, depending on the data, between three and five years. For beneficiaries of temporary protection, the retention period is one year, renewable (Article 29). In addition, transfers of Eurodac data to third countries are permitted for the purpose of identifying and re-documenting irregular migrants in the process of return and readmission.

The conditions of law enforcement access are significantly simplified. Firstly, intelligence services, which were excluded from being designated to request comparisons of fingerprints with Eurodac, can now be designated at national level to consult Eurodac (Article 5). Secondly, the requirement of national databases and the Automated Fingerprint Identification Systems of the other Member States is side-lined (Article 33). This is primarily due to the interoperability framework, which streamlines law enforcement access by allowing authorities to conduct a first check to all EU IT systems to determine whether information exists in any database without the need to fulfill any conditions of access (see here). Finally, the data on beneficiaries of international protection will be available for law enforcement purposes until their erasure, therefore not for three years only (Article 31).

The additional registration requirements are coupled with additional fundamental rights references (e.g. Articles 1(2) and 13(2)). However, administrative measures to ensure compliance with the obligation to provide biometric data can be imposed in accordance with national law and these must be effective, proportionate, and dissuasive and may include the possibility to use means of coercion as a last resort (Article 13(3)). An

exception for vulnerable people due to the condition of their fingertips or face is foreseen (Article 13(4)). Article 14 provides special rules regarding children prescribing a 'child-friendly' and 'child-sensitive' registration of biometric data 'in full respect of the best interests of the child', which involves an adult in recording the biometric data (family member, representative).

Finally, the right to information is reinforced by requiring that more extensive information is to be provided to individuals subject to Eurodac, in writing and, where necessary, orally, in a 'concise, transparent, intelligible and easily accessible form, using clear and plain language' (Article 42(1)). Additional safeguards are included in relation to children, whose right to information will be safeguarded in an age-appropriate manner (Article 42(2)).

4. Examining why the Transformation of Eurodac Is Disproportionate

Eurodac rules have long raised significant concerns regarding their compatibility with various fundamental rights, particularly the rights to private life (Article 7 of the Charter of Fundamental Rights) and protection of personal data (Article 8 of the Charter of Fundamental Rights). The growing transformation of Eurodac from an administrative tool in support of the Dublin system to a law enforcement tool and now to a multi-functional database exemplifies the growing trend of blurring the distinction between policy areas in the area of freedom, security, and justice, and notably: asylum, migration, police cooperation, internal security, and criminal justice (see here and here). This blurring is particularly evident in the watering down of the conditions of access under the new rules, which disregards the specificities of Eurodac as a system containing data on asylum seekers and embraces the assimilation of the different groups of third-country nationals, all of whom are considered to present a security risk.

The lowering of the fingerprinting age has been justified as a means to assist in the identification of minors who are separated from their families, or who abscond from care institutions or from child social services. Whereas the protection of children did not feature in the objectives of Eurodac in the 2016 Commission proposal, the revised Eurodac Regulation explicitly includes this aim. Notwithstanding the existence of several safeguards regarding the processing of personal data of children, the coercion of minors to capture their biometric data is not fully proscribed, and the reliability of biometric data of minors is questioned, in light of the long retention period during which a person's appearance may significantly change.

Furthermore, the increased categories of personal data collected, and particularly the cumulative effect of comparing a facial image along with fingerprints, will result in higher levels of accuracy. Nonetheless, this comes at the price of deeper surveillance of

applicants of international protection and irregular migrants, worsening the negative connotations of criminality generated by fingerprinting, and deepens the feeling that the movement of these individuals is monitored. This is particularly the case considering that the identification through facial images will rely on facial recognition technology and Artificial Intelligence (AI) (see here). Besides, more categories of personal data may actually exacerbate the existing data quality problems of Eurodac (for example, see here and here). Experience from SIS and VIS demonstrates that the storage of many categories of personal data in records has been coupled with longstanding data quality issues (see here and here). In addition, national authorities already arbitrarily miscategorise third-country nationals, for example, as applicants of international protection instead of individuals apprehended in connection to irregular border crossing (see here) and the addition of many more categories of individuals falling within the scope of Eurodac may increase the risk of miscategorisation.

A category of personal data which is particularly worrying from a data protection standpoint is the addition of information regarding whether an individual poses a security threat. In particular, it is unclear what information will be included in Eurodac in relation to a person posing a threat to EU internal security. This may range from a simple 'tick box' process, to a free text input system where a national authority can add as much information as it wishes. As a result, this data field lacks clarity and precision and breaches the principle of data accuracy of data protection law (Article 5(1)(d) of the EU General Data Protection Regulation). It could also have a lasting effect on individuals as the security flag may be used for rejecting applications for international protection.

Furthermore, challenges regarding the right to human dignity and the possibility of individuals being detained during the fingerprinting process have been raised. Asylum seekers who flee persecution, may not feel comfortable registering their fingerprints for various reasons, for example because they may have had traumatic experiences with providing their fingerprints to police, or because they fear the fingerprints may be shared with national authorities in their country of origin, endangering family members that remain there. Lack of cooperation may lead to deprivation of liberty through detention, and even physical or psychological coercion to overcome resistance, which could risk re-traumatisation and re-victimisation. The revised rules legitimise such practices and leave significant leeway to Member States regarding the imposition of administrative measures for non-compliance with the requirement to register biometric data. Regrettably, the exception for the imposition of such measures is narrow: children, including unaccompanied minors, could be subject to administrative measures, including coercion. In a rather contradictory wording which assimilates adults and children, Article 14(1) of the Eurodac Regulation states that 'no form of force shall be used against

minors', however 'where permitted by relevant Union or national law, as a last resort, a proportionate degree of coercion may be used'.

The strengthening of the right to information is a welcome addition to Eurodac rules. Eurodac has been critiqued for the limited possibilities of individuals subject to its rules to have access to effective extrajudicial and judicial remedies, evidenced by the few requests for access, rectification, and deletion of Eurodac data (see here). A prerequisite for the exercise of other individual rights (of access, rectification, erasure, completion and restriction of processing) is how effectively, and completely, information has been provided to individuals. It remains to be seen whether the reinforced safeguards will be sufficient. For instance, a requirement for Member States to ensure that all individuals subject to Eurodac rules have comprehended the content of the information provided remains elusive. Practice shows that the provision of information does not always mean that individuals have understood that information (see here, which demonstrates improvement in this area, but there is room for further development) due to their vulnerability, prior trauma, or difficulties with absorbing data protection-related information as they may be preoccupied with more acute priorities. Furthermore, the potential that personal data already stored in the system collected from individuals who have not been informed about the additional new uses of Eurodac creates an 'information creep'. This means that individuals may find themselves in a return procedure based on fingerprints that have been provided prior to the enactment of the revised rules.

Finally, the future use of Eurodac for return purposes opens the system up to the potential transfer of stored data to third countries. Regrettably, there are no limitations or specifications as to the categories of personal data to be transferred, or any specific safeguards relating to transfers of data of children. It must be emphasised that the countries of return of irregular migrants will not, in the vast majority of cases, provide adequate, meaning essentially equivalent, protection of personal data to that offered at EU level.

5. Conclusion

This blog post demonstrates the profound transformation of Eurodac from a database with a primarily unitary, asylum-related purpose, to a multi-purpose database, with highly sophisticated functions. Though the Eurodac rules have been carefully drafted, the fusion of migration, asylum, and criminal law, and the aim of facilitating administrative cooperation results in various fundamental rights challenges, while the safeguards contain significant loopholes. It remains to be seen how practical implementation of Eurodac will unfold, especially having in mind the bigger picture of Eurodac being a part of a complex framework of interoperable large-scale IT systems.

Eurodac is not part of the Schengen Evaluation and Monitoring Mechanism. Therefore, supervision by the national data protection authorities, the European Data Protection Supervisor (EDPS), and their cooperation within the Coordinated Supervision Committee, are of utmost importance to safeguard the fundamental rights of applicants for international protection, for refugees, and for other categories of migrants that are subjected to Eurodac.

19. Instrumentalisation of Migrants: It is Necessary to Act, but How? by Iris Goldner Lang

The term "Instrumentalisation" (of people) can be defined as using human beings as a means to achieve certain ends, or, in other words, treating humans as objects to obtain political or other goals. We can probably all agree that instrumentalisation of human beings, no matter whether they are EU citizens or third-country nationals, is morally unacceptable and that this applies also in the context of migration, asylum and border control policies. However, the concept of instrumentalisation has only recently become regulated in EU law, as a reaction to the developments at the EU's external borders with Türkiye, Morocco, Russia and, most prominently, Belarus. This blog post will first outline the political developments that led to the regulation of the concept of instrumentalisation. It will then analyse the newly adopted EU rules on instrumentalisation of migrants under the New Pact and critically assess their effects and the safeguards they contain to protect fundamental rights. Notably, the post will explore whether the developments at the EU's external borders legitimise the increasingly securitised approach towards EU border management and whether they jeopardise the right to seek asylum in the EU. Against this background, the concluding part will suggest that EU level regulation of instrumentalisation is a welcome development as it creates an additional legal basis to ensure that national measures are not unilateral and that they respect the principle of proportionality and the right to seek asylum, while granting Member States a legal tool to rely on, when faced with instrumentalisation.

Developments Leading to the Regulation of Instrumentalisation

The term "instrumentalisation" started figuring prominently in the political discourse in the EU at the end of February 2020, when Türkiye announced that it would no longer stop refugees and migrants trying to cross the Greek-Turkish border and to enter the EU. According to the Greek media, the following day more than 4,000 people repeatedly

tried to cross the Greek border. However, the border was opened only on the Turkish side, as the Greek police stopped everybody who tried to cross the border by using tear gas and rubber bullets. The situation continued to escalate in the following weeks, with tens of thousands of people gathering on the Turkish side of the border, after having been reportedly transferred there by bus, either supported, or at least tolerated by Turkish authorities and non-state actors. At the same time, Greece decided to suspend all asylum applications for one month. In his response to the letter of then Frontex Executive Director Fabrice Leggeri, inquiring into Greek pushback allegations, the Greek Minister of Maritime Affairs and Insular Policy, Ioannis Plakiotakis referred to "the organized and massive character of the migration flows at the eastern Aegean" and continued by stating that "this instrumentalisation of migrants escalated the phenomenon to a hybrid nature threat, directly affecting the EU internal stability."

Surprisingly, the Greek border conduct was strongly supported and praised by EU leaders. The President of the European Commission, Ursula von der Leyen, openly thanked Greece as Europe's "shield" in blocking entry to the EU and promised financial and material support, as well as the deployment of Frontex. In parallel, the Commission refused to release a preliminary legal assessment into the Greek decision to temporarily freeze all asylum applications. After a while, the number of people trying to cross the border considerably decreased, partly since they realised that they would not be able to enter the EU, and partly due to the coronavirus crisis.

Similar developments took place in Spain in May 2021, when 8,000 migrants attempted to enter the Spanish enclave of Ceuta from Morocco, following a diplomatic dispute between Spain and Morocco over Spain's medical treatment of Brahim Ghali, leader of the Polisario Front in Western Sahara. The Spanish government used this sudden inflow of migrants into its territory to justify "hot returns"', that is direct deportations of migrants at the border without individual examination. The reasoning of the ECtHR's Grand Chamber in its earlier judgement in *N.D. & N.T. v. Spain*, later developed in *Shahzad v. Hungary*, *M.K. v Poland*, *M.H. v Croatia* and *A.A. and Others v North Macedonia*, can be viewed as the judicial support to political developments at European external borders, as well as the Strasbourg Court's recognition that, under certain conditions, pushbacks can be legal. At the political level, similar to the situation at the Greek-Turkish border, the European Commission President, Ursula von der Leyen, expressed her strong support to Spain by tweeting that the "EU stands in solidarity with Ceuta & Spain" and that the bloc needs "common EU solutions to migration management".

The most recent and prominent examples of instrumentalisation of migrants and use of instrumentalisation discourse in relation to migration influxes at the EU's external borders, have been the situations at the Finnish border with Russia and at the Polish,

Lithuanian, and Latvian borders with Belarus. The crisis at the EU-Belarus border started in summer 2021, following the EU's decision to impose sanctions on Belarus. As a retaliation measure, Belarus started issuing tourist visas to third-country nationals from the Middle East, enabling them to get to Belarus safely and then continue their journey by trying to cross the border into the EU irregularly. As a reaction to these developments, Poland, Latvia and Lithuania strongly condemned the Belarusian actions using instrumentalisation discourse and adopted national emergency measures that enabled them to forcefully push back and return third-country nationals to third countries without an individual assessment of their asylum applications. Poland deployed 20,000 border officers, used water cannons and teargas to prevent entry, and constructed a border fence at its border with Belarus. It declared a state of emergency, preventing lawyers, journalists and NGOs from accessing the border area, and adopted national legislation that legalised pushbacks, while accusing Belarus of launching a "hybrid war". Poland is planning further restrictions at the time of writing this post. Just a few days ago, on 12 October 2024, when addressing the Belarus border crisis, Polish Prime Minister Donald Tusk, announced that he would "temporarily suspend the right to seek asylum" and "demand recognition in Europe for this decision".

Latvia and Lithuania also declared a state of emergency with the aim to legitimise pushbacks of third-country nationals who tried to cross the border, without examining their asylum claims. In his letter, dated 23 August 2021, addressed to the EU Commissioner for Human Rights, Lithuanian Prime Minister Ingrida Šimonytė stated that the migration influx from Belarus to Lithuania was a "hybrid attack launched by the Belarusian regime" and that "Lithuania has repeatedly expressed its deep concern over instrumentalisation of migrants by the Lukashenka regime". In sum, all three EU Member States regarded migration as a weapon in a hybrid war (see here and here).

Pushback practices at the Polish, Latvian and Lithuanian borders were heavily criticised by different organisations and bodies, including the CoE Commission for Human Rights, ECRE and Amnesty International. Additionally, in its 2022 judgement in *M.A.*, the Court of Justice declared that the Lithuanian asylum law, which limited the right to apply for asylum based on a state of emergency, was incompatible with the Asylum Procedures Directive. The Court further stated that there are EU procedures that "enable the Member States to carry out, at the European Union's external borders, their responsibilities with regard to the maintenance of public order and the safeguarding of internal security, without it being necessary to rely on a derogation under Article 72 TFEU" (para. 74 of the judgement). In other words, the Court of Justice argued that EU law had adequate mechanisms to respond to the challenges at the EU-Belarus border.

Nevertheless, the Commission did not start infringement proceedings against the three Member States, but supported them in their effort to fight instrumentalisation. The

Commissioner for Home Affairs, Ylva Johansson stated that Lukashenko is "using human beings in an instrumentalised way", thus committing an "extreme act of aggression towards the European Union". In her State of the Union speech from 15 September 2021, the Commission President, Ursula von der Leyen gave full support to the three Member States and embraced the "instrumentalization" and "hybrid war" discourse by confirming that "we will continue to stand together with Lithuania, Latvia and Poland", and continued by adding "and, let's call it what it is: this is a hybrid attack to destabilise Europe".

EU Rules on Instrumentalisation: Flexible Derogations from Regular EU Asylum Rules

As a response to the EU-Belarus border crisis, on 14 December 2021, the European Commission put forward a set of legislative proposals aimed to address the issue of instrumentalisation. The package included amendments to the Schengen Borders Code, the proposal for a new Instrumentalisation Regulation, further sanctions against Belarus (see here and here) and discussions on developing a toolbox of measures designed to respond to instrumentalised migration. The amendments to the Schengen Borders Code were adopted on 13 June 2024 and have already entered into force. They enable Member States to limit border traffic to the minimum in a case of instrumentalisation by temporarily closing or limiting the opening hours of some border crossing points (Art. 1(3) of the amendment). The proposed Instrumentalisation Regulation would introduce derogations from the existing EU asylum rules on asylum procedure, reception conditions, and return. However, it failed to be adopted, due to the lack of majority at the Council interior ministers' meeting. As a consequence, instrumentalisation rules were incorporated in the new Crisis and Force Majeure Regulation, which was adopted on 14 May 2024 as part of the EU's New Pact on Migration and Asylum. The Regulation is already in force but the new rules will apply as of 1 July 2026.

The Crisis and Force Majeure Regulation defines a situation of instrumentalisation broadly, as a type of a crisis situation (for the other elements of the Crisis and Force Majeure Regulation see here in this series). According to the Regulation, a situation of instrumentalisation takes place "where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security" (Art. 1(4)(b)). Recitals 15 and 16 of the Preamble qualify the definition. Recital 15 provides that "situations in which non-state actors are involved in organised crime, in particular smuggling, should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a

Member State". Recital 16, on the other hand, states that "humanitarian assistance should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State". Recital 12 of the amendment to the Schengen Borders Code provides the same qualifications. Considering the broad definition of instrumentalisation, it will be crucial to establish whether the aim of the undertaken activities is political destabilisation in order to differentiate instrumentalisation from smuggling and humanitarian assistance, which could at times be difficult.

Based on the Crisis and Force Majeure Regulation, Member States faced with a situation of instrumentalisation may derogate from regular asylum rules. First, they may derogate from Art. 27 of the new Asylum Procedures Regulation by extending the time to register asylum application from five days to four weeks as of the date the application has been made (Art. 10(1)). Further, Member States can extend border procedures normally lasting for maximum twelve weeks, as stipulated by Art. 51(2) of the Asylum Procedures Regulation, by an additional six weeks (Art. 11(1)). Additionally, even though border procedures will, in regular circumstances, be mandatory for nationalities for whom the proportion of decisions granting international protection is 20 % or lower of the total number of decisions for that third country, in case of instrumentalization, Member States will have flexibility. They will be able to lower the threshold from 20% to 5% (Art. 11(3)), or to raise it up to 50% (Art. 11(4)). This gives Member States the flexibility to significantly reduce or increase the number of border procedures they conduct. However, the possibility to extend time limits for take charge requests and take back notifications, as well as to suspend Dublin transfers, applies only to crisis situations caused by mass arrivals and not by instrumentalisation (Art. 12(4) and 13). Consequently, Member States will not be able to change Dublin deadlines and to suspend Dublin transfers in a situation of instrumentalisation. However, based on the amendment of the Schengen Borders Code, Member States can temporarily close or limit the opening hours of specific border crossing points (Art. 1(3)).

Member States must not apply these derogations unilaterally. Instead, they need to undergo a structured procedure and get Council approval. They need to submit a reasoned request to the Commission, explaining how they are faced with a situation of instrumentalisation (Art. 2(2)(a)(ii) of Crisis and Force Majeure Regulation). Based on its assessment and provided the situation qualifies as instrumentalisation, the Commission will adopt an implementing decision within two weeks, thereby proposing the list of derogations to the Council (Art. 3). Finally, the Council has to decide within two weeks and, in case it agrees with the proposal, it will adopt its implementing decision, specifying the derogations the Member State can apply (Art. 4(3)). Derogations may be applied for three months, with a possible extension of an additional three months, after which period, upon request by the respective Member State, the Commission may submit a proposal for a new Council implementing decision to amend

or extend the specific derogations for a period not exceeding three months, which can again be extended by additional three months (Art. 5(1) and (2)).

Safeguards to Protect Fundamental Rights: Limitations in Time and Space

Both the Crisis and Force Majeure Regulation and the amendment to the Schengen Borders Code provide detailed safeguards to protect fundamental rights in case a Member State derogates from regular EU rules due to instrumentalisation. Consequently, the issue is not the inconsistency of EU secondary law with Union values and principles, but their actual implementation. In other words, it will be paramount whether the right to seek asylum and other individual rights will be effective in practice when derogations are applied, especially in view of many allegations of fundamental rights violations in the context of instrumentalisation (see here, here and here).

The Crisis and Force Majeure Regulation stipulates that instrumentalisation derogations must "meet the requirements of necessity and proportionality, be appropriate to achieving their stated objectives and ensuring the protection of the rights of applicants and beneficiaries of international protection, and be consistent with the obligations of the Member States under the Charter, international law and the Union asylum acquis" (Art. 1(2)). It further states that such derogations "shall be applied only to the extent strictly required by the exigencies of the situation, in a temporary and limited manner and only in exceptional circumstances" (Art. 1(3)). The Regulation commits Member States to respect "the basic principles of the right to asylum and the respect of the principle of non-refoulement … to ensure that the rights of those who seek international protection, including the right to an effective remedy, are protected". Special protection is granted to children and people with special needs. Consequently, Member States have to exclude from border procedures minors below the age of twelve and their family members, and people with special procedural or reception needs (Art. 11(7)(a)) or cease to apply border procedures to them when it is determined that their applications are well founded (11(7)(b)).

Additionally, Member States will be geographically limited when applying derogations "only in respect of third-country nationals or stateless persons who are subject to instrumentalisation and who are either apprehended or found in the proximity of the external border … in connection with an unauthorised crossing … or who are disembarked following search and rescue operations or who have presented themselves at border crossing points" (Art. 1(4)).

The amendment to the Schengen Borders Code stipulates that any closure or limitation of opening hours of specific border points needs to be proportionate and take full account of the right to seek asylum, rights of long-term resident third-country nationals

and EU citizens (Art. 1(3)). This is important, since the actual possibility for a third-country national to reach the place where they may apply for asylum is decisive for the right to asylum to be effective and real. In case distances between border crossing points are too long, this creates a practical obstacle to the right to seek asylum. This is in line with the judgements of the ECtHR in *N.D. & N.T. v. Spain*, *Shahzad v. Hungary*, *M.K. v Poland* , *M.H. v Croatia* and A.A. and Others v North Macedonia, where the Strasbourg court stated that pushbacks at the "green border" do not violate the Convention provided the host state genuinely and effectively enables individuals to apply for asylum at its official border crossing points and there are no cogent reasons for individuals not to make use of official entry procedures (for the discussion of these cases, see here and here). Additionally, as stated by the Court of Justice in *M.A.* (see above), even though Member States may require applications for international protection to be lodged in person and/or at a designated place, this right should not undermine "the practical effectiveness of the right to seek asylum" as access to the asylum procedure should be "effective, easy and rapid" (para. 65).

To summarise, based on the new EU instrumentalisation rules, Member States will not be able to suspend the right to seek asylum. Consequently, a unilateral decision, such as the one announced by Poland on 12 October 2024 would not be possible. All the derogations will have to be consistent with international and EU human rights obligations contained in other EU acts, the Charter and the Treaties. Derogations will have to be limited in time and space and applied only upon the Commission's assessment of the Member States reasoned request and the Council's approval.

Concluding Remarks

The developments at the EU's borders with Türkiye, Morocco, and Belarus corroborate the statement that migrants are increasingly being used by third countries for political goals. Against this background, EU Member States have shown understandable concerns, but also worrying legislative and practical reactions, marked by excessive use of force and restrictions of asylum seekers' rights. Additionally, past experience has shown that the European Commission generally supports the Member States exposed to instrumentalisation by expressing strong political support and gratitude towards them and by avoiding initiating infringement proceedings against them. The instrumentalisation rhetoric has permeated EU migration discourse, particularly at the EU's eastern borders with Belarus. Against this background, Member States' political concerns are understandable. However, they cannot justify violations of EU law and disproportionate use of force. From this perspective, EU level rules on instrumentalisation are a welcome move to prevent unilateral and excessive national measures. However, practical application of EU instrumentalisation rules needs to

adhere to the same basic principles, notably the right to seek asylum and proportionality.

Finally, no matter whether a third-country national is being instrumentalised or not, they have the right to seek asylum in the EU, both based on EU and international law. Two arguments have been used to justify the adoption of EU instrumentalisation rules. The first is the need to protect national security and essential functions of a Member State, including law and order. The second is the argument that, by instrumentalising migrants, the third country creates artificial migration flows to the EU borders. In case the word "artificial" means that the third country is encouraging or facilitating the movement of third-country nationals to the EU' borders, this has been corroborated by factual evidence. However, in case the word "artificial" also implies that the instrumentalised third-country nationals are (mostly) economic migrants who, anyhow, would not be entitled to asylum, this is less certain and would need reliable evidence.

In other words, based on EU and international law, even if a third-country national is brought to the EU's borders by third country agents for political reasons, they should have the right to seek asylum. EU instrumentalisation rules rely on strong safeguards, aimed at protecting fundamental rights, in particular the right to seek asylum. On paper, they try to find the right balance between the conflicting interests of Member States to protect their national security and other state functions, with asylum seekers' rights. Time will tell whether this balance will be achieved in practice. However, against the background of unilateral national decisions to respond to instrumentalisation by reducing or completely suspending the right to seek asylum, EU level regulation of instrumentalisation is a welcome move, as it creates an additional legal basis to ensure that national measures are proportionate and not unilateral, while granting Member States a legal tool to rely on, when faced with instrumentalisation. As in other policy areas, here again, the European Commission, as the "guardian of the Treaties", will have the responsibility to control national compliance with EU instrumentalisation rules and to initiate infringement proceedings in case a Member State fails to do so.

20. Monitoring fundamental rights compliance in the context of screening and the asylum border procedure: putting bricks back into the EU house of rule of law? by Tamas Molnar

Setting the scene: Why monitoring fundamental rights compliance at borders?

Monitoring compliance with fundamental rights is particularly important for state activities performed in "hidden places" where the public has limited or no access, such as remote areas at European Union (EU) external land borders (e.g. in forests, mountains, swamps) as well as in rough waters at sea (borders) in the Aegean or in the Mediterranean, often in the dark. Over the past decade or so, EU Member States' border management tools, capacity, resources and infrastructure (including physical barriers) at EU external borders have been significantly enhanced to address ever more complex challenges. However, some of these enhancements have given rise to serious fundamental rights challenges. This calls for more effective fundamental rights monitoring at the external borders through reinforced mechanisms that have the capacity and expertise to monitor respect for the wide range of fundamental rights enshrined in the Charter of Fundamental Rights of the EU ('the Charter') that various state activities at EU external borders affect.

As the EU Agency for Fundamental Rights (FRA) has aptly pointed out, an effective and independent fundamental rights monitoring system at external borders is a core fundamental rights protection tool. Independent monitoring at borders entails collecting, verifying and analysing information to determine if the authorities' actions comply with EU and international law. It reduces the risk of fundamental rights violations by enhancing the protection of victims of fundamental rights violations, strengthening the application of fundamental rights safeguards already in place and providing expert advice when needed. At the same time, it can support domestic investigations of allegations against public authorities by providing objective, evidence-based and unbiased analysis and reporting. This improves transparency and accountability, and thus enhances public trust in authorities operating at or in the vicinity of the borders – and all of this can lead to less court litigation against their practices. Effective monitoring mechanisms can contribute to an environment at EU external borders where people concerned can effectively exercise their fundamental rights and access international protection, judicial remedies and complaints mechanisms.

Two new legal instruments adopted as components of the EU Pact on Migration and Asylum, namely the Screening Regulation (see its Article 10, coupled with recitals (27)-

(29)) and the Asylum Procedure Regulation (see its Article 43(4) paired with recital (71)) require Member States to set up independent national mechanisms to monitor compliance with fundamental rights in the context of screening (both in the vicinity of borders and within the territory) and when processing aslyum claims at or in proximity of EU external borders (asylum border procedure).

This blog post aims, first, to put the appearance of this new form of fundamental rights monitoring under EU migration/asylum law into a broader context; and then to analyse, with critical eyes, the main features and criteria set out in EU legislation of these national monitoring mechanisms, together with FRA's envisaged role in providing general guidance for Member States on the matter.

Is monitoring fundamental rights compliance at borders new?

As a matter of fact, there is nothing new under the sun when it comes to the idea of monitoring compliance with fundamental rights at EU external borders. The United Nations (UN) Refugee Agency (UNHCR) has traditionally promoted the setting up and putting into operation border monitoring mechanisms. Since the 2000s, in several Central and Eastern European countries, UNHCR, border guards and relevant NGOs working in the field have concluded tripartite arrangements to monitor border management activities along EU external land borders. At that time, these were EU candidate countries, wanting to join the Union, and all are now EU Member States located at the EU external or Schengen land borders. These tripartite agreements, serving as the legal basis, formalised the cooperation, roles and responsibilities, and working methodologies among the actors in the area of border management. They also provided a platform for dialogue among national authorities, UNHCR and its civil society partners as well as other stakeholders. Although such agreements were in most cases discontinued, UNHCR continues to monitor refugee protection in border areas together with its partners as part of its mandate under its Statute.

In addition, the Office of the UN High Commissioner for Human Rights (OHCHR) has likewise a strong human rights-monitoring role, notably through its field presence. The special procedures under the auspices of the UN Human Rights Council play a similar role. Moreover, the 2002 UN Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment (OPCAT) and the 1987 European Convention for the prevention of torture and inhuman or degrading treatment or punishment both established monitoring bodies (the SPT and the CPT respectively), providing them with unrestricted access rights to people, places and relevant documents.

Currently, in some Member States, national human rights institutions regularly visit border areas to monitor fundamental rights compliance in their capacity as national preventive mechanisms under the OPCAT.

Existing forms of fundamental rights monitoring in the EU 'area of freedom, security and justice'

Zooming in on the EU acquis, the obligation introduced by the Screening Regulation – and the Asylum Procedure Regulation as per asylum border procedures – for Member States to provide for national fundamental rights monitoring mechanisms is not unprecedented in the EU 'area of freedom, security and justice' either (Title V of the Treaty on the Functioning of the EU).

For instance, the Return Directive (Article 8(6)) has already set out the obligation to monitor rights compliance when Member States carry out forced return operations (removals). In a similar vein, the European Border and Coast Guard Agency (Frontex) has been operating, under the auspices of the Fundamental Rights Officer, a pool of forced-return monitors (with over 60 monitors designated by Member States) who observe and report on Frontex-supported or -coordinated forced return operations using objective and transparent criteria (Article 51 of Regulation (EU) 2019/1896 – 'EBCG Regulation'). This scheme complements the above-mentioned national forced return monitoring systems. More broadly, over 50 fundamental rights monitors, acting as the extension of Frontex' Fundamental Rights Officer in the field, monitor and assess the fundamental rights compliance of all Frontex operational activities, including forced return operations, and provide advice and assistance in this regard (Article 110 of the EBCG Regulation).

More broadly, the revamped Schengen evaluation mechanism (up and running since 2023) has now an explicit, *ex lege* stipulated dimension to monitor compliance with fundamental rights in the national application of the various strands of the Schengen acquis. Likewise, the so-called 'vulnerability assessment' carried out by Frontex increasingly factors in fundamental rights considerations when evaluating Member States' operational resilience in responding to challenges at external Schengen borders.

Shaping fundamental rights monitoring in the context of screening and the asylum border procedure: its genesis and the outcome

Against this backdrop, when the European Commission tabled, back in September 2020, the package of proposals under the so-called EU Pact on Migration and Asylum, it may not have come as a surprise that it envisaged the setting up, by Member States, of

independent national mechanisms to monitor the compliance with fundamental rights in the context of the 'pre-screening' process of new arrivals in an irregular situation. One of the most contentious issues during the ensuing negotiations in the law-making process was the question of monitoring fundamental rights compliance. Compared to the original Commission proposal, the co-legislators took diametrically opposing views on the matter. The Council position sought to significantly water it down, keeping the bare minimum of the proposed obligations only. The European Parliament (EP), in turn, argued for extending the scope of monitoring beyond screening per se, to cover all border management activities, including border surveillance, as most of the fundamental rights sensitive activities carried out by authorities (e.g. push-backs; ill-treatment) occur in these settings, out of sight. Also, the EP position enriched the proposed provisions with more fundamental rights safeguards and standards, including further detailed powers of the mechanism (as opposed to the original proposal), and the introduction of an obligation to involve NGOs in the mechanism.

The adopted version of the Screening Regulation, after fierce debates during the trialogues about the mechanism's scope and powers, reflects a delicate compromise. The agreed rules (Article 10) strengthened the mandate of the independent monitoring mechanism (compared to the initial Commission proposal – see its analysis below), which also got extended to the asylum border procedure (see Article 43(4) of the Asylum Procedure Regulation). However, this new form of fundamental rights monitoring does not cover border surveillance activities (which was a red line for Member States), hence authorities' actions – and their wrongdoings – at the 'green border' or at sea will not be under such mechanisms' watchful eyes. This is thus less than what Commissioner Johannsson promised in her speech on the new Pact proposals back in September 2020, emphasizing that the independent national monitoring mechanisms will make sure that "there are no push backs at the border". At the same time, the compromise kept FRA's originally envisaged role in providing general guidance for Member States on how to set up such mechanisms and ensure their independent functioning. Remarkably, this new form of fundamental rights monitoring does not extend to the return border procedure either, which forms – together with the screening and the asylum border procedure – the 'third leg' of the seamlessly connected procedures to be carried out in the vicinity of the EU external borders. Differently put, these three processes constitute together a 'pre-entry phase' for 'irregular arrivals' (recital (57) of the Asylum Procedure Regulation), who are not to be legally authorised to enter while being subject to any of them. Yet, one can argue that the joint reading of the relevant provisions of the Return Border Procedure Regulation (Article 4(3)) with the Return Directive carries the logical conclusion that – at least – forced return monitoring systems, within the meaning of Article 8(6) of the Return Directive, should be operational in the context of the return border procedure, too.

Turning to the legal edifice governing the new form of fundamental rights monitoring, the first subparagraph of Article 10(2) of the Screening Regulation stipulates that [e]ach Member State shall provide for an independent monitoring mechanism in accordance with the requirements set out in [Article 10] [to] monitor compliance with Union and international law, including the Charter [of Fundamental Rights of the EU], in particular as regards access to the asylum procedure, the principle of non-refoulement, the best interest of the child and the relevant rules on detention, including relevant provisions on detention in national law, during the screening.

Added to this, with a view to maximizing the impact of and the follow up to the findings of the national monitoring mechanism, each Member State is obliged to investigate allegations of failure to respect fundamental rights in relation to the screening, to enable victims to access civil or criminal justice. Such alleged rights violations must be dealt with effectively and without delay in the framework of the investigations they trigger (Article 10(1) and (2)(b)).

Key features of the future national independent monitoring mechanisms

Drilling a bit deeper into the new rules, Member States must guarantee the independence of the monitoring mechanism, the institutional design of which should involve ombuds institutions, National Human Rights Institutions, and national preventive mechanisms under the OPCAT – and may involve relevant international organizations (e.g. UNHCR), non-governmental organizations and independent public bodies. To ensure the required level of the mechanism's independence, Member States should draw from the safeguards set out in the OPCAT and the related guidelines on national preventive mechanisms, the UN Paris Principles for national human rights institutions, the UN General Assembly Resolution A/RES/77/224 on the role of Ombudsman and mediator institutions, the Council of Europe (CoE) Venice Principles, and the CoE Committee of Ministers Recommendation CM/Rec(2021)1 (see recital (27) of the Screening Regulation). A noteworthy safeguard, inspired by the guidance for forced return monitoring systems in the Return Handbook, flags what does not qualify as a monitoring mechanism: the existence of judicial remedies in individual cases, or national systems that supervise the efficiency of the screening – and mutatis mutandis the asylum border procedure (recital (29) of the Screening Regulation).

As for its scope, the monitoring mechanism should cover all activities related to the screening and the asylum border procedure, with the power to carry out on-the-spot checks and random and unannounced checks. Equally important is the mechanism's access to all relevant locations, including reception and detention facilities, individuals,

and documents – however, access can be subject to security clearance under certain circumstances. To ensure its sustainable functioning, Member States must equip the mechanism with appropriate financial means, too. In view of transparency and feeding into policy-making, the mechanism must be empowered to issue annual recommendations to Member States. At the same time, the European Commission must take into account the findings of the mechanism when assessing the Charter-related conditionality requirements for all relevant EU funds, in particular the EU migration and border management funds. Likewise, Member States must include in their future national strategies on migration and asylum how the findings of the monitoring have been taken into account domestically – and a similar obligation applies to the European Commission when preparing the future European Annual Asylum and Migration Reports (Asylum and Migration Management Regulation (EU) 2024/1351, Articles 7(1)(c) and 9(3)(e)).

Finally, to ensure coherence and complementarity, the work of the monitoring mechanism should be without prejudice to the activities of the Frontex Fundamental Rights Officer and the fundamental rights monitors under the EBCG Regulation; the Schengen evaluation and monitoring mechanism; the mechanism to monitor the operational and technical application of the Common European Asylum System (CEAS) run by EU Asylum Agency; as well as other existing national, regional (e.g. CoE) or international (e.g. UN) monitoring bodies. Still, it is not entirely clear as of yet how these synergies will be ensured and capitalised on. Given the importance of the various large-scale EU IT systems and their interoperability when carrying out screening tasks (Articles 14-16 of the Screening Regulation) (but also, to a lesser degree, in the context of the asylum border procedure), the mechanism is required to establish and maintain close ties with national data protection authorities and the European Data Protection Supervisor as well.

The role of the EU Agency for Fundamental Rights

Complying with all of the above criteria can pose significant challenges to EU Member States, notably for those where such monitoring is unchartered territory. This is irrespective of the fact whether one sees the glass half empty or half full when it comes to the scope, powers and safeguards of the mechanism (see e.g. Apatzidou) – the element of novelty, from a government's perspective, is undisputable. In order to assist Member States in shaping up their own national mechanism, the EU Agency for Fundamental Rights has been tasked by the EU legislator to issue more detailed general guidance for Member States on how to do that, including guaranteeing the mechanism's independent functioning. Added to this, Member States may request FRA to support them, bilaterally, in the actual development of their national monitoring mechanism,

including the safeguards for independence of such mechanisms, as well as designing the monitoring methodology and appropriate training schemes (Article 10(2), penultimate subparagraph of the Screening Regulation).

The new rules will not entrust FRA with a monitoring mandate as such – and the Agency has no capacity and resources to do monitoring itself on the ground either. Rather, FRA is required to give general advice on how to put in place such mechanisms in full compliance with the above-mentioned requirements and the applicable UN and CoE soft law instruments referred to above. Similarly, the Agency is expected to undertake capacity-building work to help Member States operate their own systems properly. In other words, 27 national independent mechanisms will need to be operating in the field. This allows for tailor-made solutions and responses to the local specificities and, if need be, timely adjustments to the realities on the ground.

In October 2022, FRA already issued a broader guidance on fundamental rights monitoring at the external borders in general (also encompassing border surveillance activities). The Agency has reviewed and updated this guidance, in close consultation with various stakeholders including Member States, to fully align it with the requirements stemming from the Screening Regulation (which are likewise applicable to the asylum border procedure). The new guidance is now available here.

Questions of implementation – outlook to the future

How will these monitoring bodies look like? What will their actual powers be? Will they really function independently, effectively and efficiently? So many unanswered questions – and counting. Member States now have some time until mid-June 2026 to come up with their own solutions when providing for an independent national monitoring mechanism. Observers will gain more insights into that once the national implementation plans for the Pact – following the blueprint of the Commission's common implementation plan – will be submitted by mid-December 2024. One building block of these plans is dedicated to fundamental rights, covering also independent monitoring mechanisms. One of the first tasks of Member States will be, next to adopting an appropriate domestic legal framework on the matter, to ensure that the mechanism "has sufficient capacity and appropriate financial means to carry out its tasks, including planning and ensuring the relevant partnerships, sufficient qualified personnel, administrative arrangements and running costs." In the course of this reflection period, Member States – activating the relevant passages of Article 10(2) of the Screening Regulation – may also want to reach out to FRA for further, country-specific advice on how to ensure, at the operational level, the mechanism's independent functioning, along

with designing its concrete working methodologies, and the accompanying training schemes.

Entrusting with these tasks already existing independent mechanisms with relevant expertise, experience and already meeting many of the criteria set forth in EU law (e.g. ombuds institutions) appears to be an approach to enjoy priority – also having regard to cost effectiveness. Certainly, creating or designating mere 'fig leaf' structures is to be avoided – which would be incompatible with the letter and spirit of the EU legislation setting out this new duty. First off, the European Commission as the 'guardian of the Treaties' must keep an eye on the national implementation steps in this regard, with the possibility to launch an infringement procedure in case of non-compliance (e.g. no mechanism up and running until the set deadline; or they fall short of the standards). Furthermore, given that the Screening Regulation is part of the Schengen acquis, and by the same token the rules on the asylum border procedure are part and parcel of the Common European Asylum System, the work of the national monitoring mechanism – and its compatibility with the applicable EU rules and criteria – will be under scrutiny in the frame of the Schengen evaluation mechanism and the soon-to-come CEAS evaluation mechanism respectively.

The national monitoring mechanisms will not deliver an almighty panacea to all fundamental rights issues at the EU external borders, that is for sure. Still, they can undoubtedly contribute to restoring the rule of law in this context, which has become severely damaged in recent years due to multiple deficiencies. These include the widespread, recurrent and grave rights violations at borders (many of which would constitute, if proven, criminal acts); non-identification of vulnerabilities; and the difficulty for victims to access justice; along with the persisting and manifest conflicts between national and EU law (eroding the "very root of the EU legal order"); the lack of effective investigations; and the sense of impunity for the perpetrators. Putting bricks back into the EU building of rule of law would be already, in itself, a welcome step forward – and 27 mechanisms will have a tangible potential to that.

* The views expressed in this blog post are solely those of the author and its content does not necessarily represent the views or the position of the European Union Agency for Fundamental Rights.

21. The Recast Single Permit Directive: Moving Forward, but Not on More Legal Migration Pathways

by Tesseltje de Lange

Introduction

The 2020 Pact on Migration and Asylum made a promise of better regulation of legal pathways into the EU. The Pact called for a "well-managed system", seeing that migration can "contribute to growth, innovation and social dynamism." It also said it would contribute to sustainable legal pathways to attract talent to the EU. The European Commission acknowledges that "Key societal challenges faced by the world today – demography, climate change, security, the global race for talent, and inequality – all have an impact on migration." In its communication of 27 April 2022, the European Commission makes a political and economic case for a sustainable and common approach to labour migration. Indeed, most EU member states face ageing populations who require care, and labour shortages are on the rise jeopardising the green transition. European economies demand migrant workers to address these challenges. Hence the need for more legal migration pathways. Legal pathways may also help to decrease the use of irregular pathways, unsafe and to the benefit of smugglers.

Besides funding EU Talent Partnerships, and the proposed EU Talent Pool Regulation, so far two legal migration Directives have seen a recast: the Blue Card Directive 2021/1883/EU and the recast Single Permit Directive 2024/1233/EU replacing Single Permit Directive 2011/98/EU. The recast entered into force on 21 May 2024 and Member States have until 21 May 2026 to transpose the changes into national law. This blog critically assesses the Recast Single Permit Directive.

The recast and the missing link to more legal pathways

When it comes to labour migration, the EU legislators' mandate is tied. According to article 79, §5 TFEU the Member States have the prerogative to determine volumes of admission of third-country nationals (TCNs) coming from third countries to their territory to seek work, whether employed or self-employed. In the 2020 Communication on the Pact (p. 27) the European Commission contemplated adding conditions for admission for low- and medium-skilled workers, unfortunately this idea was abandoned in the April 2022 Proposal for a recast of the Single Permit Directive (p. 8). On the recast proposal see my earlier blog.

Thus, the Single Permit Directive does not set entry conditions, nor does it define grounds for refusal or renewal of single permits. Such remain regulated at the national level or in the other EU labour migration directives. Although the Member State's discretion to set *volumes of admission* does not nullify the EU mandate, politically, it seriously curbs the EU's room to manoeuvre in designing *more* legal pathways through setting conditions for admission. The result is that Member States compete amongst each other with national labour migration schemes. People interested in coming to Europe for the purpose of work must inform themselves of different labour migration policies in 26 countries to establish where their skills allow for entry into the EU. The proposed EU Talent Pool Regulation aims to make this doable. If anything, albeit a common market in many aspects, the EU is not common *labour* market for TCNs.

Aim and scope of the recast

The aim of the Directive is threefold. Firstly, it aims to facilitate the procedure for TCNs to work and reside in an EU member state through a 'single permit' which combines work and residence permits (Chapter II). Secondly, its objective is to ensure equal treatment between lawfully working TCNs (irrespective of whether they have a right to residence for the purpose of work) and Member State nationals (Chapter III). Thirdly, it aims to contribute to better protection and enforcement of the rights of migrants at work in the EU.

Welcomed is the fact that the scope of the Directive is expanded and now Chapter III on equal treatment applies to working beneficiaries of protection although still the Directive does not apply to beneficiaries of temporary or subsidiary protection (article 3(2) sub f-h). Moreover, the Directive applies to all migrants holding a residence permit for purposes other than work (article 7). Yet, it does not apply to au pairs (article 3(2) sub e), self-employed (article 3(2) sub k) or sea farers (article 3(2) sub l). Also, the Single Permit Directive does not cover Seasonal Workers under Directive 2014/36 or Intra-corporate transferees under 2014/66 (article 3(2) sub e) nor posted workers in general, thus excluding those posted under Directive 96/71, as amended by Directive 2018/957. Their rights are regulated in the respective Directives. The different rights with different migration statuses contribute to highly segmented labour markets. This can be especially problematic in the case of lenient conditions for entry and access to a Single Permit status in some Member States in combination with subsequent intra-EU Posting of the Single Permit status holders to another EU Member State. This has become a business model for employers that either try to circumvent national labour migration restrictions or engage in a business model trying to cut labour costs, see e.g. European Labour Authority report (2023), p. 35.

Procedural fairness & institutional design

Applications for a single permit status can be filed from outside as well as in-country by legally staying TCN (article 4(2) SPD) or their employer (article 4(1)). This novel in-country application improves the effectiveness of the Directive because it means, for example, that an international student will not be required to leave after graduation before becoming eligible for a single permit, possibly waiting for months before it is processed. Note that the Member States have discretion to set volumes of admission for people newly arriving for the purposes of work, but not for those already here, like students transitioning into workers (article 1(2) SPD and 79(5) TFEU).

Within the 90-day time limit for adopting a decision, Member States must check the labour market situation, where such a check is carried out in connection with an individual application for a single permit (article 5(2) SPD). Member States do not have to perform a general check of the labour market situation that is not linked to an individual application for a single permit within the 90 days. Furthermore, if a visa is required, its processing time does not fall within these 90 days, although that was part of the Commissions' initial proposal to speed things up. Now, Member States should "endeavour to issue the requisite visa to obtain a single permit in a timely manner" (recital 4), which is rather vague. In addition, the often time-consuming recognition of qualifications does not need to be completed within the 90 day period (recital 18). Interestingly, EU recommendation 2023/7700 on the recognition of qualifications of 15 November 2023 does ask of the Member States to enhance their capacity to simplify and expedite recognition procedures and provide relevant support and information to TCNs, recognition authorities, public employment services, labour inspectorates and migration authorities (recital 35) "making the Union's labour market more attractive to third country nationals and to facilitate their integration into the labour market in line with the needs of the Union economy and society." (objective 1 of said recommendation).

The competent authority must notify the decision to the applicant (employer or worker) in (article 5(3) SPD). If the employer submits the application, Member States shall ensure that the employer informs the TCN in a timely manner. Placing the authorities at such a distance from the migrant worker may serve efficiency, but it may make it more difficult for the worker to know where to go in case they would want to come forward to report something is amiss, e.g. an abusive situation.

The European Parliament must be given credit for trying to include a privileged position for EU Talent Partnership participants. According to the Pact, the Talent Partnerships

are a key tool of the Commission regarding its external dimension *in combination with* the aim to "boost international labour mobility and develop talent in a mutually beneficial and circular way." (On the Talent Partnerships see the 2022 Odysseus Report for the EPRS). In the end, the recast does not offer anything for the effective implementation of 'Talent Partnerships', but for a meagre reference in recital (20) to the – optional – accelerated processing of single permit applications.

As part of the procedural improvements the Member States must make information easily accessible, e.g. on a website, and add information on the entry and residence conditions, including the rights, obligations and procedural safeguards of TCN and their family members (article 9 SPD). That information should include information on workers' organisations, to facilitate better protection at work (recital 26). This obligation supplements Directive 2019/1152 on Transparent and predictable working conditions which already obliges employers to inform employees, including TCN, of their worker rights.

The SPD allows for a processing fee to be paid by the employer, which shall not be disproportionate or excessive. The employer "shall not be entitled to recover such fees from the third-country national." (Article 10). Obliging the employer to pay the costs fits with the employer obligations enshrined in the Global Compact on Safe. Orderly and Regular Migration (GCM). However, research shows how employer-sponsorship – including the covering of fees – constrains mobility of migrant workers and can be questioned for its ethics (Wright et al 2016). It will also be difficult for the authorities to inspect whether employers do not informally recover these costs from workers.

In short, the procedure is improved from an efficiency perspective, which likely makes the EU a more attractive destination and somewhat lessens the administrative burdens for employers recruiting abroad. However, the better management does not equal more legal pathways nor better protection of single permit holders in case of situations of insecurity or abuse.

Rights: equal treatment, changing employer & secured residence in case of unemployment

The gap in equal treatment of single permit holders compared with nationals is somewhat closed by the recast.

Firstly, the fields in which TCN workers enjoy equal rights with nationals are listed in Article 12 SPD and include working conditions, including remuneration and dismissal, as well as health and safety at the workplace; The recast adds the terms of employment,

working hours, leave and holiday as well as equality of treatment between men and women. It goes without saying that EU Directives on such aspects of social policy often already cover all workers, hence also single permit status holders. See for example Directive 2019/1158 on work-life balance for parents which applies to all workers. Furthermore, single permit holders have a right to equal treatment in respect of the freedom of association and affiliation and membership of an organisation representing workers or employers, or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations. Here the recast adds the right to strike and take industrial action, including the right to negotiate and conclude collective agreements. Again, such rights are also enshrined in article 28 European Charter of Fundamental Rights on collective bargaining and action.

Equal treatment of single permit status holders also covers the right to education and vocational training and to recognition of diplomas, certificates and other professional qualifications, in accordance with the relevant national procedures. Equal treatment in the field of education and vocational training can be limited though. Furthermore, equal treatment expands to branches of social security, as defined in the EC Regulation on the coordination of social security systems. On the topic of social security, there is ample case law, for an overview see the CMR newsletter on CJEU judgements. Novel, and especially relevant in the case of unemployment or when someone wants to change employers is the access to information and advice services afforded by employment offices.

Secondly, the single permit holder is tied to a specific employer, an essential aspect of so-called demand driven labour migration systems commonly in place in EU Member States. This tie makes that leaving ones' employer means losing one's residence status. Again, this means that in case of abuse, people may not feel free to leave or report the abusive situation. How to overcome this risk was at the core of the political debate over the recast (described by myself and Marielle Falkenheim (2023) here: Precarity prevented or reinforced? Migrants' right to change employers in the recast of the EU Single Permit Directive. Now, according to Article 11(2), Member States shall allow a single permit holder to change employer. So far so good. How this will work in practice all depends on the conditions Member States may subject this right of a single permit holder to change employer to. These conditions may entail, according to article 11(3): a) a notification according to procedures in national law – suspending the right to change for a maximum of 45 days; b) the change to be subject to a check of the labour market situation, however, only if the Member State carries out such checks for single permits at all; c) require a minimum period of employment with the first employer which shall not exceed either the duration of the contract or the permit, and in any case, not exceed six months. Although recital (41) calls for appropriate mechanisms to monitor the proper

enforcement of the Directive, Article 17 on *reporting* does not demand of the Member States to provide statistics on the use of the right to change employers. Such seems a missed opportunity for measuring the effectiveness of the Directive in protecting migrant worker rights.

Thirdly, in case of unemployment during the first two years of stay while holding a single permit, the permit shall not be withdrawn for at least the first three months (Article 11(4)). In case of unemployment after a period of two years, the single permit holder will have six months to find a new job that would have them qualify for a renewal of their single permit. In case a new employer has been found and the labour market check is under way, surpassing those three months, the single permit holder should be allowed to remain on the territory, awaiting the outcome of the check. The unemployment must be notified to the authorities. Also, Member States may require single permit holders to provide evidence of having sufficient resources to maintain themselves without recourse to the social assistance system of the Member State concerned if the period of unemployment exceeds three months. This is a meagre compromise compared to what MEPs (Amendment 76, Draft Report 21 November 2022) asked for, which was a nine months job searching period in case of unemployment, similar to international students under article 25 of the Students and Researchers Directive 2016/801/EU postgraduation. The Council position was to only allow for a continued stay of two months in case of unemployment; hardly a realistic period of time for anybody to apply for a new job. The compromise text is thus to be welcomed as offering a relatively realistic option for single permit status holders who become unemployed and want to try to remain in the EU.

In sum, the EU co-legislators agreed on improving the rights of TCN at work in the EU in respect of their equal treatment with nationals, the right to change employers and to search for work in case of unemployment. The Commission would do good to monitor closely the actual implementation of and engagement with these rights on the ground, overlooked in the reporting obligations.

Protection against exploitation

The Recast SPD considers improved complaint mechanisms, monitoring, assessment, inspections and penalties, particularly in sectors identified as being at high risk of violations of labour rights, in accordance with national law or administrative practice. These should contribute to curbing the risk of abuse, an objective that places the value of human dignity at the core of the instrument. However, the proof of this noble intent, will be in the eating.

The Member States must act on infringements by employers (including temporary employment agencies, recital 8) of national provisions on equal treatment adopted pursuant to Article 12 (article 13(1) SPD). Member States shall provide for penalties against employers who have not fulfilled their obligations under the Directive (article 13(2) SPD. Penalties shall be effective, proportionate and dissuasive.

Again, more could have been done. The proposal to protect migrant workers by obliging the Member States to give labour inspections and other competent authorities access to the workplace to perform their inspections, following from Article 12 ILO Labour Inspection Convention, 1947 (No. 81), ratified by all EU Member States, did not make it into the compromise text. Similarly, access to the workplace for worker representatives was proposed, but did not make it into the final text, weakening its aim to protect.

The recast is also meant to increase the likelihood of complaints (article 14). To this end equal treatment with nationals regarding measures protecting against dismissal, such as access to complaint mechanism, made it into the Directive (article 13(3) SPD). However, the situation of nationals and TCN can hardly be called equal. Nationals do not jeopardize their right to stay in case of a complaint, while migrant workers (fear they) do. Besides making a complaint individually, third parties should be able to act (on behalf of) the migrant before national courts; legal aid for the migrants is however not accounted for. Not all Member States grant unions or NGO's representing migrant workers' standing. One would hope that the recasts' reference to third parties 'opens the eyes' of NGO's and invites them to contest the limited national interpretations of their legitimate interest in protecting migrant workers' rights. If put in practice, these protective measures could contribute to the enforcement of the rights of migrant workers, their fair treatment, and overall dignity while at work in the EU Member States.

Finally, it is important to note the EP proposed revision of the mandate of the European Labour Authority (ELA). This will allow the ELA to better support often-understaffed Member States' labour inspectorates enforcing migrant worker rights, especially when single permit holders are at work in cross-border contexts.

To conclude: missing out on more legal pathways

The 2020 Pact promised more sustainable legal pathways to attract talent to the EU. The Single Permit Directive recast was one of the instruments the Commission named to achieve this promise. While the recast can be seen as an improvement on most counts discussed above, even if it likely delivers on the goal of "well-management migration", it could have offered more. While improving the protection of migrant workers against

employer dependency and abuse, proposals for better protection did not make it into the final text. The recast did not deliver on the promise of more legal pathways at all. For now, the Single Permit Directive remains a set of norms for people coming in through other legal pathways designed in other EU Directives or at the national level.

22. Cooperation with third countries within the EU legislative reform on migration and asylum by Paula Garcia Andrade

In spite of its manifest political importance under the New Pact on Migration and Asylum and its constant topicality, cooperation with third countries might not appear as a straightforward subject of attention for this Blog Series, devoted to the internal EU legal acts recently adopted as legislative expression of the Pact. When approaching this external dimension and its contentious partnerships, our focus normally spotlights those international instruments of quite varied form and substance that the EU agrees on with countries of origin and transit. This contribution will however show, in three different steps, how the external dimension occupies, at this occasion, a prominent role in this internal legislative package and how 'the internal' and 'the external' in these policies seem even more intertwined.

Firstly, in opposition to the lasting controversies over the diverse legislative dossiers on the *ad intra* aspects of the Pact, cooperation with third countries can be considered its consensual element (1). As we will see, this might be explained because of the essential – or, put it differently, instrumental – nature of the external dimension for the achievement of the objectives of the EU migration and asylum policies, but also because seeking solutions externally may give a (false) impression of effectiveness that overclouds the inability to achieve consensus on how to manage migration and asylum *within* the Union.

Secondly, although its relevance has been constantly underlined at the highest political levels, the external dimension had not received yet a 'legal blessing' until the adoption of the Asylum and Migration Management Regulation (EU) 2024/1351 (AMMR), which proceeds to its formalization and substantive definition (2). Assuming that any sort of legal codification is never done to everyone's taste, the implications of making explicit, in secondary law, the importance of this external dimension shall be assessed.

And thirdly, besides this explicit formalization, cooperation with third countries also becomes part of the normative content of several instruments of the recent legislative package (3), as in the case of the solidarity mechanism foreseen in the AMMR or the presumption of 'safe third country' in the Asylum Procedures Regulation (EU) 2024/1348 (APR).

1.- The external dimension as the consensual element of the New Pact on migration and asylum

Cooperation with third countries was probably the element of the New Pact that attracted more consensus among Member States on the need for its implementation, or at least did not constitute a motive for important divisions. And, to a certain extent, this illustrates how strengthening the external dimension is usually the answer to the lack of advances on further integrating the internal aspects of these policies (see Santos, p. 148, and Milazzo). This allows to provide a false image of effectiveness and assumption of responsibilities on the management of migration and asylum by the EU and its Member States when the effect is usually, on the contrary, the outsourcing of those very same responsibilities to the authorities of partner countries (see Neidhardt).

In spite of the Commission's insistence on the Pact presenting a new paradigm, no changes have been identified in the EU's substantive approach to international cooperation on migration and asylum (as already noted here). The focus of the Pact is nonetheless put on the practical implementation of partnerships with third countries, to be led by a more pragmatic and flexible approach (see the European Council Conclusions of 24-25 June 2021, point 12). Examples of this 'implementation-centered perspective' can be found, on the one hand, in the adoption of action plans with selected priority countries of origin and transit (see the European Council Conclusions of 21-22 October 2021, point 15), for which a quick implementation and adequate financing is asked from the Commission, the High Representative and Member States. In addition, with a view to implement a 'whole-of-route approach', the Commission has produced action plans for several migration routes (Western Mediterranean and Atlantic, Western Balkans and Central Mediterranean; see Frasca and Gatta for the latter's analysis). They focus on preventing departures and loss of lives, addressing the root causes of migration, fighting against migrant smuggling and improving readmissions, while, in the words of the President of the Commission, "harness(ing) all leverages and tools, including by providing for safe and orderly legal pathways" and thus preserving the already traditional conditionality approach of the EU.

Also, the signature, by the EU, of several informal agreements on migration cooperation can be presented as concrete outcomes of the New Pact. This is the case of the global cooperation deals, which include, to a greater or lesser extent, migration commitments, such as the ones with Tunisia (July 2023), and Egypt (March 2024), or the more specific migration partnership with Mauritania (March 2024). These arrangements share a soft law nature, the conditionality paradigm on which they lie and the serious concerns they provoke about human rights violations in partner countries. These common features are indeed not representative of a new paradigm, but raise, on the contrary, well-known controversies regarding their conformity with EU essential principles such as rule of law, coherence or institutional balance. To this effect, we may even question the

abovementioned degree of consensus this external dimension creates, since precisely the decision to agree on the EU-Tunisia MoU on a strategic and global partnership engendered serious intra-EU divisions regarding both its substance and the procedure followed for its adoption (see a previous post in this Blog).

On the other hand, the more practical-oriented perspective of the Pact is also reflected in the adoption, in January 2022, of the Mechanism for the operational coordination of the external dimension of migration (MOCADEM), a flexible mechanism, under the direction of the Council Presidency and the strategic lead of the COREPER, aimed at ensuring the EU provides a coordinated and timely response to issues arising within the migration relations with a third country. A preliminary assessment of its functioning, based on roundtables with the participation of Council bodies, the Commission, the EEAS and interested Member States, highlights its added value on ensuring better information-sharing and coordination efforts, while also making visible the challenges it creates regarding other working groups and structures involved in this external dimension.

2.- Formalization in secondary law of the importance of the external dimension

The formal acknowledgement, in a secondary law act, of the external dimension as a constituent part of the EU migration and asylum policies presents, in my view, quite relevant implications. Although the recognition of cooperation with third countries as an essential element of these policies is well-established (mostly through the diverse quinquennial programs endorsed by the European Council until the New Pact and its ordinary conclusions), the truth is that no EU law act contained such a formal reference. The Lisbon Treaty had indeed conferred external competences on migration and asylum (both explicit on readmission in Art. 79(3) TFEU, and implicit on the management of asylum in Art. 78(2)(g) TFEU), but these only represent a scattered and partial recognition in primary law of the external dimension of these policies.

The formalization of the importance of cooperation with third countries as a fundamental element of EU migration and asylum policies appears in the normative text of the AMMR. After referring, in Art. 3, to the 'comprehensive approach' to asylum and migration management and the need to ensure a consistent implementation of these policies, including both the internal and external components, articles 4 and 5 of the AMMR respectively define these elements. Regarding the 'external components of the comprehensive approach', Art. 5 binds the EU and its Member States to "promote and build tailor-made and mutually beneficial partnerships", following the terms employed by the Commission in the New Pact. This obligation is to be developed "in full compliance with international and Union law and on the basis of full respect for human rights". The

provision adds a second duty consistent in "foster[ing] close cooperation with relevant third countries at bilateral, regional, multilateral and international levels", which would be nevertheless implicit in the reference to the building of partnerships. As a consequence, developing the external dimension of the EU migration and asylum policies becomes a legal obligation, which does not depend, from now on, on the political inclinations of EU institutions and Member States.

The AMMR also substantively defines the external dimension by specifying the objectives of the cooperation to set with third countries: promoting legal migration and legal pathways for people in need; supporting the protection efforts of partners and building their operational capacities in respect of human rights; preventing irregular migration and combatting smuggling and trafficking; addressing the root causes of migration; enhancing effective returns, readmission and reintegration; as well as ensuring the full implementation of the common visa policy. In short, Art. 5 condenses most of the dimensions of migration cooperation, in spite of the different degree of attention they receive in practice.

The AMMR explicitly insists also on the respect of the division of competences between the Union and its Member States, or between EU institutions, a legally unnecessary caveat that serves to highlight how these policy objectives are to be achieved in observance of the concurrent – and even specific exclusive – powers still preserved by Member States in these fields, and thus to insist on the indispensable coordination between both levels of action. The text of the preamble subjects the exercise of the external competences on migration to the "full respect for the procedural rules of the Treaties and in line with the case law of the Court of Justice of the European Union, in particular as regards non-binding instruments of the Union". The growing importance of international soft law arrangements as migration cooperation tools (see Kassoti and Idriz) becomes thus established. What is more relevant, with this reference to the Swiss MoU case and the need to respect the principle of institutional balance when adopting informal agreements, we observe a further illustration of the 'formalisation of informality' (as we inferred from the inter-institutional arrangements on non-binding instruments, adopted as a follow-up of case C-660/13). These terms in the AMMR were evidently unnecessary for the creation of a legal obligation which flows already from the principle of institutional balance (Art. 13(2) TEU). It clearly demonstrates all the same the Member States' will to prevent the Commission from once again conducting itself in violation of that principle, as it did when signing the MoU with Tunisia without the prior approval of the Council.

3.- Cooperation with third countries within the normative content of the recent legislative package

Besides its formalization, cooperation with third countries also becomes explicit part of the normative content of certain legislative acts adopted in this reform. Firstly, this is the case of the AMMR, which, besides Art. 5 explained above, contains other legally relevant references to this external dimension. On the one hand, the level of cooperation with third countries on migration, return and readmission constitutes an element the Commission shall take into account when assessing the 'overall migratory situation' or whether a Member State is under 'migratory pressure', 'at risk of migratory pressure' or 'confronted with a significant migratory situation' (Art. 10(2)(b) of AMMR, see also letters (c) and (g)), scenarios that will allow the Member State in question to rely on the solidarity contributions included in the Annual Solidarity Pool. In spite of its vagueness, this provision shows that an evaluation of third countries' cooperation on migration will not just be politically relevant, but also legally necessary, since the confirmation of those situations may lead to the activation of the EU Solidarity Pool to the benefit of the Member State in need.

At the same time, the Solidarity Pool itself, as a concrete expression of the solidarity principle and main stumbling block during this legislative procedure, will relate to actions typical of this external dimension. One of the components of the Annual Solidarity Pool (see Maiani's analysis here), alternative to Member States' commitments on relocations, consists of financial contributions, which may serve to provide support for actions in or in relation to third countries having a direct impact on migratory flows to Member States' external borders or improving the migration, asylum or reception systems of that third country (Art. 56(2)(b) of the AMMR; see also Art. 56(3)). It is quite disputable, however, to what extent these supporting actions in third countries may have an equivalent impact to relocations (see Tsourdi) and may thus contribute to alleviate the particular burden of the migration system of a Member State by achieving the desired *ad intra* solidarity.

If we turn to other legislative outcomes of the reform package (Regulation on crisis and force majeure evidently refers to third countries' role in instrumentalization, while the asylum and return border procedures will certainly impact on partners' cooperation on return), we find another explicit reference to the EU external action on migration in the APR (on this act, see Chetail and Ferolla in this blog). When it addresses the concept of 'safe third country', as a ground for inadmissibility of an asylum request, Art. 59 of the APR establishes a presumption of safety for countries that signed an agreement with the EU, pursuant to Art. 218 TFEU, by which migrants admitted under it will be protected in accordance with international standards and in full respect of the non-refoulement principle. This provision, absent from the Commission's proposal, may cover formal readmission agreements that include readmission obligations on third-country

nationals, as well as other cooperation agreements providing for schemes similar to the one contained in the EU-Turkey Statement of 2016, under which Turkey engaged to admit all irregular migrants crossing from its territory to the Greek islands. Actually, the Statement uses the very same terms, as Art. 59 of APR, regarding migrants' protection ("in accordance with the relevant international standards and in respect of the principle of non-refoulement"). However, the "informal" EU-Turkey Statement (or any other readmission arrangement signed by the EU; on these instruments, see Fernando Gonzalo and Frasca and Roman) would not be covered by this new provision, since it was not concluded, as a proper international agreement, under Art. 218 TFEU.

It appears certainly controversial, in any case, that a third country can be categorized as 'safe' because of having entered into commitments with the EU regarding migrants' (re)admission. Concluding readmission agreements with countries having poor human rights records is certainly worrying, if we think of the treatment their authorities would provide to readmitted persons, but the implementation of internal EU legislation on return and its safeguards should prevent the adoption and enforcement of a decision to return refugees to those countries. Art. 59(7) of the APR, by referring to those agreements, will directly authorize that course of action on a presumption of safety (on its application to Turkey in particular, see Roman, Baird and Radcliffe), which, hopefully, could be reversed in case of evidence against respect for the material conditions of safety reflected in Art. 59(1) and without prejudice to the individual assessment and the connection criterion foreseen in Art. 59(5) and 59(6) (see Thym here and here; and Peers).

A pending case before the CJEU, C-134/23, precisely relates to a preliminary question of interpretation by which a Greek court asks whether the still in force Asylum Procedures Directive 2013/32/EU precludes a Member State from designating as safe a third country that decided to de facto suspend the readmission of applicants of international protection, as Turkey did, since March 2020, with the EU readmission agreement. In support of our argument, it is interesting to observe how AG Pikamäe, in his Opinion of 13 June 2024, considers that actual admission to the country is not an element necessary for its classification as a 'safe third country', but a condition of enforcement of the admissibility decision to a particular applicant. If this may effectively lead to conclude that the suspension of a readmission agreement precludes the inadmissibility of an application for international protection on the basis of a 'safe third country' designation, it cannot however imply that the mere possibility of readmission to the country, on the basis of an international agreement, equates to a presumption of safety. Moreover, the preamble of the APR clarifies that this presumption will not apply when an agreement is suspended in accordance with Art. 218(9) TFEU, a caution that should have entered into the normative body of the Regulation.

Finally, we welcome the suppression of a reference to the external dimension in the final version of two legislative acts of the reform package. On the one hand, the Commission's proposal for a Regulation establishing a Union framework on resettlement included third countries' effective cooperation with the EU on migration as an element to take into account when determining the regions or countries from where resettlement should take place. In particular, the Commission and the Council had to consider the country's efforts in reducing irregular migration from its territory, in cooperating on readmission, and in increasing its reception and protection capacities (Art. 4(c) and (d) of the Proposal). This clearly signaled that resettlement was not a demonstration of international solidarity or a form of sharing the burden of protection with regions of origin, but an expression of the EU's conditionality approach by which resettlement is controversially added as a new leverage to obtain migration management cooperation from third countries. Fortunately, due to the opposition of the European Parliament (see EP amendments in first reading), this factor on which to decide the origin of resettlement was suppressed from the final legislative act. The definitive version of Art. 4 of Regulation (EU) 2024/1350 just refers to the scope for improving protection in third countries and to the resettlement commitments they assume, as this could create synergies to collectively contribute to the global resettlement needs. No mention is however made of the role of third countries in the resettlement and humanitarian admission processes (see Bratanova), which are expected to require their cooperation in practice.

On the other hand, a second welcome suppression that represents another 'step backwards' from the formalization of the conditionality approach on migration relates to the original content of the Proposal for the AMMR. Art. 7, on cooperation with third countries on return and readmission, included a formal conditionality mechanism, allowing the Commission to conclude on the existence of an insufficient cooperation of a third country on readmission and identify the necessary measures to adopt, "taking into account the Union's overall relations with [that] country". Fortunately too, this provision does not appear in Regulation 2024/1351 (see EP amendments in first reading). The conditionality spirit is however preserved, firstly because the quite similar mechanism set by Art. 25a of the Visa Code is still in force (for a critical comment, see Nicolosi) and, secondly, since one of the main aims of the MOCADEM is precisely to assist in the mobilization of leverages to achieve migration objectives.

Concluding remarks

With this major legislative reform of the EU policies on migration and asylum, cooperation with third countries has certainly consolidated as a constituent element of

these policies, its development becoming not just politically relevant or adequate, but legally binding. This will not end with the usual imbalance of migration partnerships, neither with the risks of (and actual) human rights violations this cooperation entails, nor with the challenges associated to the outsourcing of migration and asylum responsibilities; or the circumvention of institutional safeguards that informality involves. Indeed, these and other deficiencies and limitations of the external dimension of the EU migration and asylum policies will certainly remain, the legislative reform even providing, as we have seen, new reasons for concern. A sign of hope could, however, be envisaged, since the increasing legal formalization of these cooperation strategies could allow us to explore new judicial protection possibilities for requiring compliance with the EU structural principles this external action must abide by.

23. The new EU Resettlement Framework: A flexible harmonization undermining fundamental rights by Caroline Leclercq

Resettlement seems to be the main solution advanced in the New Pact on Migration and Asylum to fill the current gap of legal channels for asylum seekers. It is defined by the United Nations High Commissioner for refugees (UNHCR) as the selection and transfer of refugees from a first State of asylum where they are protected but in precarious or unsafe situation, to a third State that has agreed to accept them as refugees with permanent residence status. It involves a pre-selection by UNHCR, followed by a selection by the resettlement State. Resettlement aims to show international solidarity with countries that host the majority of the world's refugees, and to ensure durable protection for the most vulnerable among them.

Indeed, very few refugees manage to reach European territory to apply for asylum. Low and middle income countries currently host 75% of the world's refugees. The number of people needing resettlement is rising all the time. In 2024, UNHCR estimates this figure at 2.4 million. Since 2003, the EU Commission has increasingly prioritized resettlement as a means to enhance legal entry and managed transfer of individuals in need of international protection and to reduce the need for asylum seekers to resort to dangerous journeys to reach EU territory.

In 2015 two EU-wide resettlement programmes were established through a Commission recommendation. Those programmes were supported by significant financial resources allocated through the Asylum, Migration and Integration Fund (AMIF) and institutional support from the EASO (now the European Asylum Agency). 63.279 refugees were resettled to the EU between 2015 and 2019 (87% of the increased commitment). While these programmes established certain common principles for resettlement, they did not function based on a common admission procedure with appropriate guarantees for refugees. In 2016, the Commission introduced – as part of a New Pact on Migration and Asylum – a proposal for an EU resettlement framework under an EU regulation which was finally adopted on 14 May 2024 in order to address these shortcomings. This blog assesses the changes brought about by this new instrument regarding the harmonisation of the selection procedure and the guarantees provided to refugees during this process.

The aim of the new Resettlement and Humanitarian Admission regulation is to provide 'a common approach to the legal and safe arrival in the EU of persons in need of international protection' to 'increase resettlement and humanitarian admission efforts and reduce divergences between national resettlement practices and procedures'

(preamble, recitals 8 and 13). The Regulation foresees a structured planning process. Based on proposal from the Commission, the Council will adopt a two-year Union Resettlement Plan. The plan will set out the total number of persons to be admitted, as well as the contribution of each Member State (quotas sovereignly determined by the national authorities of these Member States), a description of the specific groups of individuals targeted and geographical priorities (article 8).

However, the preamble to the Regulation states that 'there is no subjective right to apply for admission or to be admitted by a Member State, nor any obligation on Member States to admit a person under this framework' (recital 25). This could be explained by the fact that resettlement (contrary to the right of asylum or the principle of non-refoulement) is not a right enshrined in international law. Member States are therefore free to decide whether to take part in resettlement programmes. Rather than creating binding targets around resettlement, the regulation is limited to the establishment of common rules on admission and the type of status to be granted.

Wide margin of appreciation for Member States to the detriment of refugees' rights

The admission procedure is defined in article 9 of the regulation. It implies a referral from the UNHCR that will preselect the most vulnerable refugees and submit their dossiers to the Member States (1). The latter will then proceed to the final selection by checking that eligibility criteria are met and that persons do not fall under one of the grounds for exclusion (2). The Regulation also establishes certain procedural obligations as part of the selection process (3).

1. Referral from the UNHCR: no direct application from refugees

According to the definition provided for in article 2, the first step of the resettlement process is the referral from the UNHCR. It consists of a pre-selection of the most vulnerable refugees. They cannot directly apply for resettlement. Dossiers are submitted either internally by UNHCR agents or externally by civil society actors. However, refugees can approach these liaison points.

In practice, at the pre-selection stage, the UNHCR checks that some conditions are met: firstly, the applicant must be officially recognised as a refugee either by the State of first asylum or by the UNHCR itself. The definition UNHCR employs covers refugees within the meaning of Article 1 A (2) of the 1951 Refugee Convention, but also people who meet the definition of subsidiary protection, as well as certain categories of stateless persons.

Secondly, the refugee must be considered to be particularly 'vulnerable'. To identify those who are most in need, the UNHCR employs the following 'resettlement submission categories': legal and/or physical protection needs; survivors of torture and/or violence; medical needs; women and girls at risk; children and adolescents at risk; and lack of foreseeable alternative durable solutions (article 5 § 3 a). To preserve family unity, the UNHCR may also consider the resettlement of certain family members of persons admitted to the pre-selection process (article 5 § 4). In order to determine whether the above criteria are met, the UNHCR conducts interviews.

At the end of the pre-selection procedure, the UNHCR will submit the pre-selected dossiers to the Member States in accordance with the quotas and criteria established within the Union plan and therefore check if people fall within the scope of the Plan (article 9 § 7 a).

2. Eligibility: addition of national criteria

The Member States will then assess whether the third-country nationals or the stateless persons in relation to whom they conduct an admission procedure meet the eligibility criteria set out in the regulation and do not fall under the grounds for refusal. Member States make that assessment in particular on the basis of documentary evidence, including, where applicable, information from the UNHCR on whether the third-country nationals or the stateless persons qualify as refugees, or on the basis of a personal interview, or a combination of both. Member States are therefore not obliged to interview potential resettled refugees since the selection can be based only on UNHCR dossiers.

The Regulation adopts more or less the same criteria as those UNHCR employs while pre-selecting. Namely these are refugees and those who meet the definition of subsidiary protection (third country nationals or stateless persons), while additionally falling within at least one of the seven UNHCR categories of vulnerability mentioned above. Some family members of persons considered for resettlement – the spouse or unmarried partner if treated similarly to married couples under national law; minor unmarried children ; the parent or another adult responsible for an unmarried minor; and siblings – are also eligible for admission.

The Regulation authorises Member States to favour persons: 1) with family ties to persons legally residing in a Member State; 2) with demonstrated social links or other characteristics that can facilitate their integration in the Member State, including language skills or previous residence; and 3) with particular protection needs or vulnerabilities. Allowing Member States to use 'integration potential' as a selection criterion could lead to discrimination since it is a broad concept that can be based on

considerations such as language, ethnic or social features, disabilities, religion, etc (protected criteria listed in article 21 of the EU Charter). Resettlement then also becomes an instrument of migration management aimed at controlling who enters the EU territory. In the Commission proposal, the potential for integration could be put forward at the stage of dossier submission by the UNHCR and could therefore act as a general filter. In the final version, preference might be given during the selection by the Member States in individual cases.

In terms of transparency, the regulation does not require Member States to set out their criteria in any official document.

The proposal also outlines both optional and mandatory grounds for refusing admission. The mandatory grounds combine those already present in the Qualification Directive with some risk assessment criteria from the Visa Code and Schengen Borders Code, particularly security considerations. If a person falls under one of these mandatory grounds, they are barred from participating in the resettlement process for a period of three years. In terms of optional refusal, individuals who have either declined to participate in a resettlement or humanitarian admission program, or withdrawn their consent, may also be excluded. The same applies to those refusing to engage in a pre-departure orientation program. Lastly, 'persons for whom the Member State cannot provide adequate support due to their vulnerability' may be denied admission (Article 6 § 2 d). This last reason appears paradoxical, as resettlement is intended to prioritize the most vulnerable.

3. Procedural aspects: almost no binding procedural obligation for Member States

Having identified a third-country national or stateless person who falls within the scope of the Union plan, Member States should record various information concerning the person they intend to admit. The Regulation also imposes a duty on Member States to inform third country national in the resettlement process of the objectives and different stages of the procedure, as well as of the consequences of withdrawing their consent to be admitted and of refusing to participate in a pre-departure orientation programme. In addition, it requires Member States to inform refugees in a language they understand of their rights under the GDPR.

Concerning deadlines, Member States should decide on the admission as soon as possible and in any event within seven months of the date of registration. They may extend that time-limit by up to three months in the event of complex issues of fact or law. In the case of an emergency admission (for persons with urgent legal or physical protection needs or with immediate medical needs), they should reach a conclusion as

soon as possible and endeavour to do so within one month of the date of registration. However, there are no penalties for exceeding processing times. Furthermore, a Member State is authorised to discontinue an admission procedure where it has concluded that it is not able to comply with the time limits for reasons beyond its control.

Regarding the final decision, the regulation states that when a Member State refuses to admit a person on its territory, the third- country national or stateless person concerned should not be admitted. The reason for a negative decision should be communicated to the UNHCR, 'unless there are overriding reasons of public interest for not doing so'. When a Member State rejects a file, it can be consulted by a second Member State when reviewing that file for the admission process. The current text does not impose any obligation to notify a decision to the third country nationals that are not selected, nor to give reasons for unfavourable decisions, and there is no right of appeal against such decisions. These gaps might be problematic in the light of fundamental procedural rights including good administration and the right to an effective remedy enshrined in Articles 41 and 47 respectively of the Charter of Fundamental Rights.

Where a Member State's conclusion is positive, it 'shall make every effort' to ensure entry to its territory as soon as possible and in any event within 12 months of the date of the decision. In the case of an emergency admission, the Member States 'shall ensure' the swift transfer of the third-country national or the stateless person after the date of the positive conclusion. This includes issuing the appropriate visa so that the third country nationals selected can travel to the Member State concerned. Pre-departure orientation programmes are also provided to familiarise those selected with the 'customs of the resettlement State'.

Upon arrival, Member States must take a decision to grant refugee status where the third-country national or the stateless person concerned qualifies as a refugee, or subsidiary protection status where the third-country national or the stateless person concerned is eligible for subsidiary protection. Such a decision has the same effect as a decision granting refugee status or subsidiary protection status, but only after the person concerned has entered the territory of a Member State. In practice, an asylum application will be lodged on arrival in the country of resettlement. However, this is largely a formality, as it will be automatically accepted by the national authorities. The decision on status is then notified to the refugee and may be challenged at the national level, for instance where subsidiary protection instead of refugee status is granted.

Concluding remarks

Despite the growing importance of resettlement as the only legal pathway for asylum seekers to access the EU territory, the European Union has not managed to establish

binding targets for resettlement. The regulation does not contain an obligation to resettle refugees, and instead quotas are freely set by Member States, that may choose not to participate at all in resettlement activities.

While the regulation harmonises the selection procedure, it does not offer the necessary guarantees to third country nationals. The regulation permits the addition of criteria to vulnerability, such as integration potential. This detracts resettlement from its primary objective of protecting the most vulnerable. This is accentuated by the possibility given to Member States not to resettle "persons in respect of whom the Member State cannot provide the adequate support they need because of their vulnerability". The Member States enjoy a great margin of appreciation during the selection procedure, which entails a risk of cherry picking. These risks are difficult to mitigate since the EU resettlement framework – despite its regulatory nature – contains almost no procedural obligations other than a duty of information. Deadlines are optional, and Member States are not obliged to hear refugees during the selection procedure, or to notify a reasoned decision to refugees that are not selected for resettlement. Furthermore, national programmes/criteria do not have to be made public (via official documents for instance). In the event of a positive decision, however, the guarantees attached to refugee or subsidiary protection status apply, but only once the refugee has entered the territory of the resettlement State.

Although these legal considerations are valid, the adoption of this regulation was shaped by the political context. As resettlement is not a right recognised under international law, States have the discretion to decide whether to participate in these programmes. This makes resettlement a political decision, potentially influenced by the legal constraints surrounding the process. Imposing additional procedural obligations on Member States carries the risk of discouraging their participation, which could ultimately reduce the number of refugees being resettled.

However, this reality does not justify the possibility of disregarding refugees' fundamental rights during the selection procedure. When a Member State chooses to take part in resettlement, it should respect procedural rights. The preamble of the EU resettlement framework regulation expressly imposes the obligation to respect fundamental rights enshrined in the Charter. The text of the Regulation though leaves open questions in terms of potential violations, for example in what concerns the principle of non-discrimination, the right to good administration, and the right to an effective remedy.